

# **PUBLIC PROCUREMENT LAW: A COMPARATIVE ANALYSIS**

by

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## ABSTRACT

The purpose of this research was to determine whether or not the South African public procurement regime, within the framework set out in section 217(1) of the *Constitution* 1996, complies with the internationally accepted objectives or principles of public procurement, as contained in the UNCITRAL Model Law on the Procurement of Goods, Construction and Services (1994) and the World Trade Organisation's Plurilateral Government Procurement Agreement, and how these objectives are balanced with the need for the government's socio-economic policies.

The main features of the public procurement reforms after South Africa became a constitutional state are the provision of constitutional principles applicable to public procurement; the creation of a single national legislative framework in terms of the *Public Finance Management Act* 1 of 1999 and the *Local Government: Municipal Finance Management Act* 56 of 2003, applicable to organs of state in the national, provincial and local spheres of government; and the creation of a supply chain management function that is fully integrated with the financial management processes in government, in which decisions on public procurement are decentralised to the procuring entities.

The following broad principles applicable to public procurement, which are common to the Model Law and the GPA, were identified:

- (a) Economy;
- (b) Competitiveness;
- (c) Effectiveness;
- (d) Transparency;
- (e) The combating of abuse;
- (f) The avoidance of risk;
- (g) Accountability;
- (h) Fairness and equitability; and
- (i) Integrity.

A broad and purposive interpretation of the constitutional principles of fairness, equitability, transparency, competitiveness and cost effectiveness, as enacted by section 217(1) of the Constitution, will include all of the internationally accepted principles mentioned above. Although certain criticism can be leveled against the South African public procurement regime it in general provides for all the international principles mentioned above.

It is generally accepted that public procurement may be used to achieve a country's socio-economic objectives. These objectives must be achieved within the framework of a public procurement system that complies with the accepted principles applicable to public procurement. Section 217(2) and (3) of the Constitution provides for the implementation of procurement policies that may allow categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination through national legislation. The *Preferential Procurement Policy Framework Act* 5 of 2000, only addresses the last mentioned aspects and needs to be broadened to allow for a preference in the allocation of contracts in order to achieve all socio-economic objectives. In particular, specific provision needs to be made to address issues like environmental-friendly procurement, the use of scarce resources, energy-efficient procurement, the use of labour intensive methods, the transfer of skills and related issues.

Although far from perfect, South Africa has a procurement regime in place which is comparable with international standards. To reap the full benefits of this good system it needs to be constantly measured, adapted to changing circumstances, and managed and implemented by a professional staff cadre. Many of the problems encountered in public procurement in South Africa probably rather relates to the implementation of the system than the system itself.

## AFRIKAANS SUMMARY

Die doel van hierdie navorsing was om vas te stel of die Suid Afrikaanse staatsverkrygingsbestel, binne die raamwerk van artikel 217(1) van die *Grondwet* 1996, voldoen aan die internasionaal aanvaarde doelstellings en beginsels van 'n staatsverkrygingbestel, soos vervat in die "UNCITRAL Model Law on the Procurement of Goods, Construction and Services (1994)" en die Wêreld Handels Organisasie se "Plurilateral Government Procurement Agreement", en hoe hierdie doelstellings en beginsels balanseer word met die bereiking van die staat se sosio-ekonomiese beleid.

Die hoof kenmerke van die staatsverkrygings hervorming, sedert Suid Afrika 'n konstitusionele staat geword het, is die daarstel van konstitusionele beginsels van toepassing op staatsverkryging; die skep van 'n enkel wetgewende nasionale raamwerk in terme van die *Wet op Openbare Finansiële Bestuur*, Wet 1 van 1999 en die *Wet op Plaaslike Regering: Munisipale Finansiële Bestuur*, Wet 56 van 2003 wat van toepassing is op alle staatsorgane op nasionale, provinsiale en plaaslike regeringsvlakke; en die skep van 'n staatsverkrygingsbestel wat ten volle geïntegreer is met die finansiële bestuursprosesse van die staat waarin besluite oor staatsverkryging desentraliseer is na die onderskeie verkrygings instansies.

Die volgende breë beginsels wat van toepassing is op 'n staatsverkrygingsbestel, wat ontleen is van die Model Wet en die "Government Procurement Agreement", kan identifiseer word:

- (a) Ekonomie;
- (b) Kompetisie;
- (c) Effektiwiteit;
- (d) Deursigtigheid;
- (e) Die bestryding van korrupsie;
- (f) Die vermy van risiko;
- (g) Aanspreeklikheid;
- (h) Redelikheid en billikheid; en
- (i) Integriteit.

'n Breë en doeldienende interpretasie van die konstitusionele beginsels van redelikheid, billikheid, deursigtigheid, kompetisie en koste effektiwiteit, soos vervat in artikel 712(1) van die Grondwet, sal al die bogemelde internasionale beginsels insluit. Alhoewel sekere kritiek op die Suid-Afrikaanse staatsverkrygingsbestel gelewer kan word, voldoen dit in die algemeen aan die internasionale beginsels hierbo vermeld.

Dit word algemeen aanvaar dat staatsverkryging gebruik mag word om 'n staat se sosio-ekonomiese doelwitte te bereik. Hierdie doelwitte moet bereik word binne die raamwerk van 'n staatsverkrygingsbestel wat voldoen aan die algemene beginsels toepaslik op so 'n bestel. Artikel 217(2) en (3) van die Grondwet bepaal dat in nasionale wetgewing voorsiening gemaak kan word vir die implementering van 'n voorkeurverkrygingsbeleid wat die toestaan van kategorië van voorkeur in die toeken van kontrakte en die beskerming van, of bevordering van persone, kategorië van persone, benadeel deur onbillike diskriminasie, moontlik maak. Die *Wet op die Raamwerk vir Voorkeurverkrygingsbeleid* Wet 5 van 2000, spreek slegs die laasgenoemde aangeleentheid aan en behoort gewysig te word om ook toe te laat vir die verlening van voorkeur by die toeken van kontrakte vir alle sosio-ekonomiese doelstellings. In die besonder behoort spesifiek voorsiening gemaak te word om sosio-ekonomiese aangeleenthede soos omgewingsvriendelike verkryging, die gebruik van skaars hulpbronne, energie doeltreffende verkryging, die gebruik van arbeidsintensiewe metodes, die oordrag van vaardighede en soortgelyke aspekte aan te spreek.

Alhoewel ver van volmaak, beskik Suid Afrika oor 'n staatsverkrygingsbestel wat vergelykbaar is met internasionale standaarde. Ten einde die volle voordeel van so 'n goeie stelsel te geniet moet die stelsel voortdurend gemeet word, aangepas word by veranderde omstandighede en bestuur en geïmplementeer word deur 'n professionele personeel komponent.

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### ***List of abbreviations***

AfDB	African Development Bank Group
art	article(s)
BEE	black economic empowerment
BOT	Build Operate Transfer
ch	chapter(s)
CPAR	Country Procurement Assessment Report
CUTS	Consumer Unity and Trust Society
DHS	Department Human Settlements
ERA	electronic reverse auction
Escom	Electricity Supply Commission
GATT	General Agreement on Tariff and Trade
GCC	General Conditions of Contract
GDP	gross domestic product
GPA	Plurilateral Government Procurement Agreement
IMF	International Monetary Fund
IP	Industrial Participation
IPP	Industrial Participation Program
Iscor	South African Iron and Steel Industrial Corporation
MFMA	Local Government: Municipal Finance Management Act
MFN	Most Favoured Nation
MWOD	Merriam Webster Online Dictionary
NGO	Non-Governmental Organisation
NPASA	National Ports Authority of South Africa
OECD	Organisation for Economic Co-operation and Development
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
par	paragraph(s)
PCC	Phoenix Cash and Carry
PFMA	Public Finance Management Act
PPPFA	Preferential Procurement Policy Framework Act
PPPs	Public/Private Partnerships

reg	regulation(s)
s	section(s)
SALC	South African Law Commission
SBD	Standard Bidding Documents
Sch	Schedule(s)
SCM	Supply Chain Management
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VOC	Vereenigde Oost-Indische Compagnie
WTO	World Trade Organisation
ZAR	Zuid Afrikaansche Republiek



## CHAPTER 1

### PUBLIC PROCUREMENT LAW: A COMPARATIVE ANALYSIS

#### 1 Introduction

##### 1.1 Background

The term “Public Procurement” refers to governments’ activities of purchasing goods and services necessary to carry out their functions.<sup>1</sup> This is an activity of all states. The history of public procurement is inextricably linked to the development of national states through the ages from the late Renaissance up to the modern state of the 21<sup>st</sup> century. South Africa’s public procurement regime has also been influenced by its history.<sup>2</sup>

With the development of the modern state, especially the administrative state, public procurement has grown.<sup>3</sup> It has become a socio-economic factor all governments have to reckon with.<sup>4</sup> Public procurement is, generally speaking, done with public money, it is intended to benefit the general public, and the goods and services so procured are generally provided by private enterprise. The government, the general public and private suppliers thus have a direct interest in public procurement.

International trade has grown because of the growth of international efforts to create free trade among states. Public procurement has similarly grown, especially in the last decade. Worldwide this growth has become a very important socio-economic factor and has been described as a procurement revolution.<sup>5</sup> It has also become important because of its potential influence on

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<sup>1</sup> For a definition of Public Procurement see Arrowsmith “National and International Perspectives” 3. Public procurement is also referred to as government procurement.

<sup>2</sup> This in particular is reflected in s 217(2) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter “the Constitution”), which provides for public procurement to be used as a tool to address the imbalances created by the past history of South Africa.

<sup>3</sup> It is estimated by the WTO that between 10% and 15% of countries’ Gross Domestic Product (GDP) are spent on public procurement. South Africa is no exception. See Bolton *Law of Government Procurement* 3.

<sup>4</sup> Bolton *Law of Government Procurement* 252-254.

<sup>5</sup> Arrowsmith “National and International Perspectives” 3.

human rights, including aspects like the alleviation of poverty, labour standards, environmental and other similar issues.<sup>6</sup>

Many countries have adopted a number of regional and international agreements designed to eliminate discrimination against foreign products and suppliers in public procurement. The most important of these agreements is the World Trade Organisation's (hereinafter referred to as the "WTO") Plurilateral Government Procurement Agreement (hereinafter referred to as the "GPA").<sup>7</sup> It was negotiated in parallel with the Uruguay Round<sup>8</sup> in 1994, and entered into force on 1 January 1996.<sup>9</sup> A commitment to further negotiations, in order to improve and update the GPA in view of developments in information technology and procurement methods, to extend the coverage of the GPA and to eliminate remaining discriminatory measures, was included in the GPA.<sup>10</sup> In December 2006 the text of the Revised GPA was conditionally agreed upon.<sup>11</sup> It is subject to a legal check and a mutually satisfactory outcome on an expansion of coverage.<sup>12</sup> To date the Revised GPA has not become operational. The purpose of the GPA is to promote international public procurement, to make it more transparent and to eliminate discrimination against foreign suppliers and

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<sup>6</sup> McCrudden 1999 *JIEL* 3-48. See also Leif and Weiglin 2007 *Fact Sheet on Green Procurement* [www.tenderwise.com/](http://www.tenderwise.com/).

<sup>7</sup> See the WTO 2009 *Understanding the WTO* [www.wto.org/](http://www.wto.org/): "An agreement on public procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. Its purpose is to open up as much of this business as possible to international competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. The present agreement and commitments were negotiated in the Uruguay Round. These negotiations achieved a 10-fold expansion of coverage, extending international competition to include national and local government entities whose collective purchases are worth several hundred billion dollars each year. The new agreement also extends coverage to services (including construction services), procurement at the sub-central level (for example, states, provinces, departments and prefectures), and procurement by public utilities. The new agreement took effect on 1 January 1996. It also reinforces rules guaranteeing fair and non-discriminatory conditions of international competition. For example, governments will be required to put in place domestic procedures by which aggrieved private bidders can challenge procurement decisions and obtain redress in the event such decisions were made inconsistently with the rules of the agreement."

<sup>8</sup> The WTO was established on 1 January 1995 by the Uruguay round of negotiations which commenced in 1983 and lasted until 1994. See Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 6-9.

<sup>9</sup> See WTO 2009 *Plurilateral Agreement* [www.wto.org/](http://www.wto.org/). South Africa is not a signatory to the GPA.

<sup>10</sup> GPA art XXIV: 7(b) and (c).

<sup>11</sup> WTO 2006 *Revision of the Agreement* [docsonline.wto.org/](http://docsonline.wto.org/).

<sup>12</sup> See WTO 2009 *Re-negotiation* [www.wto.org/](http://www.wto.org/).

products. Preferential treatment of own suppliers and products is prohibited.<sup>13</sup> There are, however, exceptions<sup>14</sup> applicable to developing countries.<sup>15</sup> South Africa is not a signatory to the GPA.

These developments have been supported by the adoption by the United Nations Commission on International Trade Law (hereafter referred to as “UNCITRAL”) of a Model Law on the Procurement of Goods, Construction and Services (1994) (hereafter referred to as the “Model Law”). The Model Law is designed as a guide for states seeking to reform or promulgate regulatory systems for procurement, in particular in respect of economies in transition and of developing countries.<sup>16</sup> Revisions to the Model Law are being undertaken by the Commission’s Working Group I (Procurement).<sup>17</sup> Certain revisions have been proposed addressing the use of electronic communications and abnormally low tenders, and to enable the use of electronic reverse auctions and framework agreements. Outstanding issues are framework agreements, remedies, conflicts of interest, suppliers’ lists, services and goods and the overall review of amendments made to the Model Law and the relevant provisions of the guide to enactment. It is expected that the Working Group will complete its work only after 2009.<sup>18</sup>

Some of the important objectives of a public procurement regime are to ensure value for money, the integrity of the process, transparency, and the implementation of industrial and social policies.<sup>19</sup> The six objectives set out in the preamble to the Model Law are:

- (a) maximising economy and efficiency in procurement;

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<sup>13</sup> GPA art III.

<sup>14</sup> GPA art V.

<sup>15</sup> South Africa is not a signatory to this agreement yet but will probably come under pressure to sign in future. See *Green Paper on Public Sector Procurement Reform in South Africa: An initiative* GN 691 in GG 17928 of 14 April 1997.

<sup>16</sup> See in general UNCITRAL 1994 *Model Law* [www.uncitral.org/](http://www.uncitral.org/). See also Arrowsmith 2004 *ICLQ* 17-46.

<sup>17</sup> UNCITRAL 2007 *Report* [daccessdds.un.org/](http://daccessdds.un.org/).

<sup>18</sup> UNCITRAL 2007 *Report* [daccessdds.un.org/](http://daccessdds.un.org/).

<sup>19</sup> See Arrowsmith “National and International Perspectives” 3; Arrowsmith *Public and Utilities Procurement* 2-8.

- (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby the promotion of international trade;
- (c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
- (d) providing for the fair and equitable treatment of all suppliers and contractors;
- (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) achieving transparency in the procedures relating to procurement.

The term “objective”, as used above, refers both to objectives applicable to the outcome of the procurement, for instance maximising economy, and to the principles the procurement system or regime must comply with, for instance competition, in order to achieve the outcome of such an objective. The objectives of public procurement can in this sense also be referred to as the principles of public procurement.<sup>20</sup>

The objective of the 1994 GPA is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement. It is envisaged that this will achieve greater liberalisation and expansion of world trade and improve the international framework for the conduct of world trade.<sup>21</sup>

South Africa became a constitutional state on 27 April 1994.<sup>22</sup> Prior to 1994, under the previous apartheid regime, South Africa was to a large extent isolated

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<sup>20</sup> The terms “objective” and “principle” will be used interchangeably and will refer, depending on the context, both to the objectives applicable to the outcome of the procurement and to the principles applicable to the system itself in order to achieve the stated objectives.

<sup>21</sup> Preamble GPA. See also Trepte *Regulating Procurement* 368.

<sup>22</sup> The *Constitution of the Republic of South Africa Act 200 of 1993* (hereafter the “Interim Constitution”), which was replaced by the final Constitution, *Constitution of the Republic of South Africa*, 1996.

from the rest of the world, also with regard to its economic activities. Sanctions<sup>23</sup> were instituted against South Africa, which detrimentally affected its international trade. South Africa was forced to become self sufficient and could not rely on international trade to procure all of its needs. Since 1994, with the lifting of sanctions, South Africa's economy has changed from a closed economy, where few other countries wanted to trade with South Africa and where it was forced to procure and sell most of its goods and services within the country, to a more open economy. It has once again joined the international trading community. Foreign investment and foreign trade has increased dramatically.<sup>24</sup> Government procurement has also increased substantially and is estimated to be 14% of South Africa's gross domestic product (hereinafter referred to as the "GDP").<sup>25</sup> The public procurement regime in South Africa has also undergone drastic reforms since 1994. The Constitution of South Africa<sup>26</sup> now specifically regulates public procurement.

Section 217 of the Constitution provides as follows:

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

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<sup>23</sup> Sanctions were imposed against South Africa by the international community because of its policy of apartheid.

<sup>24</sup> According to the Department of Trade and Industry South Africa's international trade amounted to R788,418,531 in 2006. See DTI 2006 *South African Trade* [www.thedti.gov.za/](http://www.thedti.gov.za/).

<sup>25</sup> Bolton *Law of Government Procurement* 3.

<sup>26</sup> *Constitution of the Republic of South Africa*, 1996.

As public procurement, generally speaking, forms part of the administrative functions of government, the principles of administrative law and in particular sections 32 and 33 of the Constitution will in many instances be applicable. Other legislation and legal principles will, depending on the circumstances, also have an influence on and be either directly or indirectly applicable to public procurement. Various new laws have been enacted since 1994 which, either in their entirety or in part, deal with or affect public procurement.<sup>27</sup> Administrative law and these other legal principles and legislation will be dealt with only in context.

South Africa uses the public procurement process as one of the instruments to achieve its socio-economic policies.<sup>28</sup> The Constitution itself provides for preferential treatment of previously disadvantaged people or communities.<sup>29</sup> The challenge is to promote such policies in terms of the constitutional prescripts of a procurement system which is fair, equitable, transparent, competitive and cost-effective. It can be expected that there will always be a degree of tension between obtaining value for money and the promotion of socio-economic policies in public procurement. In the South African context it will in particular be necessary to find a balance between the constitutional prescripts of a public procurement system which is *fair, equitable, transparent, competitive and cost effective* and the constitutional proviso allowing for a procurement policy providing for categories of preference in the allocation of contracts and the

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<sup>27</sup> The most important are: The *Public Finance Management Act* 1 of 1999, s 38(a), s 51(a) and s 76(4); (hereinafter referred to as the PFMA); the *Preferential Procurement Policy Framework Act* 5 of 2000; the *Local Government: Municipal Finance Management Act* 56 of 2003 (hereinafter referred to as the MFMA); the *Construction Industry Development Board Act* 38 of 2000; the *Local Government Municipal Systems Act* 32 of 2000, s 83 and s 84; the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, s 26; the *Electronic Communication and Transactions Act* 25 of 2002, s 11 to 26; and the *State Information Technology Agency Act* 88 of 1998, s 7(g). Other laws have a direct influence on the administrative law aspects of public procurement, in particular the *Promotion of Administrative Justice Act* 3 of 2000 (hereinafter referred to as the PAJA) and the *Promotion of Access to Information Act* 2 of 2000 (hereinafter referred to as the PAIA).

<sup>28</sup> See *inter alia* The Green Paper on Public Sector Procurement Reform, the White Paper on Creating an Enabling Environment for Reconstruction Growth and Development in the Construction Industry, and the *Preferential Procurement Policy Framework Act* 5 of 2000 (hereinafter referred to as the PPPFA).

<sup>29</sup> S 217(2).

protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

The inefficient and corrupt public procurement practices in many developing countries eligible for financial loans led to a debate on good governance.<sup>30</sup> The World Bank report of 1989 reflected on why structural adjustment programmes had failed to create economic growth. The economic crisis in Africa was considered to be a “crisis of governance”.<sup>31</sup> It is unfortunately the case that in many developing countries, which usually have a scarcity of resources, socio-economic reforms are also not achieved efficiently or cost effectively.<sup>32</sup> Many foreign donors and institutions including the World Bank now require, as a precondition for funding, that procurement be done in accordance with a procurement regime which accords with international standards, in particular with regard to value for money, transparency, integrity and review procedures.<sup>33</sup>

The constitutional requirement of a fair, equitable, transparent, competitive and cost-effective procurement system refers to internationally accepted objectives for public procurement and contains elements of the principles of good governance.<sup>34</sup> To be able to compete in the global market and to ensure economic growth, South Africa needs a procurement regime that can balance the internationally accepted objectives for public procurement with its need to address socio-economic objectives, including the need to rectify the imbalances created by apartheid.<sup>35</sup>

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<sup>30</sup> The World Bank *Sub-Saharan Africa*. The Organisation for Economic Co-operation and Development (OECD) defines good governance as follows: “[G]ood governance is the respect for the rule of law, openness, transparency and accountability to democratic institutions; fairness and equity in dealings with citizens, including mechanisms for consultation and participation; efficient, effective services; clear, transparent and applicable laws and regulations; consistency and coherence in policy formation; and high standards of ethical behaviour”. OECD 2009 *Public Governance and Management* [www.oecd.org/](http://www.oecd.org/).

<sup>31</sup> The World Bank *Sub-Saharan Africa* defines governance to mean “the manner in which power is exercised in the management of a country’s economic and social resources for development”.

<sup>32</sup> The World Bank has identified corruption as one of the important causes for this failure. See Anderson and Gray 2006 *Anti Corruption* [web.worldbank.org/](http://web.worldbank.org/).

<sup>33</sup> See World Bank Group 2009 *Procurement* [go.worldbank.org/](http://go.worldbank.org/).

<sup>34</sup> S 195 of the Constitution also prescribes elements that will further good governance.

<sup>35</sup> All of this must be done within the constitutional framework set forth in s 217.

With some notable exceptions, little research on the legal aspects of public procurement has been done in South Africa and this branch of the law will become more important in the future.<sup>36</sup>

## **1.2 Problem statement**

The question that will be investigated in this study is if the South African public procurement regime, within the framework set out in section 217 of the Constitution, complies with the generally internationally accepted objectives or principles<sup>37</sup> of public procurement as contained in the Model Law and the GPA. The attempt to answer this question entails a twofold enquiry, namely a determination of the objectives or principles of public procurement and an evaluation of the regulatory measures used to attain these objectives or principles. In answering this question it must be taken into account that as a constitutional state, South Africa's public procurement regime must comply with the constitutional prescripts for public procurement. Within these parameters the generally accepted objectives for public procurement still need to be achieved. This needs to be done within the realities of the South African situation, which necessitates that the imbalances of the past be addressed, also through public procurement. Should the South African procurement regime not comply with these internationally accepted objectives or principles it needs to be determined whether the law can be changed within the context of the constitutional imperatives and how to most effectively reach these objectives.<sup>38</sup>

In order to achieve the above, the following needs to be done:

- the nature and scope of public procurement must be determined;

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<sup>36</sup> See the recent doctoral thesis by Bolton *Legal Regulation*, her subsequent book Bolton *Law of Government Procurement* and the doctoral thesis by Quinot *Judicial Regulation*. See also the earlier doctoral thesis by Floyd *Owerheidssooreenkoms*.

<sup>37</sup> These objectives and principles refer to both the outcome of the procurement and the principles which the system must comply with to achieve its objectives.

<sup>38</sup> It must be kept in mind that other legislation and other legal principles may be directly or indirectly applicable to public procurement. In particular as public procurement, generally speaking, forms part of the administrative functions of government, the principles of administrative law and in particular s 32 and 33 of the Constitution will in many instances be applicable.

- the pre- and post-constitutional public procurement regimes of South Africa must be analysed and compared.<sup>39</sup>
- the internationally accepted objectives or principles applicable to public procurement must be determined;<sup>40</sup>
- it must be determined whether or not the South African procurement regime<sup>41</sup> complies with these internationally accepted objectives and principles through appropriate regulatory measures;
- it must be determined whether or not the South African public procurement provisions regulating the achievement of socio-economic objectives comply with the internationally accepted objectives and principles; and
- should the South African public procurement regime, within the framework set out in section 217 of the Constitution, including the achievement of its socio-economic objectives, not comply with the internationally accepted objectives and principles, it must be determined how the regime needs to be changed.<sup>42</sup>

### 1.3 Hypothesis

As South Africa is a constitutional state, its public procurement regime has to comply with the provisions of section 217 of the Constitution. It provides *inter alia* for a procurement system which is fair, equitable, transparent, competitive and cost-effective.<sup>43</sup> It authorises a procurement policy which 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.<sup>44</sup>

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<sup>39</sup> This will assist with a proper understanding of the present situation in South Africa.

<sup>40</sup> For the purposes of this study it is accepted that the Model Law and the GPA reflect the internationally accepted objectives and principles of public procurement.

<sup>41</sup> In addition to the provisions of s 217 of the Constitution, the PFMA, the MFMA and the PPPFA, which deal directly with public procurement, other legislation and legal principles contained particularly in administrative law are relevant.

<sup>42</sup> The purpose of this study is not to determine why certain objectives or principles are applicable to public procurement, but what the principles are and how they are achieved through the applicable provisions of the public procurement regime.

<sup>43</sup> S 217(1).

<sup>44</sup> S 217(2). The *Preferential Procurement Policy Framework Act* 5 of 2000 has been promulgated in consequence of the constitutional mandate contained in s 217(3) of the Constitution.

The Constitution provides in the Bill of Rights for the right to lawful, reasonable and procedurally fair administrative action.<sup>45</sup> This includes the right to be given written reasons and the right to have decisions reviewed by a court or independent and impartial tribunal. It is accepted that the South African procurement regime must comply with these constitutional imperatives.

In addition to the provisions of the Constitution, many other legal principles and legislation may, depending on the circumstances, be directly or indirectly applicable to public procurement.

South Africa is classified by the WTO as a developed country.<sup>46</sup> However, it experiences problems similar to those of developing countries, the most important being poverty, unemployment, a lack of skills and a lack of infrastructure in certain areas.<sup>47</sup> It needs to pursue collateral objectives in its procurement policy for purposes of its socio-economic development. Despite South Africa's becoming a constitutional state more than a decade ago, it will not be possible to eradicate all of the legacies of apartheid in the near future. South Africa also needs to increase its international trade for economic growth to be able to move towards the eradication of socio-economic problems like poverty and underdevelopment, and to create a sustainable economy.

As a participant in the global market and in view of the importance of international trade to its economy, South Africa needs to ensure that its public procurement regime makes it possible to attain the generally accepted

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<sup>45</sup> S 33 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.

<sup>46</sup> Bolton *Law of Government Procurement* 299.

<sup>47</sup> See also Bolton *Law of Government Procurement* 251, which specifically refers to the legacies of apartheid.

objectives and principles applicable to public procurement through its regulatory measures.

It is imperative to find a balance between the demands for socio-economic change and the demands of the international community for a public procurement regime which complies with accepted objectives and principles and which does not discriminate against foreign products or foreign suppliers. South Africa also has to adapt its public procurement regime to keep abreast of international developments in this field.

Institutions like the World Bank and donor institutions for development aid require that a public procurement regime exists which complies with the principles of good governance and generally accepted international objectives and principles in public procurement, like value for money, transparency, integrity and competitiveness, as a prerequisite for providing aid.<sup>48</sup> It is in South Africa's interest to ensure that its public procurement regime accords with these principles and objectives.

The Model Law is an example of an internationally acceptable procurement regime which provides for collateral objectives to be pursued by developing countries and those whose economies are in transition.<sup>49</sup> The Model Law has to a great extent been able to combine the requisite of addressing socio-economic issues in developing states with the requisite of complying with internationally accepted objectives and principles in public procurement, within its regulatory framework.<sup>50</sup>

The GPA is an agreement which was developed by the WTO to enhance world trade.<sup>51</sup> Most of the world's major trading partners participated in the drafting of this agreement.<sup>52</sup> The provisions of this agreement, which regulates government procurement, are accepted as reflecting the internationally accepted objectives

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<sup>48</sup> The World Bank 2009 *Procurement Policies and Procedures* go.worldbank.org/.

<sup>49</sup> Hunja "UNCITRAL Model Law" 97.

<sup>50</sup> *Ibid* 98.

<sup>51</sup> Bolton *Law of Government Procurement* 299; Gordon, Rimmer and Arrowsmith "Economic Impact" 31.

<sup>52</sup> WTO *Understanding the WTO* 56.

and principles applicable to public procurement. The GPA will become more significant in future and South Africa will be put under pressure by its trading partners to become a signatory thereto.<sup>53</sup>

The principles laid down by section 217 of the Constitution, the internationally accepted principles and objectives applicable to public procurement, and the need for socio-economic reform are all interrelated and interdependent, and inform one another. It is necessary to find a balance between these different principles and objectives. Such a balance will not be easy to attain, will differ depending on the particular circumstances of the time, and need due deference to be given to the historical imbalances existing in South Africa.

#### **1.4 Research methodology**

The research will be based mainly on a study of relevant literature. It will entail a comparative study of the relevant legal principles of the UNCITRAL Model Law, of the GPA, and of South Africa.

The Model Law will be used as it sets internationally accepted standards for procurement regimes, also with regard to developing countries and economies in transition. It has been adopted by many developing countries as part of their law. Eastern European, South American and African countries in transition, from socialist economies to more open economies, have based their procurement laws on the Model Law. The Model Law can be seen as an international benchmark against which procurement regimes can be evaluated.<sup>54</sup> Where applicable, the proposed revisions of the Model Law will be referred to.

The GPA reflects the standards for public procurement agreed upon by the world's major trading partners.<sup>55</sup> The GPA is also of importance as South Africa is a member of the WTO. Pressure will be exerted on South Africa to

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<sup>53</sup> Green Paper on Public Sector Reform; Bolton *Law of Government Procurement* 299.

<sup>54</sup> Hunja "UNCITRAL Model Law" 97.

<sup>55</sup> They include Canada, the EU, Hong Kong, Iceland, Israel, Japan, Korea, Lichtenstein, the Netherlands, Norway, Singapore, Switzerland and the United States. Nineteen further states were observers. See WTO 2009 *Parties and observers* [www.wto.org/](http://www.wto.org/).

sign the GPA as it becomes more active in the international market. The signatories to the GPA adhere to the principle of reciprocity, and open their markets for international public procurement only to co-signatories. Many of South Africa's traditional trading partners are signatories to the GPA. The GPA provides for exceptions which are applicable to developing countries. The GPA can also be seen as a benchmark against which public procurement regimes can be evaluated. As it will be some time before the Revised GPA will be finalised and accepted by the contracting states, the present GPA will be discussed. The proposed revisions will be referred to only when applicable.

Both the Model Law and the GPA are in essence framework legislation. Generally speaking, broad principles are set out with a varying degree of detail. It is left to the countries adopting the Model Law and state parties to the GPA to determine the detail in regulations or similar legislation.

The South African public procurement regime is also essentially regulated by framework legislation, namely the *Public Finance Management Act*<sup>56</sup> (hereafter referred to as the "PFMA") and the *Local Government: Municipal Finance Management Act*<sup>57</sup> (hereafter referred to as the "MFMA"). These acts reflect the broad principles of *fairness, equitability, transparency, competitiveness and cost-effectiveness* laid down in the Constitution. Many other pieces of legislation do have an influence on the public procurement regime in South Africa but they will not be dealt with in detail. It is also for practical reasons necessary to limit the discussion of each principle. In the same vein it is necessary to limit the scope of the research into the provisions aimed at ensuring the realisation of the principles set out in the different regimes. It will not be practical to delve into the detail of each applicable provision and determine how the provisions differ among the three regimes.

Most if not all of the principles are such that they could individually form the subject of a research project. The emphasis is not on why each principle and each provision is necessary for a good public procurement system but rather

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<sup>56</sup> Act 1 of 1999.

<sup>57</sup> Act 56 of 2003.

to identify the principles applied in the Model Law and GPA and to determine how they are implemented through the different provisions of the regimes and how the South African regime compares with other regimes.

The wording of the applicable provisions will generally be followed but it will be necessary to consult the original texts to determine the exact wording. Although aspects like public-private partnerships and the use of consultants fall within the ambit of public procurement, they will not be dealt with in any detail. In particular, procurement for safety and security purposes will not be dealt with. The study will concentrate on the general provisions of public procurement relating to the procurement of goods and services.<sup>58</sup> With regard to South Africa's socio-economic policies the *Preferential Procurement Policy Framework Act*<sup>59</sup> (hereinafter referred to as the "PPPFA") and the applicable provisions of the PFMA and the MFMA will be evaluated. None of the legislation and government policies dealing with black economic empowerment (hereafter referred to as "BEE") and similar socio-economic policies and legislation will be dealt with in any detail, but they will be addressed in so far as they directly relate to public procurement, in particular as part of government's efforts to achieve its socio-economic goals.

The importance of administrative law in the public procurement process is undeniable. It is, however, not necessary to discuss the relevant administrative law in any depth as there already exist many authoritative works on the subject. The discussion on the administrative law will be confined to the applicability of the administrative law in the public procurement process.

## **1.5 Content**

As a starting point this study will investigate what public procurement is and what its objectives are. In particular, the nature of public procurement will be established. The terms "goods and services", "procurement" and "public" will be dealt with separately. The objectives of public procurement will be divided

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<sup>58</sup> The procurement of goods and services for present purposes also refers to the procurement of "works" as referred to in the English law, namely construction work.

<sup>59</sup> Act 5 of 2000.

into primary and secondary objectives. Initially only broad objectives will be identified in order to enable a proper analysis of the Model Law, the GPA and the South African public procurement regime. The differences between public and private procurement will thereafter be addressed. Specific reference will be made to the applicability of administrative law to public procurement, without discussing administrative law in any detail.

The Model Law contains procedures aimed at achieving the objectives of competition, transparency, fairness and objectivity in the procurement process, thereby increasing economy and efficiency in procurement.<sup>60</sup> It will be discussed with the emphasis on the general principles, methods of procurement, tendering procedures, alternative methods of procurement and review procedures. The proposed revisions of the Model Law will be referred to where applicable.

For a proper understanding of the GPA, a short discussion of the WTO, the principles governing it and its objectives is necessary. Thereafter the GPA will be discussed with regard to its background, purpose, general provisions, scope, tendering procedures, post-award information and publication, special rules for developing countries and enforcement. The Revised GPA will be referred to where applicable.

The development of public procurement law in South Africa, with a distinction between the pre- and post-constitutional era, will be investigated and expounded upon. With regard to the pre-constitutional era the following will cursorily be dealt with: the period before whites settled in the Cape; the introduction of Roman Dutch Law in the Cape of Good Hope by the early white settlers; the influence of British Law, in particular from 1910 to 1961; and the period of the South African Republic from 1961 until 1994, when South Africa became a constitutional state. As most of the important developments in procurement law in South Africa took place after it became a constitutional state, the post-constitutional era will be dealt with in detail. In particular an exposition will be given of the generally applicable principles and applicable legislation. The provisions of the

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<sup>60</sup> UNCITRAL 1994 *Model Law* [www.uncitral.org/](http://www.uncitral.org/).

Constitution, the PFMA, MFMA and PPPFA will be dealt with in more detail. Thereafter the procurement methods, procedures of procurement, enforcement methods and the attainment of collateral objectives in public procurement will be discussed.

A comparative analysis will then be done of the South African law, the Model Law and the GPA to determine the internationally accepted objectives and principles applicable to public procurement, and how content is given thereto. The South African procurement regime will be evaluated against these principles and objectives. This will be done with regard to the legal framework and the primary and secondary objectives of public procurement. The different stages of procurement,<sup>61</sup> as well as general aspects and methods of procurement, will be dealt with when discussing the primary objectives. A general overview will be given when discussing the secondary objectives. The purpose is to extract enough detail from the provisions to demonstrate the broad principles, standards or objectives common to the regimes and to establish in broad terms how they are attained.

In conclusion, recommendations will be made on how to improve the South African procurement regime in order to comply with the internationally accepted principles and objectives whilst still securing the government's objective of socio-economic reform through public procurement.

## **1.6 Summary**

The purpose of this research is to determine if the South African public procurement regime, within the framework set out in section 217 of the Constitution, complies with the generally internationally accepted objectives and principles applicable to public procurement, and how these objectives are balanced with the need to realise the government's socio-economic policies. This entails a determination of the internationally accepted objectives and

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<sup>61</sup> They are: tender requirements with regard to the tenderer and the tender specifications; invitation to tender (time limits, documentation and similar aspects); submission of tenders; processing and evaluation of the tender; award of the tender; review and challenge procedures; and supervision of the execution of the tender.

principles applicable to public procurement and an evaluation of the regulatory measures to achieve such principles and objectives. Comments will be made on shortcomings in the South African procurement regime and how they can be addressed

## CHAPTER 2

### THE PUBLIC PROCUREMENT PHENOMENON

#### 2.1 Introduction

In order to fulfil their obligations to their citizens all governments need to carry out different functions. In fulfilling such functions, one of the major economic activities all governments are involved in is the purchasing of goods and services.<sup>1</sup> Such goods and services can be provided either “in house”<sup>2</sup> or by purchasing them from outside entities. Because of the wide variety and huge volume of goods and services needed by governments, they generally have to meet their needs by means of procurement from private parties. Public procurement refers to this particular activity.<sup>3</sup> This study will analyse the process of public procurement. The executive and possibly legislative decisions, including decisions on policy, the allocation of funds, the determination of priorities, and similar decisions which precede the actual procurement process, do not form part of this study.

The earliest known public purchase order, written on a red clay tablet and dated between 2400 and 2800 BC, comes from Syria.<sup>4</sup> Through the years, the importance of procurement in the modern state has grown exponentially. It is estimated by the WTO that at present public procurement amounts to between 10% and 15% of the gross domestic product (GDP) of developed countries and up to 25% and more of the GDP of developing countries.<sup>5</sup> It is estimated by the International Monetary Fund that the world's GDP amounted to

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<sup>1</sup> Thai 2001 *JPP* 9. The four major activities are (a) providing the legal framework for all economic activities, (b) redistributing income through taxation and spending, (c) providing public goods and services freely available to the public, such as national defence, public safety, education, and infrastructure (bridges and roads), and (d) purchasing goods, services and capital assets.

<sup>2</sup> This entails that the government provide the services themselves, for instance legal services through the state attorney's office, or produce goods themselves, for instance by means of a state-owned factory which produces military equipment.

<sup>3</sup> Arrowsmith *Public and Utilities Procurement* 1; Arrowsmith and Davies (eds) *Public Procurement* 3; Bolton *Law of Government Procurement* 1.

<sup>4</sup> The order was for 50 jars of fragrant smooth oil in return for 600 small weights in grain. Other evidence of early procurement includes the development of the silk trade between China and a Greek colony in 800 BC and the contractual issues associated with supporting the Roman Army in Spain as early as 300 BC. See Thai 2001 *JPP* 11.

<sup>5</sup> WTO 2002 *Journal on Budgeting*.

\$62,054,130,000,000 in 2005.<sup>6</sup> The GDP of South Africa amounted to \$283,071,000,000 for the same year.<sup>7</sup>

Public procurement concerns at least three interest groups: firstly, those who fund the activity, being government; secondly, those who benefit from and indirectly, through the payment of taxes, fund the goods and services procured, namely the general public; and lastly, those that supply the goods and services, namely private enterprise. The public's interest in public procurement is twofold, namely the expenditure of its (the public's) money, and being the recipient of the benefits of the public procurement. Because of the size of public procurement and the possibility of its influencing industry, it does have an important influence on a country's economy.<sup>8</sup> It can be stated that the primary function or objective of public procurement is to serve the legitimate interests of all the interested parties, taking into account the economy of the country.<sup>9</sup> Arrowsmith defines the primary objective of public procurement as "the acquisition of goods or services fulfilling a particular function on the best possible terms".<sup>10</sup> She identifies the following objectives as being shared by most systems: "value for money, integrity, accountability, fair treatment, and social/industrial development, all of which must be implemented through a cost-efficient process".<sup>11</sup>

It is accepted that public procurement can be also used as a tool to achieve governments' socio-economic policies.<sup>12</sup> This is referred to as public procurement's secondary, non-commercial, function. These secondary objectives may include the promotion of a governments' socio-economic goals, the promotion of its national policies or agendas, including objectives like sustainable

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<sup>6</sup> Information as determined by the International Monetary Fund. See IMF 2008 *World Economic Outlook* [www.imf.org/](http://www.imf.org/).

<sup>7</sup> *Ibid.*

<sup>8</sup> Arrowsmith *Public and Utilities Procurement* 2.

<sup>9</sup> Arrowsmith states that the objectives of a public procurement regime are to control expenditure and obtain value for money, the elimination of corrupt practices, accountability to the public, fair treatment of those doing business with the government, efficiency, and competitiveness. See Arrowsmith *Public and Utilities Procurement* 2-9. Watermeyer states that the primary function of any public procurement regime is to ensure *inter alia* competition, integrity, transparency, efficiency, and value for money. See Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>10</sup> Arrowsmith *Public and Utilities Procurement* 1225.

<sup>11</sup> Arrowsmith 2004 *ICLQ* 18.

<sup>12</sup> Arrowsmith *Public and Utilities Procurement* 8 and 1225; Bolton *Law of Government Procurement* 252-254; McCrudden "Social Policy Issues" 219.

development, environmental protection, the alleviation of poverty and the achievement of its international policies or agendas.<sup>13</sup> The distinction between the primary and secondary objectives is not watertight and the objectives remain interconnected and interrelated.<sup>14</sup>

Although the goods and services procured by government may be identical to goods and services procured by private parties, there is a major difference between the principles regulating public and private procurement. Contrary to private procurement, which is generally regulated by private law, administrative and private law is applicable to public procurement.<sup>15</sup>

The nature, scope and objectives of public procurement will be discussed in this chapter. In particular, a differentiation will be made between the primary and secondary objectives of public procurement. As these factors will be discussed in detail when analysing the Model Law, the GPA and the South African law, only a brief overview will be given. A distinction will also be made between public procurement and private procurement with the focus on the law regulating government agreements. In this regard, the applicability of public law, in particular administrative law, will be discussed.

## **2.2 The nature and scope of public procurement**

In order to fulfil their obligations to their citizens all governments need goods and services.<sup>16</sup> Governments can, generally speaking, obtain these goods and

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<sup>13</sup> Arrowsmith *Public and Utilities Procurement* 8. McCrudden "Social Policy Issues" 219 identifies seven such goals, namely foreign policy goals such as the protection of national security; stimulating national economic activity in particular sectors of the economy; protecting national industry against foreign competition; improving the competitiveness of certain key industrial sectors; remedying regional disparities within the state; improving environmental quality; and securing human rights and employment standards nationally or internationally. Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>14</sup> Labour intensive methods may for example be more expensive in the short run but could be less expensive if they create jobs, which might obviate the necessity to provide social grants. This will imply that the government will obtain value for money in the long run while it also fulfils its socio-economic needs.

<sup>15</sup> Arrowsmith *Public and Utilities Procurement* 9 and 32; Bolton *Law of Government Procurement* 73; Freedland 1994 *Public Law* 87.

<sup>16</sup> Arrowsmith *Public and Utilities Procurement* 1; Arrowsmith and Davies (eds) *Public Procurement* 1; Bolton *Law of Government Procurement* 1; Trepte *Regulating Procurement* 9 and 21.

services either by “in-house” provision or by “out-sourcing”.<sup>17</sup> In-house provision is used when a government sets up its own supply chain, for instance factories to build armaments, or has full-time employees to provide services, for instance the legal services provided by the state attorney’s office. Out-sourcing is used when goods and services are obtained from an independent, outside (private) entity.<sup>18</sup> The process of a government’s obtaining goods and services from private entities is referred to as government procurement or public procurement.<sup>19</sup>

It is necessary to determine what the nature and scope of “goods” and “services” are and what “public” and “procurement” entail in the public procurement process.

### 2.2.1 Goods and services

In the UK and the European Community a distinction is sometimes made between “goods” (or supplies), “services” and “works”.<sup>20</sup> Under “goods” are understood physical products.<sup>21</sup> “Services” usually refer to non–construction services including manual and white-collar services. “Works” refer to construction and engineering activities. The distinction is not always clear and the activities often overlap.

In the Model Law a distinction is made between “goods”,<sup>22</sup> “construction”<sup>23</sup> and “services”,<sup>24</sup> and deference is given to states’ obligations in terms of

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<sup>17</sup> Trepte *Regulating Procurement* 21; Bolton *Law of Government Procurement* 1; Freedland 1994 *Public Law* 87.

<sup>18</sup> This is not the same as privatisation. Privatisation occurs when a function previously performed by government is after a point conducted by an entity which is, at least partly, privately owned. Freedland 1994 *Public Law* 87.

<sup>19</sup> There also exists the possibility of obtaining goods (usually land) through expropriation. See s 25 of the *Constitution Act*, 1996, the *Expropriation Act* 63 of 1975 and Bolton *Law of Government Procurement* 1-2. This falls outside the scope of this study.

<sup>20</sup> Arrowsmith *Public and Utilities Procurement* 1-2.

<sup>21</sup> Art 1:2 of the GPA refers to products or services, including any combination thereof.

<sup>22</sup> Art 2(c) defines it as follows: “Goods’ means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves”. (The enacting State may include additional categories of goods).

<sup>23</sup> Art 2(d) defines it as follows: “Construction’ means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite

regional and international agreements. It is provided that procurement in terms of treaty obligations and international finance agreements will be excluded from the Model Law in so far as they are contradictory therewith.<sup>25</sup>

A distinction is made between “services” and “construction services” in annex 4 and 5 of appendix 1 of the GPA. In these annexes the contracting state party sets out which “services” and which “construction services” are covered by the Agreement.<sup>26</sup> In the Revised GPA the terms “goods” and “services” are dealt with in more detail. “Commercial goods and services”<sup>27</sup> and “construction services contract”<sup>28</sup> are specifically defined. “Services”<sup>29</sup> is defined to include construction services, save if specified otherwise. “Goods” and “services” procured for commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale, are excluded from the Revised Agreement.<sup>30</sup> Save if specifically included by the contracting state, certain specified procurements are excluded.<sup>31</sup> The excluded procurements relate to the acquisition of immovable property;<sup>32</sup> agreements for assistance;<sup>33</sup> the procurement of certain financial services;<sup>34</sup> public employment agreements;<sup>35</sup> procurement relating to international assistance and development aid;<sup>36</sup> the

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photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself”.

<sup>24</sup> Art 2(e) defines it as follows: “‘Services’ means any object of procurement other than goods or construction”. (The enacting State may specify certain objects of procurement which are to be treated as services).

<sup>25</sup> Art 3:

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other States,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions, the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

<sup>26</sup> Art I:1.

<sup>27</sup> Revised GPA art I(a).

<sup>28</sup> Revised GPA art I(b).

<sup>29</sup> Revised GPA art I(q).

<sup>30</sup> Revised GPA art II:2(ii).

<sup>31</sup> Revised GPA art II:3.

<sup>32</sup> Revised GPA art II:3(a).

<sup>33</sup> Revised GPA art II:3(b).

<sup>34</sup> Revised GPA art II:3(c).

<sup>35</sup> Revised GPA art II:3(d).

<sup>36</sup> Revised GPA art II:3(e)(i).

stationing of troops;<sup>37</sup> and procurements where the Agreement is inconsistent with conditions imposed by the international organisation or fund with regard to international loans, grants or assistance.<sup>38</sup>

In section 217 of the Constitution the terms “goods” and “services” are used without defining them. In the South African context the term “goods”<sup>39</sup> will include material and immaterial property and movable and immovable property.<sup>40</sup> The term “services” relates to the provision of work, which can include any kind of work, from that done by a cleaner to the intellectual work of a scientist, and the provision of commodities as diverse as banking, transport, medical, and electronic services. It will sometimes be difficult to determine whether the procurement relates to “goods” or “services”.<sup>41</sup> A wide as possible interpretation needs to be given to both terms, as the purpose of the constitutional provision is clearly to provide principles applicable to all government procurement and not to limit them by the use of the terms “goods and services”. The phrase “goods and services” is wide enough to include “works” or “construction” and there is no need to make the further distinction made in the UK and the EU.<sup>42</sup> Undoubtedly, a combination of goods and services must be included under the terms “goods and services”. The exclusions provided for in the Model Law and the GPA are not specifically excluded in South African public procurement and the constitutional principles of section 217 will be applicable thereto. In South Africa ordinary public employment agreements have never been seen as part of public procurement and are regulated by the *Public Service Act, 1994*.<sup>43</sup>

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<sup>37</sup> Revised GPA art II:3(e)(ii).

<sup>38</sup> Revised GPA art II:3(e)(iii).

<sup>39</sup> The dictionary meaning of “goods” is, according to the *Concise Oxford English Dictionary* 1982, “movable property; merchandise, wares, and services”. The *Concise Oxford English Dictionary* 2001 refers to all kinds of personal possessions.

<sup>40</sup> Bolton states the primary difference between goods and services to be that the former refers to tangible things, which are generally not consumed at the same time that they are produced. Services are generally intangible and used at the same time that they are produced. See Bolton *Law of Government Procurement* 65-66.

<sup>41</sup> It might for instance not be clear in the case of the procurement of the development of a sophisticated computer programme by an information technology expert whether the “services” of the expert or the end product, being the programme which can be classified as “goods”, was procured.

<sup>42</sup> See Arrowsmith *Public and Utilities Procurement* ch 6.

<sup>43</sup> Act 104 of 1994. The appointment of consultants does form part of public procurement.

In this thesis the terms “goods” and “services” will be used to include “works” and “construction” as nothing is gained by the further distinction between the terms.

### 2.2.2 Procurement

The African Development Bank defines procurement as follows:

Procurement refers to the process of acquiring goods, works and services resulting in the award of contracts under which payments are made in the implementation of projects, in accordance with the governing Rules and Procedures and Guidelines of the financing agency or agencies.<sup>44</sup>

The international Non-Governmental Organisation (NGO), Consumer Unity and Trust Society (CUTS)<sup>45</sup> defines it as:

Procurement is the process which creates, manages and fulfils contracts. This being the case, it can be documented as a succession of logically related actions occurring or performed in a definite manner which culminates in the completion of a major deliverable or the attainment of a milestone. Processes in turn are underpinned by methods (ie a documented, systematically ordered collection of rules or approaches) and procedures (ie the formal steps to be taken in the performance of a specific task, which may be evoked in the course of a process), which are informed and shaped by the policy of an organisation. Methods and procedures can likewise be documented and linked to processes. Procurement activities commence once the need for procurement is identified and end when the transaction is completed. There are six principal activities associated with the procurement process, namely establish what is to be procured; decide on procurement strategies in terms of contract, pricing and targeting strategy and procurement procedure; solicit tender offers; evaluate tender offers; award contract and administer contracts and confirm compliance with requirements.

Methods, procedures and operational policies are required to implement these principal activities.<sup>46</sup>

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<sup>44</sup> AfDB 2008 *Rules* [www.afdb.org/](http://www.afdb.org/).

<sup>45</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/). CUTS (Consumer Unity and Trust Society) is an NGO which was founded in 1983. It works on five programmes, which are consumer protection; international trade and development; competition, investment and economic regulation; human development and consumer safety. It is accredited to UNCTAD and the United Nations Commission on Sustainable development.

<sup>46</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

The Model Law defines procurement as the acquisition by any means of goods, construction or services.<sup>47</sup>

Article I:2 of the GPA provides that:

This Agreement applies to procurement by any contractual means; including procurement through methods such as purchase or lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.<sup>48</sup>

Procurement has also been defined as referring to the function of purchasing goods or services from an outside body.<sup>49</sup> This will normally be done through contractual arrangements but can also take place through statutory arrangements.<sup>50</sup> Arrowsmith distinguishes between procurement in a broad sense, which refers to the whole of the contract process from specification through to the administration, and termination of the contract. In the narrow sense, it refers only to the specification and awarding of the contract.<sup>51</sup>

Trepte defines procurement as the act of purchasing or acquiring goods, works and services from the market place.<sup>52</sup>

Bolton distinguishes among three stages in procurement, namely the planning stage, the process of procurement, and the contract maintenance or contract administration stage.<sup>53</sup> Trepte<sup>54</sup> distinguishes among the following stages: government requirements which includes the scope, quality and timing thereof; stockholding; internal financial arrangements; the method of acquisition, which includes internal or market procurement; the choice of procurement procedure;

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<sup>47</sup> Art 2(a).

<sup>48</sup> Art I:2.

<sup>49</sup> Arrowsmith *Public and Utilities Procurement* 1. Bolton *Law of Government Procurement* 1.

<sup>50</sup> Arrowsmith *Public and Utilities Procurement* 1 refers in this regard specifically to utility services supplied under statutory arrangements.

<sup>51</sup> Arrowsmith *Public and Utilities Procurement* 1. For purposes of this study the term procurement will be used in the broad sense.

<sup>52</sup> Trepte *Regulating Procurement* 9.

<sup>53</sup> Bolton *Law of Government Procurement* 9. See also Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 1-2 and Trepte *Regulating Procurement* 35, which also makes a distinction between the procurement process as part of the supply management chain and government contracts, which are limited to issues relating to the contracts themselves.

<sup>54</sup> Trepte *Regulating Procurement* 35.

the preparation of bidding documents, which includes the setting of specifications; the implementation of procurement procedure; the award of the contract; the termination of contracts; and the disposal of assets.

To determine what the term “procurement” entails in South African law, the provisions of the Constitution are once again the starting point. Section 217 of the Constitution refers to the contracting for goods or services by government. Section 217(1) further refers to “contracts”, and uses the word as a verb.<sup>55</sup> This can be interpreted to mean contracting in the narrow sense, which will refer only to the contractual stage of the procurement process. A wide interpretation will include both the pre-contractual and contractual phase of procurement. If one takes the purpose<sup>56</sup> for the regulating of public procurement into consideration, the wording of the section as a whole, including the reference to a “system” which must be fair, transparent and cost effective, one is driven to the conclusion that section 217(1) applies to both the pre-contractual and contractual phases of procurement.<sup>57</sup> This is confirmed in *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>58</sup> where Oliver JA states “It may well be that the words ‘contracts for goods and services’ must be given a wide meaning, similar to ‘negotiates for’ etc”.

There is no reason to limit the phrase “contracts for” and it will include all types of contracts, for instance purchase, credit, lease, insurance, barter and similar agreements.

The other issue that comes to the fore is the question if section 217 is applicable to the letting and sale of assets by state organs as opposed to the lease and purchase of property by the state from the private sector. The latter is clearly included in section 217. If the word “for” is interpreted in its usual meaning, the

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<sup>55</sup> S 217(1) reads as follows: “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”.

<sup>56</sup> See *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A); *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA); *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

<sup>57</sup> Bolton is also of the opinion that it refers to both the contractual and pre-contractual stage. See Bolton *Law of Government Procurement* 66.

<sup>58</sup> 2001 1 SA 853 (SCA) at par 20 862 A-B.

phrase “contracts for goods or services” on its own gives the impression that it refers to contracts to obtain goods and services. The term procurement also conveys the meaning “to obtain or acquire”.<sup>59</sup> An argument can, however, be made that public procurement should also include the sale and letting of assets by public organs. Section 217 is found in chapter 13 of the Constitution, which deals with general financial matters of the state. The heading of this section is procurement.<sup>60</sup> A broad interpretation should be given to section 217 in order to include the sale and letting of assets or services by the state. Logically, the principles of fairness, equity, transparency, competitiveness and cost-effectiveness should apply equally thereto. The aim of section 217(2) to remedy past injustices should be equally applicable to the letting and sale of assets and services, namely all aspects of government contracting with private parties.<sup>61</sup>

Although section 217 of the Constitution does not directly refer to the sale or letting of goods and services by the state, there can be no reason why procurement should not be interpreted to include such actions.<sup>62</sup> The PFMA,<sup>63</sup> empowers National Treasury to make regulations or issue instructions applicable to departments, concerning the alienation, letting or other disposal of state assets. Such regulations were indeed promulgated.<sup>64</sup> The MFMA also makes

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<sup>59</sup> *Concise Oxford English Dictionary* 2001. Watermeyer [no date] *Project Synthesis Report* [www.cuts-international.org/](http://www.cuts-international.org/) defines procurement much more widely, namely as the process which creates, manages and fulfils contracts relating to the provision of supplies, services or engineering and construction works, the hiring of anything, disposals and the acquisition or granting of any rights and concessions.

<sup>60</sup> See *President of the RSA v Hugo* 1997 6 BCLR 708 (CC) par 12 where it is stated that headings in the constitution can be used to elucidate a provision thereof.

<sup>61</sup> See also Bolton *Law of Government Procurement* 67-68, which comes to the same conclusion. Penfold and Reyburn “Public Procurement” 25-7 to 25-8 has a different opinion namely that the phrase “contracts for” refers to contracts where the state procures rather than provides goods and services.

<sup>62</sup> The *State Tender Board Act* 86 of 1986 s 4(1)(a), before its repeal, made the act applicable to the disposal of movable property. Ch 11 of the MFMA s 14, 90 and 100(3) provides for the disposal of goods no longer needed by local government.

<sup>63</sup> Act 1 of 1999 s 76(1)(k). Such regulations were issued, namely the Treasury Regulations published in GN R225 in GG 27388 of 15 March 2005.

<sup>64</sup> Treasury Regulation 16A.7.

16A7.1 Disposal of movable assets must be at market-related value or by way of price quotations, competitive bids or auction, whichever is most advantageous to the state, unless determined otherwise by the relevant treasury.

16A7.2 Notwithstanding the provisions of paragraph 16A7.1, accounting officers and accounting authorities may transfer movable assets free of charge to other departments, constitutional institutions or public entities by means of formal vouchers.

chapter 11, which deals with public procurement, applicable to the disposal of goods.<sup>65</sup> These constitutional principles are repeated in the PFMA, the MFMA and the regulations issued in terms thereof. On a policy basis, there ought not to be any distinction made between the acquisition or lease of goods for the state and the letting and selling thereof by state organs to the public.<sup>66</sup>

In principle, the three main interest groups in public procurement, namely the government, the ordinary citizen, and the private enterprise which deals with government procurement, should all be afforded the benefits of section 217 when the state leases or sells its property.

A further question that warrants attention is if this section is applicable to transactions between organs of state.<sup>67</sup> One organ of state may wish to acquire assets from another organ, or wish another organ of state to provide services on its behalf.<sup>68</sup> There are various treasury regulations regulating such

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16A7.3 Any sale of immovable state property must be at market-related value, unless the relevant treasury approves otherwise.

16A7.4 The letting of immovable state property (excluding state housing for officials and political office bearers) must be at market-related tariffs, unless the relevant treasury approves otherwise. No state property may be let free of charge without the prior approval of the relevant treasury.

16A7.5 The accounting officer or accounting authority must review, at least annually when finalising the budget, all fees, charges, rates, tariffs or scales of fees or other charges relating to the letting of state property to ensure sound financial planning and management.

16A7.6 The accounting officer or accounting authority must, when disposing of firearms, obtain the approval of the National Conventional Arms Control Committee for any sale or donation of firearms to any person or institution within or outside the Republic.

16A7.7 The accounting officer or accounting authority must, when disposing of computer equipment, firstly approach any state institution involved in education and/or training to determine whether such an institution requires such equipment. In the event of the computer equipment being required by such a state institution, the accounting officer or accounting authority may transfer such equipment free of charge to the identified institution.

<sup>65</sup> S110(1)(b). The term “dispose” is not defined in the Act but can be interpreted to include the letting of goods.

<sup>66</sup> For a contrary opinion see Quinot 2007 *PPLR* 465; and Penfold and Reyburn “Public Procurement” 25-7.

<sup>67</sup> Penfold and Reyburn are of the opinion that s 217 is not applicable to contracts where the state is providing the goods or services. Penfold and Reyburn “Public Procurement” 25-11 n 1 and 25-7 to 25-8. In support of their view they refer to the Model Law, which defines procurement as the acquisition of goods, construction and services.

<sup>68</sup> The *Local Government Municipal Systems Act* 32 of 2000 s 80(1) for instance provides that a municipality may provide a service through a service delivery agreement with other organs of state.

transactions.<sup>69</sup> As the state functions as a unit and no organ of the state is separate from the state, section 217 will not be applicable in such direct transactions between organs of state. If an organ of state contracts for goods and services in the open market, however, section 217 ought to be applicable, irrespective of whether the contract is awarded to a private party or to another organ of state. The general public does not have a right in terms of section 217 to provide all goods and services to the state, and the state may provide goods and services to itself, albeit by means of procuring them from another organ thereof. However, when procurement by an organ of state is advertised for private participation, the public does have the right to participate in the procurement process, in accordance with section 217, even though the contract may eventually be awarded to another organ of state.<sup>70</sup> It has correctly been pointed out that even in cases where procurement is exclusively done between different state organs the principles of transparency must still be applied.<sup>71</sup>

As pointed out above, the term “procurement” is given a wide meaning by authors, and in the Model Law and GPA. Section 217 of the Constitution should be interpreted to be applicable to procurement in the broader sense and not only to the strict contractual side thereof.<sup>72</sup> Such an interpretation will ensure that the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness are widely applied in government procurement.<sup>73</sup>

It would of course be possible to go into more detail as to the different stages of the public procurement process, but for purposes of this study the essential

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<sup>69</sup> Treasury Regulation 16A7.2 provides; “Notwithstanding the provisions of paragraph 16A7.1, accounting officers and accounting authorities may transfer movable assets free of charge to other departments, constitutional institutions or public entities by means of formal vouchers”.

<sup>70</sup> This will in particular be the case where commercial entities performing public functions or public powers are involved.

<sup>71</sup> Penfold and Reyburn “Public Procurement” 25-11 n 1.

<sup>72</sup> The entire system of procurement needs to be fair, equitable, transparent, competitive and cost-effective. See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) per Olivier JA par 20 (862 A-B): “It may well be that the words ‘contracts for goods and services’ must be given a wide meaning, similar to ‘negotiates for’ etc”.

<sup>73</sup> See also Bolton *Law of Government Procurement* 66-71.

and most important stages, after the decision to procure has been made, are the following<sup>74</sup>:

- The compilation of tender requirements;
- The invitation to tender;
- The submission and receipt of tenders;
- The processing and evaluation of the tender;
- The award of the tender;
- The review procedures; and
- The supervision of execution of the tender.

### 2.2.3 *Public*

“Public” or “government” procurement indicates procurement that is done by public bodies, or government, or organs of state, as opposed to procurement by the private sector. This is an important distinction in that public law, in particular administrative law, will not be applicable to procurement by private entities. It is not always easy to determine whether a body is public or private and this may differ from legal system to legal system.<sup>75</sup> The divide between “public” and “private” is not always clear-cut. Quite often government services are provided by private entities contracted by the state to do so.<sup>76</sup> In other instances, companies of which the state is the sole or majority shareholder provide such services.<sup>77</sup> It is also possible that entities with divergent duties may be created through legislation.<sup>78</sup> It is also conceivable that a state entity or state-owned company may provide goods or services that are not of a

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<sup>74</sup> It will be unworkable to add all possible aspects or stages like funding, the granting of authority and similar possibilities that might be peculiar to a specific procurement regime as subheadings. The stages identified are, however, representative of the important stages of procurement, taking into account the provisions of the Model Law, the GPA and the South African procurement regime. In particular, it is not proposed to deal with the possible executive and legislative functions of government which might relate to public procurement.

<sup>75</sup> S 217 of the Constitution refers to organs of state in the national, provincial or local sphere of government and secondly to any other institution identified in national legislation.

<sup>76</sup> An example occurs when a municipality contracts with a private entity to do all of the waste removal in such municipal area.

<sup>77</sup> Eskom, and Transnet, which provide electricity and railway services respectively, are examples of such companies.

<sup>78</sup> Examples are the Independent Electoral Commission and the Human Rights Commission.

public nature but fall within the sphere of private enterprise.<sup>79</sup> It could also be that for the purposes of national security or economic policy certain public activities may be excluded from the generally applicable provisions relating to public procurement. It is important to know what the term “public” in public procurement entails, both from a practical perspective<sup>80</sup> and from a more theoretical one, in order to know to what kind of procurement ought to be included in the term “public”. The Model Law and the GPA will be analysed and compared with section 217 of the Constitution in order to evaluate the scope and nature of the public element of public procurement.

The Model Law<sup>81</sup> provides that the law applies to all procurement, by procurement entities, as defined in article 2(b). It allows for the exclusion of procurement involving national defence or national security<sup>82</sup> and the exclusion of the types of procurement listed by the enacting state.<sup>83</sup> It does, however, provide that the defined excluded procurement may be made subject to the law if expressly so stated by the procuring entity when soliciting the procurement.

The Model Law provides two options for a definition of a procuring entity:<sup>84</sup>

- (b) “Procuring entity” means:
  - (i) *Option I*  
Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)  
*Option II*  
Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)
  - (ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”); ...

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<sup>79</sup> The state or a state company could, for instance, produce certain vehicles or armament, which could be sold in the open market.

<sup>80</sup> In order to determine if the public law and not only the private law will be applicable.

<sup>81</sup> Art 1(1).

<sup>82</sup> Art 1(2)(a).

<sup>83</sup> Art 1(2)(b).

<sup>84</sup> Art 2(b) of the Model Law.

In the Guide to Enactment it is stated that the objectives of the Model Law are best served by the widest possible application thereof.<sup>85</sup> The Model Law achieves this by defining “procuring entity” in wide terms, namely as “any governmental department, agency, organ or other unit, or any subdivision thereof”, of the particular state or government. It also does this by providing that even in the excluded sectors it is possible, at the discretion of the procuring entity,<sup>86</sup> to apply the Model Law, and further that the law may be made applicable to entities that do not fall within the general definition of “procuring entity”.<sup>87</sup> The international obligations of the enacting state prevail over the Model Law to the extent of any inconsistent requirements.<sup>88</sup>

The Model Law balances the need to define the applicability thereof as widely as possible, with the need to provide for the particular circumstances of different states. By providing for the possibility of making the Model Law applicable to certain instances of procurement which are normally excluded, it reiterates the principle of ensuring that the application of the Model Law is as wide as possible. It is also acknowledged that it might be necessary to make the Model Law applicable to entities, enterprises or categories thereof, which do not fall within the definition of “procuring entity”, by including option II in the definition of “procuring entity”. The Model Law provides for the broadest possible applicability. It allows for certain sectors to be excluded and provides for entities, enterprises or categories thereof which do not fall under the general definition of “procuring entity” to be included.<sup>89</sup>

Similar provisions are to be found in the GPA.<sup>90</sup> It makes provision for member countries to set out in Appendix 1 to the GPA that they sign the entities to which the agreement shall apply. For each Party, Appendix I is divided into five Annexes: Annex 1 contains central government entities; Annex 2 contains sub-

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<sup>85</sup> Par 9.

<sup>86</sup> In art 1(3).

<sup>87</sup> Art 2(b)(ii).

<sup>88</sup> Art 3.

<sup>89</sup> The applicable provisions are unaltered in the proposed new Model Law.

<sup>90</sup> Art I of the GPA provides: “This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I”.

central government entities; Annex 3 contains all other entities that procure in accordance with the provisions of the Agreement; Annex 4 specifies services, whether listed positively or negatively, covered by the Agreement; and Annex 5 specifies construction services. If one takes into account that the GPA is a plurilateral agreement, it is to be expected that countries will be allowed a wide choice as to which entities they would want the agreement to be applicable to. It is notable that, in addition to government and sub-central government entities, provision is made for states to include other entities that will be subject to the agreement. The purpose is to ensure the widest possible coverage for the GPA, subject of course to the signatories' own circumstances. In the Revised GPA this issue is dealt with in much more detail. It is specifically provided therein that the Revised GPA is applicable to procurement for governmental purposes,<sup>91</sup> of goods and services or any combination thereof,<sup>92</sup> as provided for in the annexes in appendix I.<sup>93</sup> Appendix I is divided into the same annexes as with the present GPA, with the addition of a sixth annex. This sixth annex provides for general notes that are applicable to the annexes of the state party.<sup>94</sup> The Revised GPA excludes goods and services procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale.<sup>95</sup> It also excludes procurement of the goods and services listed in article II:3,<sup>96</sup> save in so far as the state party provides to the contrary in its appendix 1.

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<sup>91</sup> Revised GPA art II:2.

<sup>92</sup> Revised GPA art II:2(a).

<sup>93</sup> Revised GPA art II:2(a)(i).

<sup>94</sup> Revised GPA art II:4.

<sup>95</sup> Revised GPA art II:(2(a)(ii).

<sup>96</sup> They are the following:

- (a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
- (b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
- (c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- (d) public employment contracts;
- (e) procurement conducted:
  - (i) for the specific purpose of providing international assistance, including development aid;
  - (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or

The Revised GPA, despite limiting its applicability, still allows for the possibility of state parties specifically to make the excluded procurement subject to the Revised GPA.

Section 217 of the Constitution refers to organs of state in the national, provincial or local sphere of government and secondly to any other institution identified in national legislation. The two categories referred to in section 217, namely organs of state in the national, provincial or local sphere of government, and other institutions identified in national legislation, will be dealt with separately.

An “organ of state” is defined in the Constitution to mean:

- (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;<sup>97</sup>

The tests applied under the Interim Constitution in order to determine whether a body or functionary is an organ of state or not were whether that body or functionary is directly or indirectly controlled by the state,<sup>98</sup> if it exercises a

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- (iii) under the particular procedure or condition of an international organization, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Agreement.

<sup>97</sup> S 239 of the *Constitution Act*, 1996.

<sup>98</sup> In *Korff v Health Professions Council of South Africa* 2000 1 SA 1171 (T) the court held that the Health Professions Council of South Africa is not an organ of state. See also *Mistry v Interim National Medical and Dental Council of South Africa* 1997 7 BCLR 933D at 947B-948C; *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T) at 454B; *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 1089 (W) at 113A-G; *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 4 SA 989 (W); *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1966 3 SA 800 (T); *Ngubane v Meisch* 2001 1 SA 425 (N); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 4 SA 375 (T); *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 3 SA 30 (T); *Inkatha Freedom Party v TRC* 2000 3 SA 119 (C). For a contrary view on the test see *Baloro v University of Botswana* 1995 4 SA 197 (B). In *Korff v Health Professions Council of South Africa* 2000 1 SA 1171 (T); Van Dijkhorst J held that the words “sphere of government” used in the Constitution are very similar to the words “level of government” used in the interim Constitution and that it does not create a material difference. See *Ex parte Chairperson of the Constitutional Assembly, in re Certification of the Constitution of the Republic of South*

function of the state,<sup>99</sup> and the government entity test.<sup>100</sup> In view of the fact that the definition of an organ of state in the Constitution differs markedly from the one in the Interim Constitution, the cases dealing with the Interim Constitution need to be used with circumspection in determining what an organ of state is as defined in the Constitution.<sup>101</sup> It will be of relevance when determining what the phrases “spheres of government”, “public power” and “public function” entail.

The definition of an organ of state in section 239 of the Constitution contains two separate subparagraphs that need to be dealt with.<sup>102</sup> Section 239(a) defines an organ of state to mean any department of state or administration in the national, provincial or local spheres of government. National, provincial and local government are defined in the Constitution itself.<sup>103</sup> The definition contained in section 239(a) of the Constitution has recently been dealt with by the Supreme Court of Appeal and the Constitutional Court, albeit not in relation to procurement.<sup>104</sup> In the *Governing Body, Mikro Primary School*<sup>105</sup> case, the governing body of the Mikro Primary School, which was a public school, refused to accede to a request by the Western Cape Education Department to change the language policy of the school in order to convert it into a parallel-medium school. An application was made for the setting aside of a directive by the Head

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*Africa* 1996 4 SA 744 (CC). In general see De Ville *Judicial Review* 41-44 and Moolman “Application”.

<sup>99</sup> See *Claase v Transnet Bpk* 1999 3 SA 1012 (T) at 1019H-I; *Hoffmann v SAA* 2001 1 SA (CC) par 23.

<sup>100</sup> See *Toerien v De Villiers* 1995 2 SA 879 (C) at 885F-886D and *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B).

<sup>101</sup> See *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA) 15-16 par 20.

<sup>102</sup> See Penfold and Reyburn “Public Procurement” 25-4 to 25-7.

<sup>103</sup> Ch 5 of the *Constitution*, s 83-102 deals with national government, ch 6, s 103-150 with provinces and ch 7, s 151-164 with local government. The nine provinces of South Africa are the Eastern Cape, Free State, Gauteng, Kwa-Zulu Natal, Mphumalanga, Northern Cape, Limpopo, North West and Western Cape.

<sup>104</sup> *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA); *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 1 SA 66 (SCA); *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC); *National Gambling Board v Premier, Kwazulu-Natal* 2002 2 SA 715 (CC). In *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA), Conradie AJA held that the Klerksdorp Local Municipality is an organ of state in the local government sphere.

<sup>105</sup> *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA).

of Education, Western Cape Education Department, to the principal of the second respondent to admit certain learners and to have them taught in English.

One of the legal questions the Supreme Court of Appeal had to decide was if the governing body was obliged, in terms of section 41(1)(h)(vi) of the Constitution,<sup>106</sup> to exhaust other remedies before it could approach the court. This would be the case if the governing body fell under the definition of “organ of state” as set out in section 239 of the Constitution. The court held that in terms of the definition in the Constitution, any institution exercising a public power or performing a public function in terms of any legislation is an organ of state.<sup>107</sup> It held that the school with its governing body was clearly an organ of state. That was, however, not the end of the matter. The court held that insofar as the determination of a language and admission policy is concerned, it is not subject to executive control at the national, provincial or local level and it can, insofar as the performance of those functions is concerned, not be said to form part of any sphere of government. It was held not to be an intergovernmental dispute as contemplated in section 41(3) of the Constitution.<sup>108</sup>

In *Independent Electoral Commission v Langeberg Municipality*<sup>109</sup> the Constitutional Court held that a dispute between a municipality and the Independent Electoral Commission is not a dispute as contemplated in section 41(3) of the Constitution. The commission is not an organ of state within any sphere of government. As an independent body created by the Constitution, it performs its functions in terms of national legislation but is not subject to national executive control and does not fall within any sphere of government.<sup>110</sup>

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<sup>106</sup> S 41(1)(h)(vi) and (3) of the Constitution provide:

41(1) All spheres of government and all organs of State within each sphere must –  
(h) co-operate with one another in mutual trust and good faith by –  
(vi) avoiding legal proceedings against one another.

(3) An organ of State involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

<sup>107</sup> Par 20 p 16.

<sup>108</sup> Par 21 p 17.

<sup>109</sup> 2001 3 SA 925 (CC).

<sup>110</sup> Par 31 p940.

Section 239(b) refers firstly to any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution. It refers, secondly, to any other functionary or institution exercising a public power or public function in terms of any legislation. It does not include a court or a judicial officer. An example of the first category is the Independent Electoral Commission.<sup>111</sup> Examples of the second category are the South African Broadcasting Corporation and similar parastatals.<sup>112</sup>

It has also been held that the term “organ of state” is extended to include a functionary and institutions that might well not be part of government but which exercise powers which are considered to be of a public nature. The classification rests on an identification of the nature of the power exercised rather than the nature of the functionary or institution.<sup>113</sup> It must be kept in mind that in every individual situation the provisions of section 217, read with section 239, of the Constitution, must be interpreted to determine whether section 217 is applicable or not.

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<sup>111</sup> *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC).

<sup>112</sup> See *Hoffmann v SAA* 2001 1 SA 1 (CC) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA).

<sup>113</sup> See *Inkatha Freedom Party v TRC* 2000 3 SA 119 (C) 130-131, where the court had to interpret s 32(2) of the Constitution, which refers to the organs of state in any sphere of government. It held “The 1996 Constitution expands the definition beyond such institutions for it includes within the definition those institutions or functionaries who might otherwise be outside of the state but which exercise public power. All institutions that can be considered to be part of the state or part of the broad operation of Government of South Africa now fall within the scope of s 32(1). Although first respondent is not under the direct control of the central government, it is an organ of the state designed to fulfill the objectives as outlined in the postscript of the interim Constitution and the preamble of the Act.” See further Baxter 1982 SALJ 212. See also *Directory Advertising Cost Cutters v Minister of Posts, Communications and Broadcasting* 1996 3 SA 800 (T) 809G, where the learned judge refers to an organ of state as “an institutional body by means of which the state governs ... implicit in this definition is that an organ is part of the greater entity, the state, as physically an organ is part of the human body”. In *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA), Conradie AJA held that the Klerksdorp Local Municipality is an organ of state in the local government sphere. In this case the court also decided that the awarding of tenders where it is done in the exercise of public power is an administrative process. See in this regard *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA). This implies that the bill of rights which requires fair and just administrative action is applicable to public procurement and that the *Promotion of Administrative Justice Act* 3 of 2000 s 3(2)(a), which requires a process to be lawful, procedurally fair and justifiable, also applies. See also Bolton *Law of Government Procurement* 64-65; Burns and Beukes *Administrative Law* 93-100; Hoexter *Administrative Law* 192-198; and De Ville *Judicial Review* 41-47.

In *Transnet Ltd v Goodman Brothers (Pty) Ltd*<sup>114</sup> the Supreme Court of Appeal had to decide whether Transnet Ltd, which was once a part of government as the South African Railways and Harbours, but changed into a limited company owned by the government, was obliged to give reasons to an unsuccessful tenderer. The court decided the matter on the basis of the tenderer's right to lawful administrative action, including the right to reasons, as provided for in section 33 of the Constitution. It held that the award of the tender by Transnet was clearly an administrative action. Even though Transnet was a limited company, the government still owned all of the shares in it and had ultimate control. Transnet provides a general service to the public, even though it is now competition- and profit-orientated, and still has a near-monopoly over rail transport in South Africa.<sup>115</sup> The court did not deem it necessary to decide the matter on the basis of the provisions of section 217 of the Constitution.<sup>116</sup>

It should further be noted that section 217 refers not only to organs of state but to organs of state in the national, provincial, and local spheres of government. This raises the question of what effect this has on the definition of organs of state contained in section 239. In section 239(a), too, reference is made to the national, provincial and local spheres of government, whilst no such reference occurs in section 239(b). The repetition of this phrase in section 239(a) ought to make no difference to the interpretation thereof. The phrase ought, however, to be applicable to section 239(b). This will mean that the constitutional procurement provision will apply only to functionaries and institutions that exercise a power or perform a function in terms of the Constitution or a provincial constitution, or exercise a public power or perform a public function in terms of any legislation, provided that they do so in the national, provincial or local sphere of government.<sup>117</sup> Section 217 also makes

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<sup>114</sup> 2001 1 SA 853 (SCA).

<sup>115</sup> Per Schutz JA par 8 at 870.

<sup>116</sup> Per Schutz JA par 14 at 871. See also the decision in *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 1 SA 66 (SCA), where the court held that Iscor was a public body albeit in terms of the definition in PAIA.

<sup>117</sup> See *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC). See also Penfold and Reyburn "Public Procurement" 25-4 to 25-7.

provision for institutions to be identified, in national legislation, to which the section will apply.

The institutions to be identified, in terms of section 217, in national legislation have been determined in the *Public Finance Management Act*.<sup>118</sup> The institutions referred to are quite extensive and most institutions which deal with public matters are contained therein.<sup>119</sup>

The system for public procurement that must be followed is, in the case of national and provincial governments, set out in the *Public Finance Management Act*<sup>120</sup> and the regulations issued in terms thereof. This Act also applies to public entities listed in Schedules 2 and 3 of the Act, constitutional institutions, and parliament and provincial legislatures. It follows that entities and institutions not listed are excluded from the provisions of the Act.

On local government level, the *Local Government: Municipal Finance Management Act*<sup>121</sup> regulates public procurement. The *Local Government: Municipal Systems Act*<sup>122</sup> also provides for public/private partnerships for the provision of services and service delivery agreements.

Procurement by public bodies, which will constitute public procurement, includes organs of state within the three spheres of government and institutions identified in national legislation.<sup>123</sup> Organs of state are identified in section 239 of the Constitution. They include any department of state or administration in the national, provincial or local sphere of government. They also include any other functionary or institution which either exercises a power or performs a function in terms of the Constitution or a provincial constitution, or exercises a public power or performs a public function in terms of any

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<sup>118</sup> Act 1 of 1999 s 38(1)(a)(iii) and 51(1)(a)(iii). See Bolton *Law of Government Procurement* 65; Penfold and Reyburn "Public Procurement" 25-7.

<sup>119</sup> See Bolton *Law of Government Procurement* 65, who also refers to the institutions governed by the PPPFA and the regulations issued in terms thereof.

<sup>120</sup> Act 1 of 1999.

<sup>121</sup> Act 56 of 2003.

<sup>122</sup> Act 32 of 2000.

<sup>123</sup> S 217 of the *Constitution Act*, 1996.

legislation. The provision does not include a court or a judicial officer. The institutions to which public procurement applies are identified in the PFMA.<sup>124</sup> In this regard the scope of public procurement in South Africa is comparable with the provisions of the Model Law, the GPA and the EC directives.

Both the Model Law and the GPA, within the constraints peculiar to these instruments,<sup>125</sup> attempt to make the scope of public procurement as broad as possible. They provide mechanisms to include in the public procurement regime instances of procurement that are generally excluded. The Constitution in section 217 similarly uses the broad concept of organs of state, with the rider that an organ of state must exercise a function within the national, provincial or local spheres of government. The possibility of making other institutions, through national legislation, subject to the general provisions of section 217 makes it possible to identify as part of the public procurement regime specific institutions which do not fall within the general definition. This allows a measure of flexibility and makes it possible to broaden the scope of public procurement, should public interest so demand.

### **2.3 The objectives of public procurement**

Public procurement is a core function of public financial management and service delivery. To a large extent budgets get translated into services through the government's purchase of goods and services. Good public procurement systems are central to effective government spending and a vital component in the strategy to improve the social and economic position of citizens of developing countries, especially.<sup>126</sup>

Public procurement affects at least three interest groups directly: the state, which funds the procurement; the citizens, on whose behalf or in whose interest the procurement is done and who indirectly pay for the procurement through taxes; and the private sector, which participates in the procurement

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<sup>124</sup> Schedules 1, 2 and 3.

<sup>125</sup> In the case of the Model Law the need to have a flexible system that can serve as a model to different countries and legal systems, and in the case of the GPA the reality of a negotiated agreement in which a divergence of interests needs to be accommodated.

<sup>126</sup> Trepte *Regulating Procurement* 9-26.

process. The economy of the country is also directly influenced by public procurement. Economic considerations are central to public procurement and to all of the interest groups. The legitimate interests of the above groups and the economy of the country are relevant to public procurement.<sup>127</sup>

The objectives of public procurement can be divided into primary and secondary objectives. The first group has to do with ensuring good public financial management and services, or put differently, with obtaining value for money, and the second group has to do with socio-economic benefits.<sup>128</sup> This division presupposes that prior decisions have been taken on the need for the particular procurement, the levels of expenditure, and the type of goods and services needed. In the discussion hereunder, the primary and secondary objectives of public procurement will be identified as they manifest themselves in the Model Law, GPA and section 217 of the Constitution. Reference will be made to the African Development Bank and the World Bank, but their procurement provisions will not be discussed in detail. At this stage only the broad objectives will be identified, as the Model Law, GPA and South African procurement regimes will be discussed in detail in separate chapters.<sup>129</sup> When comparing the South African regime with the Model Law and the GPA in Chapter 6, the objectives of public procurement will be revisited and discussed in more detail.

### 2.3.1 *Primary objectives*

Generally speaking, the primary objective of public procurement is to obtain value for money.<sup>130</sup> It must be kept in mind that other factors are relevant when public procurement is compared with private procurement, which necessitates special consideration. Some of these are the need for accountability by the state, fair treatment of suppliers, avoidance of corrupt

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<sup>127</sup> Arrowsmith *Public and Utilities Procurement* 2.

<sup>128</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/). These are sometimes referred to as commercial goals (or qualitative performance and requirements) as opposed to non-commercial or socio-economic goals.

<sup>129</sup> The Model Law will be dealt with in ch 3, the GPA in ch 4, and the South African position in ch 5 of this study.

<sup>130</sup> Arrowsmith *Public and Utilities Procurement* 799 defines the primary objective as the acquisition of goods or services fulfilling a particular function on the best possible terms.

practices, and the need to avoid secondary motives like political gain or national preference.<sup>131</sup> The effect hereof is that although the main objective of procurement may be to obtain value for money, this is not as simple in the case of public procurement as in the case of private procurement, as other considerations are also of importance. The objectives of public procurement may differ from state to state and institution to institution. There are, however, certain core principles that are common, or ought to be common, to most public procurement regimes. It is also not possible to determine value for money in public procurement without reference to all of the circumstances, including the interest of the major role players, namely the state, the general public and the tenderers. The primary objective of public procurement can be said to be to obtain value for money through the application of certain principles in the procurement process.<sup>132</sup>

#### 2.3.1.1 Model Law

In the Guide to Enactment of the Model Law on Procurement of Goods, Construction and Services,<sup>133</sup> it is stated that the work on the Model Law was done because of the fact that the existing legislation governing procurement is inadequate or outdated in a number of countries. An inadequate procurement system can result in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure to obtain adequate value in return for the expenditure of public funds.<sup>134</sup> In developing countries and countries with economies in transition, which often suffer from a lack of funds, the public sector engages in a substantial portion of all procurement. Such procurement often relates to projects that are essential for economic and social development. In such countries a proper and effective procurement regime is of the utmost importance. The public procurement regime provided by the Model Law seeks to ensure that the objective of value for money is achieved even in developing countries.

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<sup>131</sup> Arrowsmith *Public and Utilities Procurement* 5-6.

<sup>132</sup> Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* in ch 2 identified the following objectives, namely value for money; efficiency of the process; probity (integrity); fair and equal treatment by contractors; industrial social and environmental policies; and outsourcing policies.

<sup>133</sup> Hereafter referred to as the Guide to Enactment.

<sup>134</sup> Guide to Enactment par 3.

The Model Law also has the purpose of furthering international trade.<sup>135</sup> International traders are risk adverse. Suppliers and contractors are often unwilling to contract with foreign Governments because of the inadequate or divergent state of national procurement legislation. International public procurement is important for price competitiveness, the quality of products, obtaining the latest technology, and the transfer of skills. The adoption of the Model Law, or at least the conformation to the principles set out therein, may help to overcome the problems caused by inadequate procurement legislation, which problems pose a risk to international trade.<sup>136</sup>

The six objectives set out in the preamble to the Model Law are:

- (a) maximising economy and efficiency in procurement;
- (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, thereby promoting international trade;
- (c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
- (d) providing for the fair and equitable treatment of all suppliers and contractors;
- (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) achieving transparency in the procedures relating to procurement.

The objectives of the Model Law, as explained in the guide thereto, are to maximise competition, to accord fair treatment to suppliers and contractors, and to enhance transparency and objectivity, qualities which are essential for fostering economy and efficiency in procurement, and for curbing abuses.<sup>137</sup>

Incorporating the Model Law in national legislation would assist to ensure that the public purchaser is likely to spend public funds with responsibility and

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<sup>135</sup> Guide to Enactment par 4.

<sup>136</sup> Arrowsmith 2004 *ICLQ* 18-22.

<sup>137</sup> Guide to Enactment par 8.

accountability and obtain fair value, and would tend to result in the fair treatment of parties who contract with the Government.

One can extract three broad principles from the Model Law. The first is an economic one. It must be ensured that value for money is obtained. This is done by ensuring maximum competition, participation and efficiency. The second is that the public is entitled to see that public money is spent with responsibility and accountability. The integrity of the process must be ensured and transparency will be a major element to achieve this. Lastly, the parties contracting with governments should be treated fairly. Fair and equitable treatment can be enhanced in a number of ways including by the integrity of the process, transparency and the absence of arbitrariness. These three principles can be obtained through different or the same means, and sometimes they will overlap.<sup>138</sup> How the Model Law sets out to achieve these objectives is dealt with in more detail in chapter 3.

#### 2.3.1.2 The GPA

In its preamble the GPA addresses two broad issues: firstly the liberalisation and expansion of world trade and how to achieve this, and secondly the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries. The preamble in short recognises:

- the need to achieve greater liberalisation and expansion of world trade and to improve the international framework for the conduct of world trade.
- that protection of domestic products or services or domestic suppliers should not be afforded by states, and discrimination against foreign products or services or against foreign suppliers should not be allowed.
- that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

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<sup>138</sup> Transparency can for instance ensure both accountability and competitiveness. The absence of arbitrariness will not only ensure fairness but also promote participation in the tender process which can lead to value for money.

- the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintaining the balance of rights and obligations at the highest possible level; and
- the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries.

Although the GPA's objectives relate mainly to the expansion of world trade, the GPA does lay down principles relating to procurement in general, to which the signatories thereto must abide. Some of these requirements relate to principles that any national procurement system should strive to achieve. Articles VI to XIX of the GPA deal with general aspects of procurement. These are: technical specifications;<sup>139</sup> tendering procedures;<sup>140</sup> the qualification of suppliers;<sup>141</sup> invitations to participate in the intended procurement;<sup>142</sup> selection procedures;<sup>143</sup> time-limits for tendering and delivery;<sup>144</sup> tender documentation;<sup>145</sup> the submission, receipt and opening of tenders and awarding of contracts;<sup>146</sup> negotiation;<sup>147</sup> limited tendering;<sup>148</sup> offsets;<sup>149</sup> transparency;<sup>150</sup> information and review as regards the obligations of entities;<sup>151</sup> and information and review as regards the obligations of parties.<sup>152</sup>

These provisions also endeavour to provide for public procurement, which ensures value for money, through a system with integrity, which is accountable to the public and which is fair to the suppliers too. One of the important means of

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139 Art VI.  
 140 Art VII.  
 141 Art VIII.  
 142 Art IX.  
 143 Art X.  
 144 Art XI.  
 145 Art XII.  
 146 Art XIII.  
 147 Art XIV.  
 148 Art XV.  
 149 Art XVI.  
 150 Art XVII.  
 151 Art XVIII.  
 152 Art XIX.

obtaining these goals is through transparency.<sup>153</sup> Although the stated objectives are not pertinently referred to in the GPA they are inherent in the provisions of the GPA. The effect of the provisions is that the objective of value for money is pursued by means of a system that adheres to principles like transparency, fairness, equity, competitive-ness and integrity. These provisions will be dealt with in more detail in chapter 4.

### 2.3.1.3 African Development Bank

The African Development Bank's procurement policy is based on five main considerations, namely:

- the need for economy and efficiency in project implementation;
- equal opportunity for all eligible suppliers and contractors from member countries to compete in the supply of goods, works and services financed by the Bank;
- encouragement of the development and participation of contractors and suppliers from regional member countries of the institution;
- the importance of transparency, accountability, competency, and non-discrimination, in the procurement process; and
- the need to combat fraud and corruption in the procurement process.<sup>154</sup>

This policy gives due recognition to the main economic objective of value for money by its reference to economy and efficiency in the project implementation and by providing for equal opportunity for eligible suppliers in order to enhance competition. The importance of the integrity of the process is acknowledged through the reference to the principles of transparency, accountability, competency, and non-discrimination. The interests of the section of the private sector participating in the process are provided for by the principles of equal opportunity for eligible suppliers, non-discrimination and the combating of fraud and corruption in the procurement process.

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<sup>153</sup> This is deemed to be so important by the WTO that a working group on transparency in public procurement is still researching this aspect.

<sup>154</sup> AfDB 2009 *Procurement* [www.afdb.org/](http://www.afdb.org/).

#### 2.3.1.4 The World Bank

In its Country Procurement Assessment Report the World Bank identified what it deems to be the minimum elements a public procurement process needs to comply with. They are the following:

- effective and wide advertising of upcoming procurement opportunities;
- public opening of bids;
- pre-disclosure of all relevant information including transparent and clear bid evaluation and contract award procedures;
- clear accountability for decision making; and
- a bidder's enforceable right of review when public entities breach the rules.<sup>155</sup>

It is further stated that a strong and well-functioning procurement system would be one that is governed by a clear legal framework establishing the rules for transparency, efficiency, and mechanisms of enforcement, coupled with an institutional arrangement that ensures consistency in overall policy formulation and implementation. A professional cadre of staff that implements and manages the procurement function is also necessary.<sup>156</sup>

The objective of value for money is served through ensuring competition by requiring effective and wide advertising of upcoming procurement opportunities. Fairness to private entities is served by prescribing pre-disclosure of all relevant information, including transparent and clear bid evaluation and contract award procedures. The most emphasis is, however, placed on the integrity of the process by prescribing pre-disclosure of all relevant information including transparent and clear bid evaluation and contract award procedures, accountability for decision making and the bidders' enforceable right of review when the rules are breached. The World Bank also emphasises the need for the proper implementation of the system. This can be done through an institutional

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<sup>155</sup> World Bank Group 2009 *Assessment* [go.worldbank.org/](http://go.worldbank.org/) and specifically website content by RR Hunja, Senior Procurement Specialist, Procurement Policy and Services Group, World Bank, Washington DC.

<sup>156</sup> RR Hunja Senior Procurement Specialist, Procurement Policy and Services Group, World Bank 2009 *Procurement Policies and Procedures* [go.worldbank.org/](http://go.worldbank.org/).

arrangement that ensures consistency in policy formulation and implementation through a professional cadre of staff.

#### 2.3.1.5 The South African Constitution

Section 217(1) of the Constitution requires a system which is fair, equitable, transparent, competitive and cost-effective. These requirements can also be broadly distinguished to relate to the economic aspects of public procurement, in particular value for money, the right of the public to know that public money is spent in an accountable and responsible way, and fairness towards entities contracting with the state. The requirements of competitiveness and cost effectiveness in particular relate to the economic objective of public procurement. The requirements of a system that is transparent, fair and equitable relate to both the right of the public that public money be spent in an accountable and responsible way and fairness towards entities contracting with the state. As part of a system, these objectives or principles in many instances overlap and are interconnected, interrelated, interacting and interdependent.<sup>157</sup> They should be viewed as a whole and not as distinct, stand-alone requirements. The weight attached to each requirement will depend on the particular circumstances. A balance between the competing principles must be sought when determining if they have been complied with. The principles set out in section 217 will be dealt with separately and in detail in Chapter 5 when the South African law is discussed.

#### 2.3.1.6 Conclusion on primary objectives

A detailed evaluation of the objectives of public procurement and how to achieve such objectives will be possible only after analysing the Model Law, the GPA and the South African law in more detail. This evaluation will be done in Chapter 6. However, it is already possible at this stage, and necessary for the rest of the discussion, to make some provisional deductions.

Although the procurement regimes discussed above vary with regard to their purpose and function it is possible to identify certain objectives and principles

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<sup>157</sup> System is defined in the *Concise Oxford English Dictionary* 2001 as a “complex whole, set of connected things or parts, organized body of material or immaterial things”.

that are common to them all. These objectives and principles are linked with the main spheres of interest in the procurement, namely the state, the public, and private enterprise.

Procurement is because of its nature in essence an economic activity. The outcome thereof has economic and social implications. The economic objective is, generally speaking, to obtain value for money. The entity who has to pay for the procurement in principle wants its money to be utilised to the best possible effect. This entails that certain measures need to be in place to achieve this objective.

The second sphere of interest in public procurement is that of the public. Its interest relates firstly to the fact that it indirectly funds the procurement through taxes, and secondly that it is the beneficiary of the procurement. Its interests are usually served by introducing measures to obtain value for money and to ensure the integrity of the process, in particular through ensuring transparency and accountability. The supplier or potential supplier also has a direct interest in the procurement as that part of private enterprise which provides the goods and services. Fairness to such suppliers is a prerequisite for a proper procurement system. This can be achieved by ensuring transparency and effective remedies in the case of unlawful actions.

Lastly, although it is included in the objective of obtaining value for money, the economy of a country at large is affected by public procurement. This is not only because it is in essence an economic activity and because of the sheer volume thereof, but also because it relates to the creation of infrastructure, influences many sectors of industry, and has a social impact when it is used as an instrument to further governments' socio-economic policies.

As stated in the Country Procurement Assessment Report of the World Bank, these objectives and principles will come to naught if not properly implemented by procurement officials who are skilled and professional in their work.

### 2.3.2 Secondary objectives

It is generally accepted that secondary or non-commercial objectives, such as the promotion or protection of certain industries, the promotion of labour intensive methods and other measures by a state to achieve its socio-economic policies may be promoted by public procurement policies.<sup>158</sup> This should be done subject to qualified tenderers not being excluded and criteria being measurable, quantifiable and monitored for compliance.<sup>159</sup> The provisions for attaining these objectives will be discussed in general with reference to the provisions of the Model Law, the GPA and the South African position.

#### 2.3.2.1 The Model Law

The drafters of the Model Law recognised the need, especially for developing countries, to achieve their secondary objectives through public procurement. Different provisions in the Model Law enable the state to achieve such objectives.<sup>160</sup> Provision is made in article 1(2)(b)<sup>161</sup> for the enacting state when adopting the Model Law to exclude certain types of procurement from the operation of the Model Law. This enables states to exclude certain sectors of the economy, for instance security or defence sectors, from the operation of the Model Law. States can also, in terms of article 1(2)(c), exclude certain types of procurement by issuing regulations to this effect.<sup>162</sup> To enable the widest possible application of the Model Law, provision is made for the application of the Model Law to certain procurement in the excluded sectors or excluded types of procurement.<sup>163</sup> The procuring entity, when initially

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<sup>158</sup> Arrowsmith *Public and Utilities Procurement* 1225-1226; Bolton *Law of Government Procurement* 251-252; Bolton 2007 *PPLR* 36; Bolton 2006 *JoPP* 193; Bolton 2004 *SALJ* 619; McCrudden "Social Policy Issues" 219-238. These objectives can also include social and national agendas by the government: Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>159</sup> Hunja "Obstacles".

<sup>160</sup> These are art 1(2), 2(b), 27(v), 8, 34(4)(d) and 39(2).

<sup>161</sup> "1(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:  
(a) Procurement involving national defence or national security;  
(b) (the enacting State may specify in this Law additional types of procurement to be excluded);  
(c) ..."

<sup>162</sup> "1(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:  
(a)... (b)... (c) Procurement of a type excluded by the procurement regulations".

<sup>163</sup> Art 1(3) reads as follows: "This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so

soliciting tenders, may expressly declare that in that specific instance the procurement will not be excluded but will be subject to the provisions of the Model Law.

The definition of a “procuring entity” in article 2 also allows for the exclusion of certain entities from the applicability of the Model Law by listing them as excluded entities.<sup>164</sup>

Deference is further made to states’ obligations in terms of regional and international agreements.<sup>165</sup> These international obligations, for instance loan agreements with specific provisions with regard to procurement and procurement directives of regional bodies, prevail over the provisions of the Model Law to the extent that they are inconsistent therewith.

Discrimination based on nationality is also allowed on condition that the procuring entity does so on the grounds specified in the procurement regulations or other provisions of the law.<sup>166</sup> Although the purpose of the

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declares to suppliers or contractors when first soliciting their participation in the procurement proceedings”. See also the Guide to Enactment art 1 par 2.

<sup>164</sup> Art 2 (b) reads as follows: “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

*Option II*

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of ‘procuring entity’).

Art 2(2) of the Model Law provides for the possibility to list entities that will be excluded from the operation of the Model Law.

<sup>165</sup> Art 3: “To the extent that this Law conflicts with an obligation of this State under or arising out of any –

(a) Treaty or other form of agreement to which it is a party with one or more other States,  
(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions, the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law”.

<sup>166</sup> Art 8 provides:

“(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides,

Model Law is to enhance world trade, it is realised that many countries use public procurement to achieve their secondary goals. As stated in the Guide to Enactment, the Model Law recognises that enacting states may wish to restrict foreign participation in order to protect certain economic sectors of their national industrial capacity against the deleterious effects of unbridled foreign competition.<sup>167</sup>

The Model Law provides in articles 34(4)(d) and 39(2) for the use of the technique referred to as the “margin of preference” in favour of local suppliers and contractors.<sup>168</sup> The procuring entity can award the tender to a more expensive local tenderer as long as the price difference between the local tenderer and the lowest tender falls within the margin of preference. The effect thereof is that it allows the procuring entity to favour local suppliers and contractors without simply excluding foreign competition. Provision is further made in the Model Law that the transfer of technology and counter trade can be made preconditions for the awarding of a tender by the procuring entity.<sup>169</sup>

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on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

- (2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.
- (3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them”.

<sup>167</sup> The Guide to Enactment s 1 par 25. As stated in par 25 the requirement in art 8(1) that the imposition of the restrictions by the procuring entity should be based only on grounds specified in the procurement regulations or should be pursuant to other provisions of law is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation. The Model Law also takes account of cases in which the funds used derive from a bilateral tied-aid arrangement. Such an arrangement would require that procurement with the funds should be from suppliers and contractors in the donor country. Similarly, recognition is thereby given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other states’ members of the regional economic grouping.

<sup>168</sup> The Guide to Enactment s 1 par 26 states that the margin of preference permits the procuring entity to select the lowest-priced local tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition.

<sup>169</sup> Art 27(v). In general see Arrowsmith 2004 *ICLQ* 17-46.

Ample provision is made in the Model Law to enable countries adopting this law to still achieve their secondary procurement objectives. This can be done by excluding certain types of procurement or certain procuring entities from the operation of the Model Law. It further provides that obligations in terms of international agreements take precedence over the Model Law, discrimination based on nationality is allowed in order to protect local industry, and a margin of preference to protect local tenderers may be allowed. The imposition of any restriction by the procuring entity may, however, be based only on grounds specified in the procurement regulations or other provisions of law.<sup>170</sup>

### 2.3.2.2 The GPA

In the preamble to the GPA, recognition is given to the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries. Already in article I:1, which defines the scope of the application of the GPA, provision is made that the agreement applies only to the entities set out in appendix 1 to the agreement. This entitles states to exclude specific entities from the effect of the agreement by not including them in appendix 1. Article I:4 also allows parties to set monetary thresholds for the applicability of the agreement. In this way, lower-valued procurement can be excluded from foreign competition.

The GPA provides for the special and differential treatment of developing countries.<sup>171</sup> Parties must in the implementation and administration of the GPA duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to

- (a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;
- (b) promote the establishment or development of domestic industries, including the development of small-scale and cottage industries in rural or backward areas, and the economic development of other sectors of the economy;

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<sup>170</sup> See art 8(1) of the Model Law and art 1 par 25 of the Guide to Enactment. This requirement will promote transparency and prevent arbitrary and excessive resort to the restriction of foreign participation.

<sup>171</sup> Art V of the GPA.

- (c) support industrial units so long as they are wholly or substantially dependent on government procurement; and
- (d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization and not disapproved by it.<sup>172</sup>

Provision is made for developing countries to negotiate for exclusions from the rules on national treatment with respect to entities, products or services that are included in its coverage lists. Developing countries participating in regional or global arrangements may also negotiate exclusions to its lists.<sup>173</sup> Coverage lists may also be modified, having regard to the developing country's development, financial and trade needs.<sup>174</sup>

At the time of accession, developing countries may also negotiate conditions for the use of offsets.<sup>175</sup> Offsets in government procurement are defined in the GPA to mean measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.<sup>176</sup> These conditions for the use of offsets may not be used as criteria for the awarding of the contract. They may be used only to qualify prospective suppliers to participate in the procurement process. It is further provided that they must be objective, clearly defined and non-discriminatory.<sup>177</sup>

The position of developing countries is extensively dealt with in article IV of the Revised GPA. It is once again provided that in negotiations on accession to and in the implementation and administration of the GPA, special consideration must be given to the development, financial, and trade needs and circumstances of developing countries.<sup>178</sup> It is recognised that such consideration may differ from

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<sup>172</sup> Art V:1.

<sup>173</sup> Art V:4.

<sup>174</sup> Art V:5. This must be done in accordance with the provisions of art XXIV(6). It may also request the Committee on Government Procurement to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists.

<sup>175</sup> Art XVI.

<sup>176</sup> See art XVI of the GPA.

<sup>177</sup> Art XVI also states that the conditions must be set out in the country's Appendix I.

<sup>178</sup> Which includes least-developed countries.

country to country. Special and differential treatment must be afforded to the extent that it meets the development needs of such developing countries.<sup>179</sup> A developing country, upon accession to the GPA, may adopt certain transitional measures during a transitional period, based on its development needs.<sup>180</sup> These measures are a price preference programme,<sup>181</sup> offsets,<sup>182</sup> the phased-in addition of specific sectors,<sup>183</sup> and a threshold that is higher than its permanent threshold.<sup>184</sup> The delay of the implementation of any specific obligation may be negotiated, in the case of least-developed countries, for a period of 5 years and in other developing countries for a period not exceeding 3 years.<sup>185</sup> Due consideration must further be given to any request by a developing country for technical cooperation and capacity building with regard to its accession to the GPA or the implementation thereof.<sup>186</sup>

Both the GPA and Revised GPA acknowledge the need and make ample provision for state parties, in particular developing and least-developed countries, to attain their secondary objectives through public procurement. They include provision for state parties to exclude procuring entities from the list of entities to which the GPA applies, the provision of monetary thresholds, differential treatment for developing countries, the possibility to negotiate exclusions from the rules of national treatment, modification of the coverage list, and the possibility to negotiate offsets at the time of accession to the agreement. The Revised GPA provides for a price preference programme, offsets, the phased-in addition of specific sectors to appendix I, a threshold that is higher than the permanent threshold, and the delay of the implementation of an obligation in terms of the GPA.<sup>187</sup>

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<sup>179</sup> Revised GPA art IV:1.

<sup>180</sup> Revised GPA art IV:3.

<sup>181</sup> Revised GPA art IV:3(a).

<sup>182</sup> Revised GPA art IV:3(b).

<sup>183</sup> Revised GPA art IV:3(c).

<sup>184</sup> Revised GPA art IV:3(d).

<sup>185</sup> Revised GPA art IV:4. In terms of art IV:6 of the Revised GPA the developing country may request that the transition period be extended or that new transitional measures be implemented.

<sup>186</sup> Revised GPA art IV:8.

<sup>187</sup> Revised GPA art IV:3.

### 2.3.2.3 The South African law

In South Africa, the Constitution itself provides for secondary objectives to be obtained through public procurement.<sup>188</sup> Section 217(2) and (3) provides:

- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that section from implementing a procurement policy providing for –
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

This section provides the opportunity to organs of state to implement preferential policies and policies to protect or advance persons or categories of persons disadvantaged by unfair discrimination.<sup>189</sup> The subsection does not make it obligatory for organs of state to implement such policies.<sup>190</sup> If such policies are utilised this must take place in accordance with the national legislation.<sup>191</sup>

The *Preferential Procurement Policy Framework Act*<sup>192</sup> was enacted to give effect to the constitutional provision contained in section 217(3). The definition of “organ of state” in this Act is more restrictive than the one in the Constitution.<sup>193</sup> It does, however, provide that the relevant minister may make the provisions of the Act applicable to any of the organs of state included in section 239 of the Constitution.<sup>194</sup>

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<sup>188</sup> For a general discussion of the use of procurement as a policy tool in South Africa see Bolton *Law of Government Procurement* 251-307.

<sup>189</sup> This is in accordance with s 9(2) of the Constitution: “(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”

<sup>190</sup> The subsection states that organs of state are not prevented from implementing such policies, implying that they do have a discretion. The legislation referred to in subsection (3) provides for a framework in terms of which organs of state may implement such policies, also implying the existence of a discretion to implement such policies. To allow such a discretion seems logical in that in certain instances such a policy need not be applied under the particular circumstances, and secondly at some stage the policy may have served its purpose and need not be applied any more.

<sup>191</sup> S 217(3).

<sup>192</sup> Act 5 of 2000, hereafter the PPPFA.

<sup>193</sup> S 1(iii).

<sup>194</sup> S 1(iii)(f). See *Fidelity Springbok Security Services (Pty) Ltd v SAPO Ltd* [2004] JOL 13215 (T), where it was held that the defendant was an organ of state in terms of the act as the procurement falls under s 217 of the Constitution.

The Act provides for a preference point system to be developed.<sup>195</sup> For contracts with a value above a prescribed amount,<sup>196</sup> a maximum of 10 points may be allocated for specific goals.<sup>197</sup> For contracts with a value equal to or below the prescribed amount, a maximum of 20 points may be allocated for specific goals.<sup>198</sup> The specific goals may include<sup>199</sup> contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination based on race, gender or disability;<sup>200</sup> or implementing the programmes of the Reconstruction and Development Programme.<sup>201</sup> The remainder of the points, namely eighty and ninety respectively, must be awarded for price. The provisions of this Act do not override the requirements of section 217 of the Constitution and they still have to be adhered to.<sup>202</sup>

It is provided that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.<sup>203</sup> These goals must be measurable, quantifiable and monitored for compliance.<sup>204</sup> The contract must be awarded to the tenderer with the highest points unless objective criteria in

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<sup>195</sup> S 2(1)(a).

<sup>196</sup> At this stage the amount is R500 000.

<sup>197</sup> S 2(1)(b)(i). The amount is at present equal to or above R500 000.

<sup>198</sup> S 2(1)(b)(ii). The amount is at present below R500 000 and equal to or above R30 000. See *Barry Kotze Inspections CC t/a Bis Joint Venture with Pugubye Investments (Pty) Ltd v City Council of Johannesburg* 2004 3 BCLR 274 (T), where the court said the values should be based on estimates.

<sup>199</sup> S 2(1)(d).

<sup>200</sup> A historically disadvantaged individual is defined in reg 1(h) as a South African citizen: “(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 or the Constitution of the Republic of South Africa, 1993 (‘the Interim Constitution’); and/or

(2) who is a female; and/or

(3) who has a disability:

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

One of the problems with this definition is that it can be interpreted to mean that black men who, because of their age, were not allowed to vote prior to the Interim Constitution, are not historically disadvantaged individuals.

<sup>201</sup> Published in GG 16085 of 23 November 1994.

<sup>202</sup> See *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (Ck); *SAPO Ltd v Chairperson Western Cape Provincial Tender Board* 2001 2 SA 675 (C); and *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* [2004] 3 All SA 715 (C).

<sup>203</sup> S 2(1)(e).

<sup>204</sup> S 2(2).

addition to the goals set out justify the award of the contract to another tenderer.<sup>205</sup> The Act is not clear on what such objective criteria could be.<sup>206</sup>

Regulation 9, issued in terms of the PPPFA,<sup>207</sup> provides that a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest points. However, this is not provided for in the Act itself but must be read with section 2(1)(f) mentioned above. Once again, such grounds are not set out. It is uncertain how, in practice, effect should be given thereto. The relevant minister can make exemptions to the applicability of the Act.<sup>208</sup>

South Africa also employs offsets<sup>209</sup> to achieve its secondary goals by means of public procurement. Specific provision for the use of offsets in public procurement in South Africa is made in the National Industrial Participation Programme introduced by the Department of Trade and Industry.<sup>210</sup> Industrial participation is a precondition but not a factor in the adjudication of tenders, unless all bids are relatively close.<sup>211</sup>

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<sup>205</sup> S 2(1)(f).

<sup>206</sup> See *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T); *RHI Joint Venture v Minister of Roads and Public Works* 2003 5 BCLR 544 (Ck); and *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All SA 340 (T).

<sup>207</sup> GN R725 of 10 August 2001.

<sup>208</sup> S 3. These exemptions can be made if it is in the interest of national security, in the public interest, or if the likely tenderers are international suppliers.

<sup>209</sup> Offsets are described in the GPA as measures used to encourage local development or to improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. See art XVI of the GPA.

<sup>210</sup> Hereinafter referred to as "NIPP". Industrial Participation (IP) became obligatory on 1 September 1996 in terms of Cabinet Memorandum 10/1996. Cabinet endorsed the IP Policy and its operating guidelines on 30 April 1997. DTI 2009 *NIPP* [www.dti.gov.za/](http://www.dti.gov.za/). Industrial Participation Programmes have been used by many countries in the past to offset major state purchases by requiring a *quid pro quo* of the percentage value of the order to be reinvested in some way in the purchasing country's economy. This allows the purchasing country to moderate the impact of large purchases in foreign dominated currencies, stimulate local industries, develop new industries, receive assistance in finding new markets, and benefit from skills and technology transfers. IP can also strengthen national industrial development strategies, for instance in directing investment into areas where risk may be slightly higher because the terrain is new or uncharted. This has the further benefit of diversifying the country's manufacturing sector, in terms of both products and spatial distribution.

<sup>211</sup> That is according to the information given by the Department of Trade and Industry. The PFMA and regulations issued in terms thereof, however, do not contain such a provision. Reg 10 provides only that an accounting officer or accounting authority must obtain clearance for a recommended bidder from the Department of Trade and Industry, in

The PPPFA and the National Industrial Participation Programme are the two important instruments utilised in South Africa to achieve its socio-economic objectives through public procurement. In particular, through the PPPFA it fully utilises public procurement to fulfil its socio-economic goals and concentrate on rectifying the injustices of the past. This is understandable in the context of its political history. The way in which public procurement is utilised for obtaining secondary goals is, however, still subject to the provisions of section 217 of the Constitution.

#### 2.3.2.4 Conclusion on secondary objectives

There can be no doubt that public procurement is widely used to achieve governments' socio-economic policies. There are many ways in which to use it to this effect. They include the preferential treatment of individuals, categories of people, or sectors of industry, the use of offsets, direct legislation, and the phasing-in of requirements.

Public procurement will remain an important instrument, in particular in developing countries, to achieve socio-economic policies. There will always be a tension between the achievement of such secondary objectives and the primary objectives of public procurement. This is because the achievement of socio-economic objectives can have a direct influence on the primary interest spheres of public procurement, namely the state, the general public, the private entities which are potential participants in the procurement process, and the economy in general. It will be necessary to achieve a balance between the interests of all role players. The secondary objectives of public procurement must be achieved whilst taking due consideration of the primary objective of value for money and the principles generally applicable to public procurement. This will be discussed in more detail in chapter 6.

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respect of contracts which are subject to the National Industrial Participation Program of that Department. See DTI 2009 *NIPP* [www.dti.gov.za/](http://www.dti.gov.za/).

## **2.4 Public procurement compared with private procurement**

One can distinguish between a free market economy<sup>212</sup> on the one hand and a command economy<sup>213</sup> on the other hand.<sup>214</sup> In a free market individuals are free to pursue their own interest largely without government interference.<sup>215</sup> In a command economy, government takes most decisions centrally and little individual freedom exists to take part in the economy.<sup>216</sup> In practice most economies are mixed economies which fall somewhere between the above extremes.<sup>217</sup> Market forces play an important part in mixed economies where both the government and the private sector solve economic issues. Public procurement plays an important role in market-orientated economies as a substantial level of government participation occurs, albeit in the free market.<sup>218</sup> In demand economies, the government is a major player in the market place too.

Although both private entities and the government, in procurement in South Africa, operate in the open market, there are differences between the rules regulating procurement by the two. The essence of the act of procurement is the contract to acquire goods and services, which is regulated by private law, in particular the law of contract.<sup>219</sup> Private law clearly applies in both private and public procurement. As a general rule, private entities have the freedom of contract.<sup>220</sup> This is not the case with contracts by the state. It is trite that public law regulates state activities.<sup>221</sup> In particular, administrative law is applicable to state actions.<sup>222</sup> It is generally accepted that in the private law sphere the government acts as an equal to the private party and in the administrative law sphere the government acts from a position of public power

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<sup>212</sup> Also called an open market economy.

<sup>213</sup> Also referred to as a centrally planned or socialist economy.

<sup>214</sup> Trepte *Regulating Procurement* 2.

<sup>215</sup> Trepte *Regulating Procurement* 19.

<sup>216</sup> Trepte *Regulating Procurement* 19.

<sup>217</sup> Bolton *Law of Government Procurement* 3; Trepte *Regulating Procurement* 19.

<sup>218</sup> Public procurement is estimated to amount to between 15% and 20% of the gross domestic product of most countries, according to the WTO. See WTO 2002 *Journal on Budgeting*.

<sup>219</sup> The law of delict can also apply, as evidenced by the case of *Steenkamp v Provincial Tender Board EC* [2006] JOL 16187 (SCA), where a delictual claim for damages was instituted against the tender board for its alleged negligent awarding of a tender.

<sup>220</sup> Van der Merwe *et al Contract* 8-15; Bolton *Law of Government Procurement* 35.

<sup>221</sup> Hosten *et al Introduction* 272-274; Hahlo and Kahn *South African Legal System* 116; Quinot *Judicial Regulation* 29. Floyd 2005 *SAPL* 378; Floyd 2006 *SAPL* 161.

<sup>222</sup> Baxter *Administrative Law* 50-56; Hoexter *Administrative Law* 2-7; Quinot *Judicial Regulation* 29.

and the other party from a position of subordination.<sup>223</sup> In the latter instance, administrative law provides the framework for the exercise of the state's public power.<sup>224</sup> As pointed out by Quinot there is, however, not always clarity in South African law as to how the state's commercial activities should be legally regulated.<sup>225</sup>

This discussion will focus on the applicability of administrative law to state action in the public procurement process. Administrative law itself will not be discussed in any detail as there already exist many authoritative works thereon. With regard to private law, reference will be made to the law of contract. The capacity of the state to contract will be discussed first, as this constitutes the main difference from the private capacity to contract. A brief discussion on the invitation to contract (the invitation to tender), the conclusion of the contract in public tender proceedings, and the enforcement of contracts will follow. The main part of this discussion will, however, relate to administrative law, including the provisions of PAJA and PAIA, as to its applicability to public procurement, as this is the most important distinguishing factor between private and public procurement.

#### 2.4.1 Private law

##### 2.4.1.1 Capacity to contract

That organs of state can contract is trite.<sup>226</sup> Organs of state are, however, because of their nature and functions, not free to contract as they please. The reason for this is primarily that they do not expend their own funds but public funds.<sup>227</sup> Their capacity to contract and the limitations thereon are regulated by the Constitution, the common law and enabling legislation.<sup>228</sup> Organs of

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<sup>223</sup> Quinot *Judicial Regulation* 28; Wiechers *Administratiefreg* 50-51.

<sup>224</sup> Quinot *Judicial Regulation* 27.

<sup>225</sup> Quinot *Judicial Regulation* 29.

<sup>226</sup> *Minister of Home affairs v American Ninja IV Partnership* 1993 1 SA 257 (A) 268C-D; *Floyd Owerheidssooreenkoms*; Bolton 2004 SA Merc LJ 198.

<sup>227</sup> Bolton *Law of Government Procurement* 73-74.

<sup>228</sup> *Steenkamp v The Provincial Tender Board of the Eastern Cape* 2007 3 SA 121 (CC) par 20. The *State Liability Act* 20 of 1957 provides for liability of the state if a servant of the state acted in his capacity and within his authority. S 1 reads: "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognisable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed

state act through their officials. Officials must be authorised to act on behalf of such public entities.<sup>229</sup> Such officials' actions and decisions, including when exercising a discretion, must be duly authorised by law. This entails that the statutory requirements and legal preconditions attached to any action, decision or the exercise of a discretion must be complied with by such an official.<sup>230</sup> The power to enter into an agreement must be exercised lawfully by such an official on behalf of the organ of state.<sup>231</sup>

It seemed trite that the existence of the prerogative powers of the state at common law ceased to exist after South Africa became a constitutional state in 1994.<sup>232</sup> The Constitutional Court held in *President of the Republic of South Africa v Hugo*<sup>233</sup> that the common-law royal prerogative<sup>234</sup> ceased to be an independent source of executive power with the introduction of the 1993 and 1996 Constitutions.<sup>235</sup> This was confirmed in *President of the Republic of South*

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by any servant of the State acting in his capacity and within the scope of his authority as such servant". Also see Quinot *Judicial Regulation* 69 and 122, where he concludes that state commercial activity can never be divorced from the state's constitutional and public function; s 217 of the Constitution and the PFMA and MFMA in particular regulate public procurement. Bolton 2004 *SAPL* 90.

<sup>229</sup> Bolton *Law of Government Procurement* 97; *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All SA 340 (T); *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T).

<sup>230</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 58. Hoexter *Administrative Law* 224-292. S 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful. Hoexter categorises unlawful action as a ground of review as relating to the three main themes of legality, namely the requirement of authority, the concept of jurisdiction, and the abuse of discretion. Hoexter *Administrative Law* 225. For a discussion with regard to the possibility to bind the state through estoppel and the rule against fettering of discretion, see Bolton *Law of Government Procurement* 82-86.

<sup>231</sup> Bolton *Law of Government Procurement* 35-36 and 74-75. She correctly states that the rule of law at a minimum includes the principle of legality. Legality requires the state to act in accordance with the legal principles and rules that apply to them. See also Bolton 2006 *Stell LR* 266, De Waal, Currie and Erasmus *Bill of Rights Handbook* 77; *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* [2005] JOL 13639 (T); 2006 2 SA 25 (T); and *Mustapha v Receiver Lichtenburg* 1958 3 SA 343 (A). For a general discussion of the state's commercial capacity see Floyd *Owerheidssooreenkoms*; Quinot *Judicial Regulation*. See also *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* [2005] JOL 13639 (T); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 58.

<sup>232</sup> For the position prior to the Constitution see *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 4 SA 1 (A); *Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 (A).

<sup>233</sup> 1997 4 SA 1 (CC)

<sup>234</sup> – which was exercised under the previous constitutions of South Africa and derived from the English law.

<sup>235</sup> *Id* 8 par 7.

*Africa v South African Rugby Football Union and others*<sup>236</sup> and *Mohamed and others v President of South Africa and others*<sup>237</sup> In *Minister of Public Works v Kyalami Ridge Environmental Association and others*<sup>238</sup> it was held that the state, as landowner, has all the rights that a private landowner has. It can do anything in terms of such landowners' rights as long as it falls within the framework of the Constitution and does not contravene any legislation.<sup>239</sup> This opens the possibility that the state's capacity to take part in commercial activities can be based on the common law applicable to private individuals.

Quinot, however, convincingly suggests that the state's capacity to contract and to participate in commercial activity is founded in the Constitution. He states:

In terms of this approach the state's capacity to engage in commercial activity can be viewed as a derivative power, which looks to the source of the function being fulfilled by the commercial action for a legal basis. Since the functions the state may lawfully pursue are limited (and grounded) by the Constitution the source of the state's commercial capacity is likewise ultimately found in the Constitution.

He bases his approach on the provisions of section 41(1)(f) of the Constitution, which provides:

All spheres of government and all organs of state within each sphere must ... not assume any power or function except those conferred on them in terms of the Constitution.

He further deals with three other possible sources of commercial activity provided for in the Constitution:<sup>240</sup> firstly sections 217, 218 and 230, which have a direct bearing on the commercial activities of the state and should regulate such activities;<sup>241</sup> secondly certain provisions of the Constitution which mandate legislation which can confer commercial powers on specific

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<sup>236</sup> 2000 1 SA 1 (CC) 68 par 144.

<sup>237</sup> 2001 3 SA 893 (CC) 907-908 par 31.

<sup>238</sup> 2001 1 SA 1151 (CC).

<sup>239</sup> *Id* 1169-1170 par 40.

<sup>240</sup> *Id* 105-107.

<sup>241</sup> *Id* 106.

organs of state;<sup>242</sup> thirdly the provisions dealing with the executive authority of the Republic with specific reference to sections 84 and 85 of the Constitution.

He is of the opinion that section 217 is a source of public procurement law and not of public procurement power.<sup>243</sup> Quinot bases this opinion on the wording and structure of this section which, he states, presupposes an existing power to contract. The existing power to contract is founded in the Constitution in general. This capacity to contract is, however, subject to the specific requirements of section 217.<sup>244</sup> Sections 218 and 230 expressly confer the capacity to enter into loan guarantees and to raise loans.<sup>245</sup>

The legislation mandated by the Constitution, in terms of which the Constitutional Commissions, the Auditor General, the Intelligence Services and the Reserve Bank are regulated, may include provisions relating to the commercial activities of such entities.<sup>246</sup>

With regard to the executive power, he argues that section 85(1) vests executive authority in the President of the Republic. Section 84(1) provides:

The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions as head of state and head of the national executive.

The first part of section 84(1) read with section 85(1) restricts executive power to constitutional and legislative sources. He concludes that the second part grants to the President the powers necessary to perform the functions entrusted to him by the Constitution and legislation.<sup>247</sup> This implies that the executive powers of the state extend beyond those expressly provided for in the Constitution and legislation but are limited with reference to the functions

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<sup>242</sup> These include s 182(2), 184(2); 185(2), 187(2), 188(4), 190(2), 210 and 225. They relate to constitutional commissions, the Public Protector, the Auditor General, the Intelligence Services and the South African Reserve Bank.

<sup>243</sup> He disagrees with the remark by Moseneke DJP in *Steenkamp v Provincial Tender Board Eastern Cape supra* at par 33 where he stated that s 217 is the source of the power and function of the provincial tender board.

<sup>244</sup> Quinot *Judicial Regulation* 105.

<sup>245</sup> Quinot *Judicial Regulation* 106.

<sup>246</sup> Quinot *Judicial Regulation* 106.

<sup>247</sup> Quinot *Judicial Regulation* 108-109.

granted by the Constitution and legislation.<sup>248</sup> Section 85(2) lists powers of the executive mandated by the Constitution.<sup>249</sup>

In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*<sup>250</sup> Goldstone J held that –

it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.<sup>251</sup>

This further implies that the executive may exercise no power and perform no function beyond that conferred upon it by law.<sup>252</sup> In *Kate v MEC for the Department of Welfare, Eastern Cape*<sup>253</sup> Froneman J also held that “The State and its organs have no powers outside that granted to it by the Constitution or by legislation complying with the Constitution”.<sup>254</sup>

The argument by Quinot, that the functions of the state are grounded in the Constitution, is in accordance with the idea of a constitutional state. By distinguishing between the functions prescribed by the Constitution and the actions and methods at the disposal of the state to execute such functions, a margin of flexibility is retained in that the actions and methods remain open-ended. The actions and methods, including commercial activity, are however not unlimited, as they remain relative to and dependant on the primary functions provided for in the Constitution.<sup>255</sup>

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<sup>248</sup> Quinot *Judicial Regulation* 109.

<sup>249</sup> This section provides as follows: “85(2) The President exercises the executive authority, together with the other members of the Cabinet, by –  
(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;  
(b) developing and implementing national policy;  
(c) co-ordinating the functions of state departments and administrations;  
(d) preparing and initiating legislation; and  
(e) performing any other executive function provided for in the Constitution or in national legislation”.

<sup>250</sup> 1999 1 SA 374 (CC).

<sup>251</sup> *Id* 339 par 56.

<sup>252</sup> *Id* 400 par 58.

<sup>253</sup> 2005 1 SA 141 (SE).

<sup>254</sup> *Id* 155 par 21.

<sup>255</sup> Quinot *Judicial Regulation* 110.

Private parties are generally free to contract with whom they wish and on what terms they wish. This is not the case with the state. It has to exercise its power within the confines of its constitutional and statutory powers.<sup>256</sup> In the case of public procurement the state's capacity to contract is founded in the Constitution. Section 217 is a source of public procurement law whilst its public procurement power is founded in the Constitution as a whole. Possible private law competencies of the state based on the common law, as envisaged in *Minister of Public Works v Kyalami Ridge Environmental Association and others*,<sup>257</sup> will also be subject to the Constitution but remain a source of lawful action by the state.

#### 2.4.1.2 The general principles of the law of contract

In the case of public procurement, the conclusion of contracts is inevitable. It usually entails that the public entity enters into an agreement with a private entity with regard to goods and services procured by the public entity from the private entity. That the general principles of the law of contract will be applicable to such contracts is trite.<sup>258</sup> This does not mean that the principles of the administrative law may not also be applicable, as will be discussed in par 2.4.2 hereunder.<sup>259</sup> For present purposes it is not necessary to discuss the law of contract and how it applies to public procurement in any detail.<sup>260</sup>

The basis of a contract is agreement or consent, also called consensus, between the parties thereto.<sup>261</sup> This consensus can be an actual meeting of

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<sup>256</sup> Bolton *Law of Government Procurement* 74.

<sup>257</sup> 2001 1 SA 1151 (CC).

<sup>258</sup> *Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 (A). Bolton *Law of Government Procurement* 16; Christie *Law of Contract* 42.

<sup>259</sup> See *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 4 SA 989 (W), where Blieden J stated as follows at 997B-D: "Section 217 read together with ss 32(1) and 33 makes it plain that in addition to his common-law rights, any person dealing with a State organ such as the respondent, is entitled to expect fairness, openness and equitable conduct from it in all its actions. The respondent is required to act in the spirit of the Constitution and the consequence of this is that in exercising its discretion to accept or reject any tender the respondent is required to act 'fairly, responsibly, and honestly; it is not unfettered'."

<sup>260</sup> For a very interesting, thorough and thought provoking discussion of the possible regulation of state commercial activity by means of private law, see Quinot *Judicial Regulation* ch 4.

<sup>261</sup> Christie *Law of Contract* 21; Kerr *Principles* 3 and Van der Merwe *et al Contract General Principles* 16.

the minds or the reasonable belief by one of them that there is consensus.<sup>262</sup> As pointed out by Christie,<sup>263</sup> the most common and helpful technique to ascertain whether an agreement has been reached or not is to determine if there was an offer and an acceptance of the offer. Although there are different ways in which goods and services may be procured by public entities, tender procedures are the most common. The discussion will focus on the invitation to tender and the acceptance (award) of the tender. To illustrate the difficulties in deciding whether the public law or the private law is applicable to a particular situation, a discussion of the enforcement of contracts entered into by the state will follow.

#### 2.4.1.2.1 Invitation to contract (invitation to tender):

It is generally accepted that in the public procurement process, when tenders are called for, it amounts to an invitation to do business subject to the conditions specified in the tender documents.<sup>264</sup> The procuring entity is not obliged to accept the tender.<sup>265</sup> There may be exceptions to this rule, for instance if in the invitation to tender particular contractual rights are provided for. An example would be if it is stipulated that the lowest bidder will be awarded the contract. The invitation to tender will then either amount to an offer in itself or to an invitation coupled with an undertaking that the lowest tenderer will be awarded the contract.<sup>266</sup> The ordinary rules of “offer” and “acceptance” of the private law of contract will still apply.<sup>267</sup>

An invitation to tender is usually a request to submit offers. Each tender submitted is an offer, which may be accepted or rejected. The consequences is

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<sup>262</sup> Van der Merwe *et al Contract General Principles* 16.

<sup>263</sup> Christie *Law of Contract* 28.

<sup>264</sup> Bolton *Law of Government Procurement* 14-15; Kerr *Principles* 68-69; Christie *Law of Contract* 42- 44; *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A); *Fraser and Chalmers (SA) (Pty) Ltd v Cape Town Municipality* 1964 3 SA 303 (C); *Wentzel v Gemeenskapsontwikkelingsraad* 1981 3 SA 703 (T); *G & L Builders CC v McCarthy Contractors (Pty) Ltd* 1988 2 SA 243 (SE); *Coolcat Restaurante BK h/a Die Kafeteria, UOVS v Vrystaatse Regering* 1999 2 SA 635 (O).

<sup>265</sup> Bolton *Law of Government Procurement* 14. *Wentzel v Gemeenskapsontwikkelingsraad* 1981 3 SA 703 (T).

<sup>266</sup> Bolton *Law of Government Procurement* 14; Christie *Law of Contract* 42, *Leyds v Simon* 1964 1 SA 377 (T); *Wentzel v Gemeenskapsontwikkelingsraad* 1981 3 SA 703 (T).

<sup>267</sup> See *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George* [2005] JOL 13628 (C).

that the tender specifications, drawings, plans, bills of quantities and similar information contained in the tender documents are supplied for information purposes, save if the tender document states otherwise. The fact that the tenderer uses or includes the tender specifications, drawings, plans, bills of quantities and similar information in his tender does not detract from the fact that he is the one that is making the offer. Any inaccurate, inappropriate or unworkable specification, drawing, plan or bills of quantity will be at his risk as he is the one that makes the offer.<sup>268</sup>

In *Felton Skead and Grant v Port Elizabeth Municipality*<sup>269</sup> the applicants tendered to do a property evaluation of all properties in certain wards in Port Elizabeth for a lump sum. In the tender documents the respondent had set out certain estimates of the number of properties to be valued. The applicant based its price thereon. These estimates proved to be incorrect. The applicant then claimed additional remuneration. The court held:

- The primary duty of a tenderer in respect of such a contract is to satisfy itself of all the material facts relating to the tender.<sup>270</sup>
- Ignorance on its part when making its tender will not excuse it from performing its contract. Even if it be the usage of contractors to rely on the specification of a contract without examining it for themselves or employing a skilled person to do so on their behalf, such a usage cannot excuse such a contractor.<sup>271</sup>
- It is for the tenderer to satisfy himself as to the nature and extent of the work to be done regardless of the cost and inconvenience involved in thus satisfying itself.
- It is no argument to say that for the tenderer to have made an independent and exhaustive investigation into the extent of the work involved, for the purposes of submitting a tender, would have entailed considerable time, expense and effort.

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<sup>268</sup> See Christie *Law of Contract* 42.

<sup>269</sup> 1964 4 SA 422 (E).

<sup>270</sup> The court referred to *Thorn v Mayor and Commonality of London* (1876) 1 AC 120.

<sup>271</sup> *Id* at 132, *per* Lord Chelmsford.

- There was an express duty on the applicants as tenderers to have satisfied themselves as to the nature and extent of the work involved before submitting their tender.<sup>272</sup>

Unlike invitations to tender by private entities, such invitations, in the case of public procurement, are not only subject to the law of contract but also to the constitutional provisions relating to procurement,<sup>273</sup> other constitutional provisions<sup>274</sup> and applicable legislation.<sup>275</sup>

#### 2.4.1.3 The conclusion of the contract

The general principles of the law of contract relating to the conclusion of a contract also apply in public procurement. The general principle is that the contract comes into existence only once the offer is accepted to the knowledge the offeror.<sup>276</sup>

In public procurement the decision to award a tender is usually made by a tender committee<sup>277</sup> whilst the contract is signed by an authorised official. The successful tenderer is notified, either orally or in writing, that he is the successful tenderer, but the agreement is entered into only at a later stage. It also often happens that a tenderer is informed that he is the “preferred tenderer”.

As the ordinary rules of contract apply, it must first be established whether or not the offer, which will usually include the information and conditions contained in the invitation to tender, specifically deals with the acceptance of the tender. In this regard the National Treasury has issued General Conditions of Contract and Standard Bidding Documents applicable to

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<sup>272</sup> *Felton Skead and Grant v Port Elizabeth Municipality* 1964 4 SA 422 (E) at 425 D-H.

<sup>273</sup> S 217. This will for instance have an effect on the call for tenders in that, because of the requirement of competitiveness in s 217 of the constitution, the invitation to tender may be held to have been unlawful because of, for example, a lack of publication or similar requirements provided for in other applicable legislation.

<sup>274</sup> In particular s 32 and 33.

<sup>275</sup> In particular the PFMA, the MFMA, PPPFA, PAJA and PAIA.

<sup>276</sup> Van der Merwe *et al Contract* 54; Christie *Law of Contract* 57; Kerr *Principles* 97.

<sup>277</sup> The regulations issued in terms of the PFMA and the MFMA provide for tender committees.

National and Provincial government.<sup>278</sup> It has also issued General Conditions of Contract and Municipal Bidding Documents applicable to Local Government.<sup>279</sup> These prescribed documents have certain provisions relating to the acceptance of tenders, which may be applicable.<sup>280</sup>

If a tender committee decides to award a tender to a specific tenderer it will generally be an administrative decision only and the contract will be concluded only when it is signed or the successful tenderer is formally informed thereof.<sup>281</sup> Depending on the circumstances, tender committees usually do not have the intention to contract but only to indicate who the successful tenderer should be.<sup>282</sup> In *Aquafund (Pty) Limited v Premier of the Western Cape*<sup>283</sup> a distinction was made between the process of considering and making recommendations on tenders on the one hand, and the conclusion of a contract on the other hand. The court held:

It is well established that the acceptance of a tender results in a contract between the tenderer and the person who called for tenders and that the conclusion of such an agreement is not an administrative action. I do not understand the Applicant to dispute this. But in my view the process of considering tenders and of making recommendations is distinct from the subsequent conclusion of an agreement. ... It is further borne out by the fact that while the tenders are considered by the Tender Board and the Tender Committee, the contract pursuant to the award of the tender was concluded between what was then known as the Provincial Administration: Western Cape and the successful tenderer.<sup>284</sup>

The consequences of a tenderer being informed that it is a preferred bidder will depend on the wording of such a communication.<sup>285</sup> If the communication is to the effect that the tenderer is the preferred bidder subject to a formal

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<sup>278</sup> They can be found on: National Treasury 2009 *Home* [www.treasury.gov.za](http://www.treasury.gov.za).

<sup>279</sup> They can be found on: National Treasury 2009 *Home* [www.treasury.gov.za](http://www.treasury.gov.za).

<sup>280</sup> In particular provision is made for the written acceptance of bids by means of registered mail and for the publication of information on successful bidders in the Government Tender Bulletin, in clause 31.1 of the GCC for Local Government and PFMA reg 16A6.3(d) respectively.

<sup>281</sup> *Posts and Telecommunications Corporation v Support Construction (Pvt) Ltd* [1998] JOL 3613 (ZS).

<sup>282</sup> *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 (C); Bolton *Law of Government Procurement* 29.

<sup>283</sup> [1997] 2 All SA 608 (C)

<sup>284</sup> [1997] 2 All SA 608 (C) 616.

<sup>285</sup> See *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 1 SA 116 (C).

agreement being entered into or subject to certain formalities being complied with, it will usually not create a binding agreement.<sup>286</sup> If the wording is unconditionally to the effect that the tenderer is the preferred bidder, the communication can amount to the award of the contract.<sup>287</sup> The legal position will depend on the circumstances, in particular the intention of the parties.<sup>288</sup>

Although the ordinary law of contract applies to the acceptance of tenders it must, once again, be kept in mind that the administrative law might provide additional remedies if the conclusion or non-conclusion of the agreement was not a valid exercise of the public entity's powers.<sup>289</sup>

#### 2.4.1.4 The enforcement of the contract

One of the main distinctions between public and private procurement is the applicability of the public law to the former, as it poses a limitation on the state's freedom to act. There exist many examples where the courts have applied the law of contract in contractual relations between public and private entities.<sup>290</sup> Since the advent of the new constitutional dispensation, our courts

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<sup>286</sup> The preferred tenderer will of course have rights in administrative law, such as the right to procedural fairness.

<sup>287</sup> Such a tenderer will probably at least have a legitimate expectation that the contract will be awarded to it.

<sup>288</sup> *Posts and Telecommunications Corporation v Support Construction (Pvt) Ltd* [1998] JOL 3613 (ZS).

<sup>289</sup> Bolton *Law of Government Procurement* 29; Bolton 2006 *Stell LR* 266. See also the following decided cases which relate to the unlawful award of tenders: *Umso Construction (Pty) Ltd v The Member of the Executive Council of the Government of the Province of the Eastern Cape Responsible for Roads and Transport* [2006] JOL 17569 (Ck); *Sabenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All SA 340 (T); *Crook v Minister of Home Affairs* 2000 2 SA 385 (T); *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T); *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* [2004] 3 All SA 715 (C); *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (Ck); *Tecmed (Pty) Ltd v Eastern Cape Provincial Tender Board* 2001 3 SA 735 (SCA); *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 (C); *RHI Joint Venture v Minister of Roads and Public Works* 2003 5 BCLR 544 (Ck); *K&P Contractors v Standerton Town Council* 1963 1 SA 405 (T); *Phillips Medical Customer Support (Pty) Ltd v Eastern Cape Provincial Tender Board* [2003] JOL 11118 (E); *Dominium Earthworks (Pty) Ltd v State Tender Board* 1968 4 SA 151 (T); *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA); *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA).

<sup>290</sup> Some of these are: *Minister of Public Works and Land Affairs v Group Five Building Ltd* 1996 4 SA 280 (A); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA); *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A); *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 4 SA 310 (T); *South African*

have had the opportunity to decide on the question of whether or not public law, in particular administrative law, is applicable when the state exercises rights conferred by the private law of contract. In *Logbro Properties CC v Bedderson NO and others*,<sup>291</sup> Cameron JA preferred the minority judgment, by Schreiner JA, in *Mustapha and another v Receiver Lichtenburg and others*<sup>292</sup> when he stated:

Although a permit granted under s 18(4) of Act 18 of 1936 has a contractual aspect, the powers under the subsection must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the subsection is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised.<sup>293</sup>

He held the minority judgment to be a correct exposition of the law.<sup>294</sup>

In the *Logbro* matter the facts were that the award of a tender, for the sale of a property, was set aside on review and referred back to the tender committee. In view of the escalation of property values, the committee decided not to award the tender after a re-evaluation but to call for new tenders altogether. This decision was again the subject of a review application and the subject of an appeal. Counsel for the respondent argued that it had the contractual right to withdraw the property from tender without the scrutiny of administrative law. Cameron JA held that even if the conditions expressed in the initial invitation to tender and accepted by the tenderers, relied upon by

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*Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA); *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 1 SA 196 (SCA).

<sup>291</sup> 2003 2 SA 460 (SCA)

<sup>292</sup> 1958 3 SA 343 (A).

<sup>293</sup> 347D-G.

<sup>294</sup> 468 par 12.

counsel, constituted a contract, its provisions did not exhaust the province's duties toward the tenderers. He held that the principles of administrative justice continued to govern the relationship between the organ of state and the tenderers:<sup>295</sup>

Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation.

This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract (footnotes omitted).<sup>296</sup>

The judge distinguished this matter from the decision in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others*.<sup>297</sup> He did so on the basis that a public authority's exercise of a power to cancel a contract is not an exercise of public power in that the contract was concluded on equal terms without any element of superiority or authority deriving from the public authority's public position.<sup>298</sup>

In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others*,<sup>299</sup> the appellant (an organ of state) cancelled a contract entered into with the respondent (a private party). This was done subsequent to a tender's being issued with regard to certain functions and duties which related to the identifying and collection of outstanding levies, that had to be exercised on behalf of the appellant. Appellant summarily cancelled the contract because of fraudulent commission claims by the Respondent. Streicher JA held that

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<sup>295</sup> 466 par 7.

<sup>296</sup> 466-467 par 7 and 8.

<sup>297</sup> 2001 3 SA 1013 (SCA).

<sup>298</sup> 467-468 par 10.

<sup>299</sup> 2001 3 SA 1013 (SCA).

although the appellant as a public entity derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. These principles of the law of contract were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority.<sup>300</sup> The cancellation was for these reasons not an administrative action. The court did indicate that had the cancellation been effected in terms of the applicable financial regulations,<sup>301</sup> it would have amounted to administrative action.<sup>302</sup>

In the recent decision by the Supreme Court of Appeal in *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd*<sup>303</sup> Brand JA held:

What remains are observations originating from comments by the court *a quo* which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the tender board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these comments by the court *a quo*, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) at para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) at paras 11 and 12). The fact that the tender board relied on authority derived from a statutory provision (ie s 4(1) (eA) of the *State Tender Board Act*) to cancel the contract on behalf of the government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the tender board relied were, *inter alia*, reflected in a regulation. All that happened, in my view, is that the provisions of the regulations – like the provisions of ST36 – became part of the contract through incorporation by reference.

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<sup>300</sup> 1023-1024 par 18.

<sup>301</sup> The Financial Regulations for Regional Services Councils GN R1524 of 28 June 1991.

<sup>302</sup> 1024 par 20.

<sup>303</sup> 2009 1 SA 163 (SCA). See also *Forenco (Pty) Ltd v Minister of Finance* [2008] JOL 22701 (T); *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2009] 1 All SA 303 (SCA) and *Northwest Provincial Government v Tswaing Consulting CC* [2007] 2 All SA 365 (SCA).

The above illustrates the difficulty in deciding if administrative law and other principles of public law are also applicable to state actions where the private law clearly provides for the exercise of certain rights.

The main difference between public procurement and private procurement is that although private law,<sup>304</sup> in particular the law of contract, is applicable to procurement by both entities, the public entities' freedom is more limited. These limitations are imposed on public entities by public law, in particular administrative law, which does not apply to private entities.

#### 2.4.2 Public law

In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the RSA and Others*<sup>305</sup> public law was described as follows:

Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the precepts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of

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<sup>304</sup> Not only the law of contract but also the law of delict may be applicable. See *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA); *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA); *Steenkamp v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA); *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC); *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA); *Minister of Finance v Gore* 2007 1 SA 111 (SCA).

<sup>305</sup> 2000 2 SA 674 (CC).

government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control (footnotes omitted).<sup>306</sup>

The Constitution provides for public procurement in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, making these principles constitutional imperatives for public procurement.<sup>307</sup> Public procurement is also subject to other provisions of the Constitution and various legislative measures.<sup>308</sup> As already stated,<sup>309</sup> the constitutional court has held that it is a fundamental principle of the rule of law that the exercise of public power is legitimate only where lawfully exercised.<sup>310</sup> This implies that the executive may exercise no power and perform no function beyond that conferred upon it by law and in accordance with the principles and requirements laid down by the Constitution.<sup>311</sup>

The provisions of section 217 of the Constitution and the legislation applicable to public procurement will be dealt with in Chapter 5 below. The applicability of the general principles of administrative law to public procurement as opposed to private procurement will be discussed next. Specific reference will be made to administrative action, judicial review and the right of access to information.

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<sup>306</sup> 2000 2 SA 674 (CC) 696 par 45.

<sup>307</sup> S 217.

<sup>308</sup> The most important legislation is the PFMA, MFMA, PPPFA, PAJA and PAIA.

<sup>309</sup> See 2.4.1.1 above.

<sup>310</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) at 399 par 56.

<sup>311</sup> *Id* 400 par 58.

#### 2.4.2.1 Administrative action

Section 33(1) of the Constitution provides for the constitutional right to lawful, reasonable and procedurally fair administrative action.<sup>312</sup> These rights have been given content in PAJA.<sup>313</sup> Administrative action is defined in PAJA as:

- ...any decision taken, or any failure to take a decision, by –
- (a) an organ of state, when –
    - (i) exercising a power 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; or
  - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, ...

The executive and legislative powers on national, provincial and local government level are excluded from the definition of administrative action. So too are the judicial functions of a court, the decision to institute or continue a prosecution, a decision relating to the nomination, selection or appointment of a judicial officer by the Judicial Service Commission, and any decision taken, or failure to take a decision, in terms of any provision of PAIA and the provisions of section 4(1) of PAJA.<sup>314</sup>

Currie and Klaaren list seven elements that make up the definition of “administrative action”.<sup>315</sup> They are

- a decision or proposed decision;

<sup>312</sup> S 33(1) reads as follows: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.

<sup>313</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd (TAC as Amici Curiae)* 2006 2 SA 311 (CC).

<sup>314</sup> PAJA s 1. S 4(1) of PAJA states as follows: “(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –  
(a) to hold a public inquiry in terms of subsection (2);  
(b) to follow a notice and comment procedure in terms of subsection (3);  
(c) to follow the procedures in both subsections (2) and (3);  
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or  
(e) to follow another appropriate procedure which gives effect to section 3.”

<sup>315</sup> Currie and Klaaren *Benchbook* par 2.4; Hoexter *Administrative Law* 186; Burns and Beukes *Administrative Law* 112; and De Ville *Judicial Review* 35-68.

- of an administrative nature;
- that is made in terms of an empowering provision;
- that is not specifically excluded;
- that is made by an organ of state or by a private person exercising public power;
- that adversely affects rights; and
- that has a direct external legal effect.<sup>316</sup>

Our courts have held that the public procurement process, including the conduct of the process, the evaluation of the tender and the award of the contract, is a form of administrative action.<sup>317</sup>

In *Bullock NO and Others v Provincial Government, North West Province, and Another*<sup>318</sup> the court dealt with the question of whether the disposal by an organ of State of a right in state property amounted to an administrative action or not. The Premier of the North West Province decided to grant a servitude over a portion of the foreshore of the Hartebeespoort Dam (which belongs to the state) to an adjacent private landowner. The court concluded that the decision to grant such a servitude amounted to an administrative action.<sup>319</sup> It based its finding on the interest of the public in the foreshore, in that the dam is a valuable recreational resource available to the public at large. The decision to grant a servitude over a part of the foreshore to one property

<sup>316</sup> For a discussion of these seven elements see Hoexter *Administrative Law* 186-216; De Ville *Judicial Review* ch 2; and Burns and Beukes *Administrative Law* ch 5.

<sup>317</sup> See Bolton *Law of Government Procurement* 18-19; *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W); *Umfolozu Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A); *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 (C); *ABBM Printing & Publishing (Pty) Ltd v Transnet* 1998 2 SA 109 (W); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 4 SA 375 (T); *Nextcom (Pty) Ltd v Funde* 2000 4 SA 491 (T); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T); *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA); *Compass Waste Services (Pty) Ltd v Chairperson, NC Tender Board* [2005] JOL 15344 (NC); *First Base Construction CC v Ukhahlamba District Municipality* [2006] JOL 16724 (E); *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 6 SA 220 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) at par [21] 489C–E. An unsuccessful tenderer can take public procurement decisions on review also if the decision is not justifiable in relation to the reasons given, as stated in *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 1 SA 701 (O).

<sup>318</sup> 2004 5 SA 262 (SCA) at 265 par 1.

<sup>319</sup> 2004 5 SA 262 (SCA) at 270 par 14.

owner, to the exclusion of all other persons, would significantly curtail access to that resource by the public. This entitled the public to administrative justice and the decision, being an administrative action, could be challenged.<sup>320</sup>

In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>321</sup> the court again had to decide what constitutes administrative action. The first respondent, an organ of state, had leased a portion of the quayside of Hout Bay harbour to the third respondent. The court *a quo* dismissed an application for a temporary interdict restraining the third respondent from developing the property, and for an order reviewing and setting aside the first respondent's decision to lease the property to the third respondent. On appeal, the appellants *inter alia* contended that the first respondent's decision was in conflict with the right to procedurally fair administrative action as conferred by section 3 of PAJA. They argued that the appellants should have been consulted or invited to comment on the third respondent's request to lease the property before the lease was granted. They based this on the argument that the first respondent's decision fell to be set aside in terms of section 6 of PAJA because it was irrational and arbitrary. The question on appeal was whether or not the first respondent's decision constituted administrative action falling within the terms of PAJA.

Nugent JA held:

While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two

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<sup>320</sup> 2004 5 SA 262 (SCA) at 271-272 par 19.

<sup>321</sup> 2005 6 SA 313 (SCA).

qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of “an administrative nature”) that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as Head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.<sup>322</sup>

In view of the broad definition by Nugent JA, it is difficult to envisage what action in the public procurement process falling within the sphere of the law of contract will not also be administrative action.<sup>323</sup> It can, however, be expected that the courts will, as was stated in *President of the Republic of South Africa v South African Rugby Football Union*,<sup>324</sup> still decide on a case by case basis what action falls under “administrative action”. Factors which were held to be relevant to decide whether or not an action constitutes “administrative action” are the nature of the power exercised, its subject matter, if it involves the exercise of a public duty, and how closely it is related to policy matters (which are not administrative action) as opposed to the implementation of legislation, which will constitute administrative action.<sup>325</sup>

Quinot states that in South African law the judicial regulation of state commercial activity is based on the classification approach. In terms of this approach all state action can be classified as either private or public in nature.<sup>326</sup> He identifies six

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<sup>322</sup> 2005 6 SA 313 (SCA) at 323-324 par 23 and 24.

<sup>323</sup> See also Quinot *Judicial Regulation* 381.

<sup>324</sup> 2000 1 SA 1 (CC) (1999 10 BCLR 1059) at 67-68 par 143.

<sup>325</sup> *President of the RSA v SARFU* 2000 1 SA 1 (CC) 67 par 143.

<sup>326</sup> It should be noted that commercial activity can not be equated to public procurement, although the last mentioned is clearly part of commercial activity because of its nature with regard to certain aspects.

criteria which have been used by the courts, either independently or in combination, to classify state action, namely<sup>327</sup>

1. the identity of the actor;
2. the source of the power exercised;
3. the use of superior and/or state action in concluding the contract;
4. public interest in the particular action;
5. the fulfilment of a public function; and
6. the impact of the particular action, particularly on individual legal rights.

He argues that the present classification approach by our courts is not a viable approach to the judicial regulation of state commercial activity.<sup>328</sup> The main reason for this conclusion is the inherent indeterminacy of the approach with the resultant uncertainty and potential for uncertainty.<sup>329</sup> He is further of the opinion, with reference to Klare,<sup>330</sup> that it is at odds with the notion of transformative constitutionalism.<sup>331</sup>

He also investigated the possibility of a private law model to regulate state commercial activity.<sup>332</sup> In terms of this model, the courts treat state commercial activity as nothing more than commercial activity that is subject to the normal private law rules, especially those of the law of contract.<sup>333</sup> However, he concluded that although the model has sufficient doctrinal tools available to flesh out a viable exclusively private law approach to the regulation of commercial state activity, it is highly unlikely that such development will occur in our law in the near future. He further concluded that this model would be unable to sufficiently internalise the complexities of state commercial activities within a regulatory framework.<sup>334</sup> It would for the above reasons not be a viable alternative to the present classification model.

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<sup>327</sup> Quinot *Judicial Regulation* 124-125.

<sup>328</sup> Quinot *Judicial Regulation* 244.

<sup>329</sup> Quinot *Judicial Regulation* 244.

<sup>330</sup> Klare 1998 *SAJHR* 150.

<sup>331</sup> Quinot *Judicial Regulation* 244.

<sup>332</sup> Quinot *Judicial Regulation* ch 4.

<sup>333</sup> Quinot *Judicial Regulation* 491.

<sup>334</sup> Quinot *Judicial Regulation* 492.

As a second alternative to the classification approach, he investigated the cumulative approach.<sup>335</sup> In terms thereof both private law and administrative law apply to all state commercial activities. State commercial action is viewed as both administrative and contractual in nature.<sup>336</sup> Although he is of the opinion that this model is not ideal either, there are many advantages.<sup>337</sup> It reduces the possibility of abuses of state power and keeps the state within strict legal limits. This model is able to integrate the complexity of state commercial activity into the regulatory approach. Whilst the law of contract focuses the regulatory attention on the relationship between the parties to the contract, the public law regulation ensures that the wider public interests are not neglected.<sup>338</sup>

The negative aspects of this model are that it limits the state's ability to harness market forces in the public interest. It may undermine the very purpose of state commercial activity if legal mechanisms are not developed that can shield particular instances of state commercial activity from unwarranted restrictive forms of regulation.<sup>339</sup>

With regard to all three models described above he concludes that they do not enhance judicial justification of the court's involvement in state commercial activity. They also fail to facilitate judges' responsibility to justify their decisions not only by reference to authority but also with reference to ideas and values.<sup>340</sup>

The conclusion reached by Quinot is that the best option is a more sophisticated view of the public/private divide, that will form the basis for the refinement of the present classification approach. In terms hereof:

... contract and administrative action are not viewed as sharply distinct monolithic legal concepts, but as multi-dimensional social practices that stand in a complex relationship to each other. The task of the judicial regulator is to decide in every case how public

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<sup>335</sup> Quinot *Judicial Regulation* ch 6.

<sup>336</sup> Quinot *Judicial Regulation* 493.

<sup>337</sup> Quinot *Judicial Regulation* 493.

<sup>338</sup> Quinot *Judicial Regulation* 493.

<sup>339</sup> Quinot *Judicial Regulation* 493.

<sup>340</sup> Quinot *Judicial Regulation* 494.

and/or how private the specific instances of state commercial activity are, ie what the relationship between the two notions entails in that instance. This determination is done through direct and open engagement with an open number of contextually contingent considerations that impact on the relationship. Furthermore, these considerations are themselves multi-dimensional and stand in complex relationship with each other. The regulation applied to a particular instance of state commercial activity is eventually a function of this network of relationships.<sup>341</sup>

In practice this entails that the choice as to which legal rules should apply to the commercial activity of the state must be made

...with open and direct reference to the substantive considerations that inform both the applicability and substance of the particular rules. Sustained, consistent and articulated reference to these considerations is the main difference between the proposed approach and the competing models, such as the current classification approach ...<sup>342</sup>

He proposes that this open-ended approach should not result in new substantive rules but remain flexible. By this method more normative complexity can be introduced into the reasoning process.<sup>343</sup>

The main attraction of Quinot's approach is that it forces one to refer to the considerations that inform the regulatory measure, whether it be private law or administrative law. The model provides a measure of open-endedness which, if properly used, can ensure adaptability to new and unforeseen circumstances whilst remaining true to constitutional values. In the case of public procurement, it includes the requirements of fairness, equitability, transparency, competitiveness and cost-effectiveness. Through this model it will be possible also to achieve the transformative constitutionalism formulated by Klare.<sup>344</sup> It can be expected that should the courts adopt this approach they will still decide the matters before it on a case by case basis and previous judgments will still be given due consideration. It will however be possible to take a more principled approach in which the constitutional values are given more prominence and the interests of

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<sup>341</sup> Quinot *Judicial Regulation* 496.

<sup>342</sup> Quinot *Judicial Regulation* 505.

<sup>343</sup> Quinot *Judicial Regulation* 506.

<sup>344</sup> Klare 1998 *SAJHR* 146.

all interest groups<sup>345</sup> can be appropriately balanced. The results of such an approach will probably not be drastically different from those of the present approach by the courts, but will make it unnecessary for the courts to classify a particular action as either private or administrative.

#### 2.4.2.2 Judicial review:

The law of judicial review defines the scope of the powers of organs of state, the way in which their power should be exercised, and the effect of non-compliance with the above. Hoexter refers to PAJA as the primary or default pathway to judicial review.<sup>346</sup>

Section 6(2) of PAJA provides:

A court or tribunal has the power to judicially review an administrative action if –

- (a) the administrator who took it –
  - (i) was not authorised to do so by the empowering provision;
  - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
  - (iii) was biased or reasonably suspected of bias;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken –
  - (i) for a reason not authorised by the empowering provision;
  - (ii) for an ulterior purpose or motive;
  - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
  - (iv) because of the unauthorised or unwarranted dictates of another person or body;
  - (v) in bad faith; or
  - (vi) arbitrarily or capriciously;
- (f) the action itself –
  - (i) contravenes a law or is not authorised by the empowering provision; or
  - (ii) is not rationally connected to –
    - (aa) the purpose for which it was taken;
    - (bb) the purpose of the empowering provision;
    - (cc) the information before the administrator; or
    - (dd) the reasons given for it by the administrator;

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<sup>345</sup> In the case of public procurement, these would be the contracting public entity, the public at large, and the private participating entities.

<sup>346</sup> Hoexter *Administrative Law* 114. See also De Ville *Judicial Review* 1-6.

- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.<sup>347</sup>

The courts have the power to scrutinise the lawfulness, reasonableness, and procedural fairness of administrative action, and the right to being given written reasons for administrative action. The unsuccessful tenderer clearly has the right to judicial review of public procurement decisions.<sup>348</sup>

The remedies available are set out in section 8:

- (1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders –
  - (a) directing the administrator –
    - (i) to give reasons; or
    - (ii) to act in the manner the court or tribunal requires;
  - (b) prohibiting the administrator from acting in a particular manner;
  - (c) setting aside the administrative action and –
    - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
    - (ii) in exceptional cases –

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<sup>347</sup> S 6(3) of the *Promotion of Administrative Justice Act 3 of 2000* provides:

“(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where –

- (a)(i) an administrator has a duty to take a decision;
- (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; ... or
- (b)(i) an administrator has a duty to take a decision;
- (ii) a law prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.”

<sup>348</sup> *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 1 SA 701 (O); *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 5 SA 186 (C); *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C); *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 6 SA 442 (C). See also *Quinot* 2008 *Stell LR* 68-88 and *Roos and de la Harpe* 2008 *PELJ* 1-24.

- (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    - (bb) directing the administrator or any other party to the proceedings to pay compensation;
  - (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
  - (e) granting a temporary interdict or other temporary relief; or
  - (f) as to costs.
- (2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders –
- (a) directing the taking of the decision;
  - (b) declaring the rights of the parties in relation to the taking of the decision;
  - (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
  - (d) as to costs.

That PAJA is utilised to scrutinise public procurement is clear from the abundance of reported cases relating to the award of public tenders.<sup>349</sup>

#### 2.4.2.3 Access to information

Related to PAJA is the *Promotion of Access to Information Act*,<sup>350</sup> which, *inter alia*, gives effect to the constitutional right of access to information held by the State.<sup>351</sup> This Act enables the public to obtain information from organs of state relating to public procurement. It is an important instrument to ensure transparency and to obtain the necessary information to enable the public to exercise its right to lawful administrative action.

In *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd*<sup>352</sup> the question as to whether or not an unsuccessful tenderer is entitled to information on the tender submitted by the successful tenderer was dealt with.

<sup>349</sup> See Bolton *Law of Government Procurement* 316-340. See also *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 1 SA 701 (O); *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C); *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C); *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 6 SA 442 (C).

<sup>350</sup> Act 2 of 2000.

<sup>351</sup> S 32 of the Constitution.

<sup>352</sup> 2006 6 SA 285 (SCA).

One of Transnet Ltd's trading divisions, the National Ports Authority of South Africa (NPASA), invited tenders for a two-year contract for the removal of galley waste from ships in Cape Town harbour. The successful tenderer was Inter Waste (Pty) Ltd. The notice to tenderers which accompanied the issued tender documentation contained the following sentence:

Transnet does not bind itself to accept the lowest or any tender/quotation nor will it disclose the successful tenderer's tender price or any other tendered prices as this is regarded as confidential information.

The above formed part of the eventual written agreement entered into between Transnet and Inter Waste.

After the award of the tender, SA Metal Machinery Co (Pty) Ltd, one of the unsuccessful tenderers, in terms of the *Promotion of Access to Information Act*,<sup>353</sup> requested NPASA for copies of *inter alia* Inter Waste's completed tender document. Eventually NPASA forwarded Inter Waste's entire tender documentation, but with the rates and certain totals material to the calculation of the tender price deleted from the portion of the documentation that specified the prices and provisional quantities.

Transnet relied on sections 36(1)(b),<sup>354</sup> 36(1)(c),<sup>355</sup> 37(1)(a),<sup>356</sup> and 82<sup>357</sup> of the Act for its refusal to provide the information. The first three sections fall under

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<sup>353</sup> Act 2 of 2000.

<sup>354</sup> It reads: "36(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains –  
(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial".

<sup>355</sup> It reads: "36(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains –  
(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected –  
(i) to put that third party at a disadvantage in contractual or other negotiations; or  
(ii) to prejudice that third party in commercial competition".

<sup>356</sup> It reads: "36(1) Subject to subsection (2), the information officer of a public body –  
(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement".

<sup>357</sup> It reads: "82 The court hearing an application may grant any order that is just and equitable, including orders –

chapter 4, which specifies grounds for refusal of access to the records of a public body. Section 82 confers a discretion on a court in terms of which anybody who has been refused access by the public body may apply for the judicial grant of access. In the appeal the provisions of section 36(1)(b) were not relied on by Transnet.

The court had to decide if in terms of section 36(1)(c) “information supplied in confidence by the third party ‘the disclosure of which could reasonably be expected’ (i) to put the third party at a disadvantage in contractual or other negotiations [would] (ii) to prejudice the third party in commercial competition”. It also had to decide if the disclosure of the rates would “constitute an action for breach of a duty of confidence” owed to the third party in terms of an agreement as provided for in section 37(1). Lastly it had to determine if the court should exercise a discretion as provided for in section 82 of the Act to make orders “(a) confirming, amending or setting aside the refusal decision; (b) requiring the information officer to take, or refrain from, specified action; (c) granting an interdict, interim or specific relief, a declaratory order or compensation; and (d) as to costs”.

The court interpreted the phrase “the disclosure of which could reasonably be expected” in section 36(1)(c) to mean “consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation”.<sup>358</sup> On the facts before it the court found that the disclosure of the rates would not put Inter Waste at any disadvantage in contractual or other negotiations or prejudice it in commercial competition.<sup>359</sup>

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- (a) confirming, amending or setting aside the decision which is the subject of the application concerned;
  - (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;
  - (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or
  - (d) as to costs”.

<sup>358</sup> 2006 6 SA 285 (SCA) 299 par 42.

<sup>359</sup> 2006 6 SA 285 (SCA) 300-301 par 50.

With regard to the provisions of section 37(1) and the relevant clause in the tender documents and agreement, Howie JP held:

To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails. I therefore fail to see how the confidentiality clause could validly protect the successful tenderer's tender price from disclosure after the contract has been awarded. Accepting a need for confidentiality in the pre-award phase, it seems to me that the intention of the drafter of the notice was no more than that a tenderer should not be able to know a competing tenderer's price in that period, hence the reference to "other tendered prices". In the context of the notice the tender price contemplated as protected by confidentiality was the total price without component details. It follows that once the contract was awarded the confidentiality clause, certainly insofar as the successful tenderer was concerned, was a spent force and offered Inter Waste no further protection from disclosure as regards its tender price.<sup>360</sup>

The court held that it could also not have been the intention of the parties that the rates should be kept confidential after the award.<sup>361</sup> The confidentiality clause provided no reason under section 37(1)(a) to refuse disclosure of the rates. The disclosure of the rates would therefore not "... constitute (grounds for) an action for breach of a duty of confidence owed to a third party in terms of an agreement" as contemplated in section 37(1)(a) of the Act.<sup>362</sup> Although the court found it unnecessary to decide on this aspect, it stated that it agreed that it can be concluded that if Inter Waste did indeed sue the appellant for breach of confidentiality the latter would not be at any risk of an adverse finding, whether as to material breach entitling cancellation, or as to an award of damages. It did so on the basis that the disclosure of the rates would not be likely to cause the harm referred to in section 36(1)(b) and could not

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<sup>360</sup> 2006 6 SA 285 (SCA) 301-302 par 55.

<sup>361</sup> 2006 6 SA 285 (SCA) 302 par 56.

<sup>362</sup> 2006 6 SA 285 (SCA) 302 par 57.

reasonably be expected to result in probable harm of the kinds referred to in section 36(1)(c).<sup>363</sup>

With regard to section 82, Transnet submitted that even if a case for the refusal to provide information is not established under sections 36 and 37, it can still be entitled to a discretionary order dismissing an application for information. The court found this submission untenable in that the Legislature enacted detailed provisions governing refusal of access to information. It would not then enable a court by way of an unlimited discretion to allow the refusal of information when the public body failed to justify such refusal under the detailed provisions. It further held that the primary purpose of the Act is to give effect to the constitutional right of access to State information. This right can be limited only as set out in sections 36 and 37. If the refusal cannot be brought under those sections, it cannot be allowed.<sup>364</sup> Finally, the court confirmed that section 11 of the Act made it clear that if a requester of information has complied with the procedural requirements and has overcome the refusal grounds in chapter 4, he or she must be given access irrespective of his or her reasons for the request.<sup>365</sup>

In the matter of *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd*<sup>366</sup> the unsuccessful tenderer, Intertrade Two (Pty) Ltd, requested information, in terms of the provisions of PAIA, relating to the tender adjudication process. Intertrade subsequently instituted review proceedings without the information requested being provided by the MEC. It successfully brought an application against the MEC to provide the information requested in terms of PAIA. The MEC appealed against the decision. The court held that section 7(1) which reads:

- (1) This Act does not apply to a record of a public body or a private body if
  - (a) that record is requested for the purpose of criminal or civil proceedings;

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<sup>363</sup> 2006 6 SA 285 (SCA) 302 par 57.

<sup>364</sup> 2006 6 SA 285 (SCA) 302 par 57.

<sup>365</sup> 2006 6 SA 285 (SCA) 303 par 59.

<sup>366</sup> 2006 5 SA 1 (SCA).

- (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
- (c) the production of or access to that record for the purpose referred to in para (a) is provided for in any other law.

– does not prevent the present application, as the request for information was made before the institution of review proceedings. It reiterated the objectives of the Act as being to make information held by the State accessible to the public to promote accountability.<sup>367</sup>

To be entitled to the information from a public body in terms of PAIA it is of course necessary that the definition of “public body” must be complied with. In *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo*<sup>368</sup> it was held that the former Iscor was a public body as defined in the Act and that it had to provide the records requested by the respondent in terms of the provisions of PAIA.<sup>369</sup>

It is clear that both PAJA and PAIA are important instruments in ensuring that the objectives of public procurement are achieved. This relates in particular to issues of fairness, transparency, accountability, the integrity of the process and effective remedies.

## **2.5 Conclusion**

Public procurement is an economic activity governments have to pursue, in order to fulfil their functions, as they cannot provide all goods and services “in house”. Public procurement can potentially include the procurement of any goods or services government might require to fulfil its functions. Although

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<sup>367</sup> 2006 5 SA 1 (SCA) 8 par 18.

<sup>368</sup> 2007 1 SA 66 (SCA).

<sup>369</sup> 2007 1 SA 66 (SCA) 77 par 28. Although applying the control test, the court referred to other tests (at 76 par 22) “not because the control test is inappropriate in the present case but to emphasise that the test may, under given circumstances, not be the most suitable one. In an era in which privatisation of public services and utilities has become commonplace, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies”.

public procurement will differ from state to state and procurement regime to procurement regime, a wide meaning is afforded to public procurement.<sup>370</sup>

With regard to the nature and scope of public procurement it can be concluded that section 217 of the Constitution is applicable to procurement in the broader sense, including the entire system of procurement, and not only the strictly contractual side thereof. Procurement by public bodies, which constitutes public procurement, includes procurement by organs of state within the three spheres of government and institutions identified in national legislation. Organs of state are identified in section 239 of the Constitution. The institutions to which public procurement apply are identified in the PFMA.<sup>371</sup>

Although the principles and objectives of public procurement will be dealt with in detail in the following chapters, it is at this stage already possible to draw some preliminary conclusions. The objective of value for money, which is fundamental to public procurement as an economic activity and important to the procuring entity, which wants its money to be used optimally, can be achieved by ensuring competition and wide participation in the process. The public's interest lies in the fact that it indirectly funds public procurement. The procurement ought therefore to be in its best interest. The public has the right to know that the money for public procurement is being spent responsibly. This can be achieved through deference to the principles of accountability, integrity and transparency. The right of private enterprises which participate in public procurement to fair treatment requires integrity, and transparency in the body adjudging the tenders, and the existence of effective remedies to deal with malpractice. It is notable that these principles are in essence invoked in section 217 of the Constitution. They provide the necessary foundations to give effect to the rights of the three interest groups, by requiring public procurement to be fair, equitable, transparent, competitive and cost-effective. These requirements should not be viewed as distinct or as standing alone. They relate closely to one another, and should they seem to compete they must be reasonably balanced with one another.

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<sup>370</sup> This is evident from the provisions of the Model Law, the GPA and South African law.  
<sup>371</sup> Sch 1, 2 and 3.

The secondary, non-commercial, function of public procurement is to promote government's socio-economic goals, and to promote its national agendas including objectives like sustainable development, environmental issues and the alleviation of poverty. Both the Model Law and the GPA acknowledge and provide for the need to achieve secondary objectives through public procurement. Specific provision is made in the Constitution for secondary or collateral objectives to be attained by public procurement. The PPPFA and the National Industrial Participation Programme in particular regulate the achievement of secondary objectives in public procurement. What is of importance is that these objectives must still be obtained through a system which is fair, equitable, transparent, competitive and cost-effective.

It is generally accepted that in the private law sphere the government acts as an equal to the private party and in the administrative law sphere the government acts from a position of public power and the other party from a position of subordination.<sup>372</sup> In the latter instance, administrative law provides the framework for the exercise of the state's public power.<sup>373</sup> The difference between private and public procurement manifests itself largely in the applicability of public law, in particular administrative law, to public procurement. Private parties generally have freedom of contract and may run their affairs within the boundaries of private law. The freedom of an organ of state to contract, however, is limited by the provisions of the Constitution, its enabling statutes, other applicable legislation,<sup>374</sup> and common law. The state has to run its affairs, including public procurement, within the limits of both public and private law.

That organs of state can contract is trite.<sup>375</sup> Their capacity to contract and the limitations thereon are regulated by the Constitution, common law and enabling legislation. As organs of state act through their officials, such officials' actions and decisions must be duly authorised by law. This entails that the statutory requirements and legal preconditions attached to any action,

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<sup>372</sup> Quinot *Judicial Regulation* 28; Wiechers *Administratiefreg* 50-51.

<sup>373</sup> Quinot *Judicial Regulation* 27.

<sup>374</sup> In particular PAJA and PAIA.

<sup>375</sup> *Minister of Home affairs v American Ninja IV Partnership* 1993 1 SA 257 (A) 268C-D.

decision or the exercise of a discretion, must be complied with by such an official when contracting.<sup>376</sup>

Our courts have held that the public procurement process, including the conduct of the process, the evaluation of the tender and the award of the contract, is a form of administrative action.<sup>377</sup> In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>378</sup> Nugent JA gave a very broad definition of administrative action when he held that:

Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.<sup>379</sup>

It can, however, be expected that the courts will still decide on a case by case basis what falls under “administrative action”, as was stated in *President of the Republic of South Africa v South African Rugby Football Union*.<sup>380</sup> Factors which were held to be relevant in deciding if an action constitutes “administrative action” are the nature of the power exercised, its subject matter, whether or not it involves the exercise of a public duty, and how

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<sup>376</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 58. Hoexter *Administrative Law* 224-292. S 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful. Hoexter categorises unlawful action as a ground of review as relating to the three main themes of legality namely the requirement of authority, the concept of jurisdiction and the abuse of discretion. Hoexter *Administrative Law* 225. For a discussion with regard to the possibility to bind the state through estoppel and the rule against fettering of discretion, see Bolton *Law of Government Procurement* 82-86.

<sup>377</sup> See Bolton *Law of Government Procurement* 18-19; *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W); *Umfolozu Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A); *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 (C); *ABBM Printing & Publishing (Pty) Ltd v Transnet* 1998 2 SA 109 (W); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 4 SA 375 (T); *Nextcom (Pty) Ltd v Funde* 2000 4 SA 491 (T); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T); *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA); *Compass Waste Services (Pty) Ltd v Chairperson, NC Tender Board* [2005] JOL 15344 (NC); *First Base Construction CC v Ukhahlamba District Municipality* [2006] JOL 16724 (E). An unsuccessful tenderer may take public procurement decisions on review also if the decision is not justifiable in relation to the reasons given, as stated in *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 1 SA 701 (O).

<sup>378</sup> 2005 6 SA 313 (SCA).

<sup>379</sup> 2005 6 SA 313 (SCA) at 323-324 par 23 and 24.

<sup>380</sup> 2000 1 SA 1 (CC) (1999 10 BCLR 1059) at 67-68 par 143.

closely it is related to policy matters (which are not administrative action), as opposed to the implementation of legislation, which will constitute administrative action.<sup>381</sup>

Quinot argues that the present classification approach by our courts is not a viable approach to the judicial regulation of state commercial activity.<sup>382</sup> The main reason for his reaching this conclusion is the inherent indeterminacy of the approach, with the resultant uncertainty and potential for uncertainty.<sup>383</sup> He proposes an open-ended approach which in practice entails that the choice as to which legal rules should apply to the commercial activity of the state must be made “with open and direct reference to the substantive considerations that inform both the applicability and substance of the particular rules”.<sup>384</sup> The results of such an approach would probably not be drastically different from those of the present approach by the courts, but would make it unnecessary for the courts to classify a particular action as either private or administrative.

In the following chapters the public procurement regime of the Model Law, the GPA and South African law will be dealt with in more detail.

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<sup>381</sup> 2000 1 SA 1 (CC) 67 par 143.

<sup>382</sup> Quinot *Judicial Regulation* 244.

<sup>383</sup> Quinot *Judicial Regulation* 244.

<sup>384</sup> Quinot *Judicial Regulation* 505.

## CHAPTER 3

### THE UNCITRAL MODEL LAW ON THE PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES (1994)

#### 3.1 Introduction

The United Nations Commission on International Trade Law<sup>1</sup> was established by the General Assembly of the United Nations on 17 December 1966.<sup>2</sup> The General Assembly recognised that the differences in national laws governing international trade inhibited such trade. It regarded the Commission as the vehicle by which the United Nations could play an active role in reducing or removing these obstacles to international trade.<sup>3</sup> The Commission's mandate is to further the progressive harmonisation and unification of the law of international trade so as to remove unnecessary obstacles to international trade caused by inadequacies and divergences in the law affecting trade.<sup>4</sup> South Africa is at present a member of the Commission.<sup>5</sup>

UNCITRAL has prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade.<sup>6</sup>

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<sup>1</sup> Hereafter referred to as UNCITRAL.

<sup>2</sup> Resolution 2205(XXI) of 17 December 1966.

<sup>3</sup> See in general: UNCITRAL 2009 *Mandate* [www.uncitral.org/](http://www.uncitral.org/).

<sup>4</sup> See UNCITRAL Guidelines to the Model Law on the Procurement of Goods, Construction and Services.

<sup>5</sup> The Commission is composed of sixty member States elected by the General Assembly. Membership is representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for a term of six years, the terms of half the members expiring every three years. See in general UNCITRAL 2009 *Origin* [www.uncitral.org/](http://www.uncitral.org/).

<sup>6</sup> These include *inter alia*: UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Model Law on International Commercial Conciliation, UNCITRAL Notes on Organising Arbitral Proceedings, Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules, UNCITRAL Conciliation Rules, UNCITRAL Arbitration Rules, UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL Legislative Guide on Insolvency Law, United Nations Convention on the Assignment of Receivables in International Trade, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, UNCITRAL Model Law on International Credit Transfers, United Nations Convention on International Bills of Exchange and International Promissory Notes, United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, United Nations Convention on the Carriage of Goods by Sea – the "Hamburg Rules", UNCITRAL Model Law on Electronic Signatures, UNCITRAL Model Law on Electronic Commerce, Recommendation on the Legal

The UNCITRAL Model Law on the Procurement of Goods and Construction was adopted by the Commission in 1993<sup>7</sup> and the Model Law on Procurement of Goods and Construction and Services in 1994.<sup>8</sup> This last-mentioned Model Law will be used in this thesis to evaluate the South African public procurement regime. The Model Law is designed to assist States in reforming and modernising their laws on procurement procedures. The Model Law contains procedures aimed at achieving the principles of competition, transparency, fairness and objectivity in the procurement process, thereby increasing economy and efficiency in procurement.<sup>9</sup> In order to assist governments, parliaments and legislatures using the Model Law, the Commission has produced a Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.<sup>10</sup>

Revisions to the Model Law are being undertaken by the Commission's Working Group I (Procurement), hereinafter referred to as the "Working Group".<sup>11</sup> The cumulative proposed revisions to the text of the Model Law discussed during the sixth to eleventh sessions of the Working Group were provisionally agreed upon and published in September 2007.<sup>12</sup> These revised provisions so published will be referred to as the "Revised Model Law". These provisions are not final and are still the subject of discussion by the Working

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Value of Computer Records, Model Legislative Provisions on Privately Financed Infrastructure Projects, UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, UNCITRAL Model Law on Procurement of Goods, Construction and Services, UNCITRAL Model Law on Procurement of Goods and Construction, UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, UNCITRAL Legal Guide on International Counter Trade Transactions, Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, United Nations Convention on Contracts for the International Sale of Goods (CISG), and the Convention on the Limitation Period in the International Sale of Goods.

<sup>7</sup> At its 26<sup>th</sup> session.

<sup>8</sup> At its 27<sup>th</sup> session. The former remains in place for states that do not want to include services. Only the latter will be discussed and will hereafter be referred to as the "Model Law".

<sup>9</sup> See in general on the origin, mandate and composition of UNCITRAL 1994 *Model Law* [www.uncitral.org/](http://www.uncitral.org/).

<sup>10</sup> Hereafter referred to as "the Guide to Enactment".

<sup>11</sup> UNCITRAL 2007 *Report* [daccessdds.un.org/](http://daccessdds.un.org/). See also the reports by the Working Group at its 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> sessions as contained in UNCITRAL documents A/CN.9/648, A/CN.9/664, A/CN.9/668 and A/CN.9/672 respectively.

<sup>12</sup> Report of the Working Group I (Procurement) on its Twelfth Session. UNCITRAL document A/CN.9/640 dated 13 September 2007. The revisions were published in UNCITRAL document A/CN.9/WG.I/.../CRP... dated 25 July 2007 in annexure A/CN.9/WG.I/XII/CRP.2.

Group. It is expected that the Working Group will complete its work only after 2009.<sup>13</sup> For purposes of this thesis the present Model Law will be used. Where applicable the proposed revisions provisionally agreed upon and published during September 2007<sup>14</sup> will be referred to in so far as they address issues of importance. Where necessary the further deliberations by the Working Group will be referred to.<sup>15</sup> These deliberations will not be dealt with in any detail because of the ongoing nature thereof and as the proposed new provisions may still change before a final new Model Law is agreed upon.

The Model Law is a template for reforming the procurement regimes of countries.<sup>16</sup> It has been used as the basis for many national statutes in countries with economies in transition, including countries in Central and Eastern Europe, the former Soviet Union, and Africa.<sup>17</sup>

In the preamble to the Model Law the following are stated to be its objectives:

- (a) Maximising economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by

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<sup>13</sup> Report of the Working Group I (Procurement) on its Twelfth Session. UNCITRAL document A/CN.9/640 dated 13 September 2007.

<sup>14</sup> UNCITRAL document A/CN.9/WG.I/.../CRP... dated 25 July 2007 in annexure A/CN.9/WG.I/XII/CRP.2.

<sup>15</sup> Outstanding issues deliberated on by the Working Group during its 13<sup>th</sup> session were framework agreements, suppliers lists, the use of electronic communication, the publication of procurement related information, abnormally low tenders and electronic reverse auctions. See Report of the Working Group I on its Thirteenth Session, UNCITRAL Document A/CN.9/648. During the 14<sup>th</sup> session the provisions relating to review, framework agreements and conflict of interests were discussed. See Report of the Working Group I on its Fourteenth Session, UNCITRAL document A/CN.9/664. During the 15<sup>th</sup> session the revised provisions as a whole were deliberated but a final document was not agreed upon as it was decided that further research was needed to ensure that all provisions are compliant with the relevant international instruments. See Report of the Working Group I on its Fifteenth Session, UNCITRAL document A/CN.9/668. At the Working Group's 16<sup>th</sup> meeting it dealt with a proposal on the inclusion of provisions relating to the "Request for Proposals with Competitive Negotiations". See Report of the Working Group I on its Sixteenth Session UNCITRAL document A/CN.9/672.

<sup>16</sup> Arrowsmith 2004 *ICLQ* 17. See in general Hunja "UNCITRAL Model Law"; Arrowsmith, Linarelli and Wallace *Regulating Public Procurement*, Wallace 1992 *PPLR* 406; Wallace 1994 *PPLR* 2; Westring 1994 *PPLR* 142; Meyers 1993 *International Business Lawyer* 179; Dischendorfer 2003 *PPLR* 100.

<sup>17</sup> Arrowsmith 2004 *ICLQ* 20. See also UNCITRAL 2009 *Status* [www.uncitral.org/](http://www.uncitral.org/) where the following countries are listed: Afghanistan (2006), Albania, Azerbaijan, Croatia, Estonia, Gambia (2001), Kazakhstan, Kenya, Kyrgyzstan, Malawi (2003), Mauritius, Moldova, Mongolia, Nigeria (2007), Poland, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan.

suppliers and contractors regardless of nationality, thereby promoting international trade;

- (c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement.<sup>18</sup>

In the Guide to Enactment the objectives identified are maximising competition, according fair treatment to tenderers, and enhancing transparency and objectivity. It is stated that this will foster economy and efficiency and curb abuses. It is stated that the Model Law will create an environment in which the public is assured that public funds are likely to be spent with responsibility and accountability, ensuring that fair value is obtained in an environment in which parties are confident of obtaining fair treatment.<sup>19</sup>

The Model Law can be used as a benchmark for public procurement against which the regime in South Africa can be evaluated. The discussion of the Model Law entails a broad exposition of its structure and its provisions aimed at ensuring that the general principles of public procurement are achieved in practice. It is not the purpose of this study to go into minute detail, but rather to give an exposition of the most important aspects of the Model Law so as to enable an understanding of the public procurement regime proposed by the Model Law.

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<sup>18</sup> See the Preamble of the Model Law. In the Guidelines it is stated that “the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries”.

<sup>19</sup> Guide to Enactment par 8.

The text of the Model Law is readily available and should be consulted if necessary.<sup>20</sup> The Model Law comprises six chapters, namely

- General provisions;
- Methods of procurement and their conditions for use;
- Tendering proceedings;
- Principle method for procurement of services;
- Procedures for alternative methods of procurement; and
- Review.

With a few exceptions, the framework of the Model Law will be followed in the discussion. First the general provisions of the Model Law will be discussed, then the primary or general method of procurement of goods and construction. Thereafter the procurement methods for services will be addressed, then the alternative methods of procurement, and finally the review procedures. Although it will be endeavoured to keep as close as possible to the text of the Model Law, the exact wording will not always be used. Only a general discussion of the import of the different provisions of the Model Law will be given. To determine the exact meaning of a particular provision it will be necessary to consult the original text of the Model Law. The principles applicable to a public procurement system as it is reflected in the Model Law will be extracted from this discussion. These principles so extracted and the way in which content is given thereto in the Model Law will be used in Chapter 6 in comparison with and in evaluating the South African public procurement regime.

## **3.2 General provisions**

### *3.2.1 Introduction*

The Model Law is a framework law and provides for detailed regulations to be issued, by the enacting state, for the implementation of the procurement system.<sup>21</sup> The Model Law itself provides all of the essential principles and procedures for conducting procurement proceedings in the various types of

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<sup>20</sup> See UNCITRAL 1994 *Model Law* [www.uncitral.org/](http://www.uncitral.org/).

<sup>21</sup> Model Law art 4, Guide to Enactment par 12 and 13.

circumstances likely to be encountered by procuring entities.<sup>22</sup> The Model Law also allows for changing circumstances in that the state can address such changes by amending the regulations whilst still adhering to the Model Law itself. The Model Law does not address all of the legal aspects relating to procurement. The particular state's laws will still regulate many of the issues relevant to procurement, in particular with regard to the law of contract, administrative and criminal law.

### 3.2.2 *Scope of the Model Law*

The Model Law is framed as widely as possible.<sup>23</sup> It does, however, provide for the exclusion of defence and security-related procurement, as well as for the exclusion of other sectors, if the enacting state wishes to exclude them. It can do so either in the law adopted by the state or in the procurement regulations enacted in terms thereof.<sup>24</sup> It is provided that it is possible, at the discretion of the procuring entity, to apply the Model Law even in the excluded sectors.<sup>25</sup> Deference is given to the international obligations of the enacting state. The Model Law provides that international obligations, in terms of treaties or other forms of agreements, prevail over the Model Law to the extent of any inconsistent requirements.<sup>26</sup>

### 3.2.3 *Publication of legal texts and procurement opportunities*

To ensure transparency and to enable everyone to participate in public procurement, it provides that the text of the enacted law, the procurement regulations and all administrative rulings and directives of general application which relate to procurement covered by the enactment, and all amendments

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<sup>22</sup> The general provisions relate to the scope of application, definitions, international obligations of the state relating to procurement, procurement regulations, public accessibility of legal texts, qualifications of suppliers and contractors, pre-qualification proceedings, participation by suppliers or contractors, form of communications, rules concerning documentary evidence provided by suppliers or contractors, record of procurement proceedings, rejection of all tenders, proposals, offers or quotations, entry into force of the procurement contract, public notice of procurement contract awards, inducements from suppliers or contractors, rules concerning description of goods, construction or services, and language.

<sup>23</sup> Art 1. Procurement is defined in art 2 as the acquisition by any means of goods, construction or services.

<sup>24</sup> Art 1(2).

<sup>25</sup> Art 1(3).

<sup>26</sup> Art 3.

thereof, must be made accessible to the public. Such information must be systematically maintained in order to keep it up to date.<sup>27</sup>

In terms of the Revised Model Law judicial decisions and administrative rulings with precedence value must also be made available to the public and be updated.<sup>28</sup> After the beginning of the fiscal year procuring entities may publish information of the forthcoming expected procurement opportunities.<sup>29</sup> This particular provision is not obligatory but will be a useful instrument to provide information of forthcoming opportunities and will probably ensure better participation by the private sector, resulting in the achievement of value for money and ensuring transparency. These provisions will enhance transparency, effectiveness and competition in the procurement process and are fair towards potential tenderers.

#### *3.2.4 Qualifications of suppliers and contractors*

Provision is made for the ascertainment, by the procuring entity, of the qualifications of suppliers or contractors at any stage of the procurement proceedings.<sup>30</sup> The criteria for qualification relate to a variety of factors such as professional and technical qualifications and abilities,<sup>31</sup> legal capacity,<sup>32</sup> financial means,<sup>33</sup> fulfilment of obligations to the state regarding taxes,<sup>34</sup> and a clean criminal record.<sup>35</sup> The criteria and procedures that the procuring entity may use to assess the qualifications of suppliers and contractors are specified.<sup>36</sup> It is provided that the requirements should be set out in the tender

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<sup>27</sup> Art 5.

<sup>28</sup> Revised Model Law art 5(2). The inclusion of judicial decisions and administrative rulings in the information that must be made available will assist, especially in the common law countries, with transparency. The limitation that they must have precedence value is practical.

<sup>29</sup> Revised Model Law art 5(3).

<sup>30</sup> Art 6.

<sup>31</sup> Art 6(1)(b)(i).

<sup>32</sup> Art 6(1)(b)(ii).

<sup>33</sup> Art 6(1)(b)(iii).

<sup>34</sup> Art 6(1)(b)(iv).

<sup>35</sup> Art 6(1)(b)(v).

<sup>36</sup> Art 6(1). These include: (i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract; (ii) That they have legal capacity to enter into the procurement contract; (iii) That they are not insolvent, in receivership, bankrupt or

documents and applied equally to all suppliers.<sup>37</sup> The tenderers must be evaluated in accordance with the criteria set out in the tender documents.<sup>38</sup> If any information provided by a tenderer regarding the qualifications of the tenderer were to be **false**, such a tenderer **would have** to be disqualified.<sup>39</sup> If such information were **materially inaccurate** or incomplete the tenderer **might** be disqualified.<sup>40</sup> If such information were **not materially** incorrect or incomplete the tenderer **might not** be disqualified.<sup>41</sup>

The above provisions will ensure fairness to all tenderers in that they are treated equally; - transparency in that the criteria will be set out in the tender documents and applied in the evaluation process; – value for money in that only qualified tenderers will be eligible for the award of the tender; – the combating of abuse in that tenderers may be disqualified in the case of inappropriate conduct; – the integrity of the system in that dishonesty will be dealt with and criteria will be applied objectively; – and fairness to the government in that tenderers need to fulfil their obligations to the state, like the payment of taxes.

Pre-qualifying procedures are provided that enable the procuring authority to identify suppliers and contractors that are qualified to do the work or supply the goods before the submission of tenders.<sup>42</sup> Article 6, which deals with the qualifications of tenderers, is also applicable to the pre-qualification process.<sup>43</sup> These provisions are designed to ensure that the suppliers and contractors are qualified to perform the procurement contracts awarded to them. The Model Law

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being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing; (iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State; (v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

<sup>37</sup> Art 6(3).

<sup>38</sup> Art 6(4).

<sup>39</sup> Art 6(6)(a).

<sup>40</sup> Art 6(6)(b).

<sup>41</sup> Art 6(6)(c).

<sup>42</sup> Art 7.

<sup>43</sup> Art 7(2).

also provides for re-confirmation, at later stages, of the qualifications of suppliers and contractors that had been pre-qualified.<sup>44</sup> This helps to ensure that risks are avoided, corruption is minimised, and the process is successfully completed. It also addresses the effectiveness of the tenderers and is fair towards the procuring entity.

### 3.2.5 *Form of communication*

Communications must be in a form that provides a record of the content of the communication.<sup>45</sup> No other requirements with regard to documentary evidence provided by suppliers or contractors in qualifying procedures may be imposed than those already prescribed by the laws of the country.<sup>46</sup> Although electronic communications are allowed, electronic communication cannot in terms of the Model Law be made obligatory.<sup>47</sup>

Electronic communication is dealt with in article 5*bis* of the Revised Model Law. Provision is made that documents, notifications, decisions, and other communication in the course of the procurement must be in a form that provides a record of the content of the information and is accessible and usable for subsequent reference.<sup>48</sup> This also applies to review proceedings and the record of proceedings provided for in article 11 of the Model Law.<sup>49</sup> Communication of information may be done by means that do not provide a record of the content on condition that immediately thereafter confirmation of the communication is given in a form that provides a record of the content thereof. It must be accessible in

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<sup>44</sup> Art 6(8).

<sup>45</sup> Art 9. The United Nations Convention on the Use of Electronic Communications in International Contracts in art 9.2 provides for information contained in electronic communication to be accessible so as to be usable for subsequent reference. S 12(b) of the *Electronic Communication and Transaction Act 25 of 2002* has the same requirement.

<sup>46</sup> Art 10.

<sup>47</sup> See in general the provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts. The Convention is available at UNCITRAL 2005 *Convention* [www.uncitral.org/](http://www.uncitral.org/), and the South African *Electronic Communication and Transaction Act 25 of 2002*. Although the Convention is not in operation yet it may in future be relevant for international public procurement. See also Eiselen 2007 *PER* [www.puk.ac.za/](http://www.puk.ac.za/).

<sup>48</sup> Revised Model Law art 5*bis*(1).

<sup>49</sup> Revised Model Law art 5*bis*(1).

order to be useable for future reference.<sup>50</sup> These provisions *inter alia* enable the use of electronic media on condition that confirmation is provided in a form that provides a record of the content of the communication which can be used for future reference. The importance of having a record for future reference is apparent in that it will ensure transparency, efficiency, competition and integrity, and enable parties to exercise their rights in cases of dispute.

It is further provided in the Revised Model Law that the procuring entity must specify the form of communication, which has to provide a record of the content of the information communicated;<sup>51</sup> the means to be used to communicate information;<sup>52</sup> the means to be used to satisfy the requirements of “writing” and “signature”;<sup>53</sup> and the means to be used to hold meetings.<sup>54</sup> Such means should be readily capable of being used and must be similar to means commonly used by suppliers and contractors. The means to hold meetings must ensure the full and contemporaneous participation therein.<sup>55</sup> Appropriate measures must be put in place to secure authenticity, integrity and confidentiality of information.<sup>56</sup> These issues are of course important in the use of electronic communications. The Revised Model Law refers to the principles of authenticity, integrity, confidentiality, accessibility, transparency and participation, but leaves it to the enacting state to determine how these principles should be achieved.

### 3.2.6 *Record of proceedings*

Another important provision is that a record of the procurement proceedings must be maintained.<sup>57</sup> At least the following information must be retained:

- a description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;<sup>58</sup>

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<sup>50</sup> Revised Model Law art 5*bis*(2).

<sup>51</sup> Revised Model Law art 5*bis*(3)(a).

<sup>52</sup> Revised Model Law art 5*bis*(3)(b).

<sup>53</sup> Revised Model Law art 5*bis*(3)(c).

<sup>54</sup> Revised Model Law art 5*bis*(3)(d).

<sup>55</sup> Revised Model Law art 5*bis*(4).

<sup>56</sup> Revised Model Law art 5*bis*(5).

<sup>57</sup> Art 11.

<sup>58</sup> Art 11(1)(a).

- the names and addresses of all suppliers or contractors that submitted tenders, proposals, offers or quotations,
- the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;<sup>59</sup>
- information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;<sup>60</sup>
- the price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;<sup>61</sup>
- a summary of the evaluation and comparison of the tenders, proposals, offers or quotations, which must include the application of any margin of preference;<sup>62</sup>
- if all tenders, proposals, offers or quotations were rejected,<sup>63</sup> a statement to that effect setting out the grounds for the rejection;<sup>64</sup>
- if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefore;<sup>65</sup>
- information regarding inducements relating to the procurement, as required by article 15;<sup>66</sup>
- the fact of the rejection of a tender, proposal, offer or quotation pursuant to the above provision,<sup>67</sup> in procurement proceedings involving the use of a procurement method pursuant to article 18(2),<sup>68</sup> or article 18(3)(a);<sup>69</sup>

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<sup>59</sup> Art 11(1)(b).

<sup>60</sup> Art 11(1)(c).

<sup>61</sup> Art 11(1)(d).

<sup>62</sup> Art 11(1)(e) The margin of preference is dealt with in art 34(4)(d) and 39(2).

<sup>63</sup> This is provided for in art 12.

<sup>64</sup> Art 11(1)(f).

<sup>65</sup> Art 11(1)(g).

<sup>66</sup> Information must be provided with regard to an offer, giving or agreement to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.

<sup>67</sup> Art 11(1)(h).

<sup>68</sup> In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to art 19, 20, 21 or 22.

<sup>69</sup> In the procurement of services, a procuring entity must use the method of procurement set forth in ch IV, unless the procuring entity determines that it is feasible to formulate

- a statement setting out the grounds and circumstances on which the procuring entity relied to justify the selection of the procurement method used;<sup>70</sup> in the procurement of services by means of chapter IV, a statement<sup>71</sup> setting out the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;<sup>72</sup>
- in procurement proceedings involving direct invitations of proposals for services,<sup>73</sup> a statement of the grounds and circumstances on which the procuring entity relied to justify the direct invitation;<sup>74</sup>
- in procurement proceedings in which the procuring entity, limits participation on the basis of nationality,<sup>75</sup> a statement of the grounds and circumstances on which the procuring entity relied to impose the limitation;<sup>76</sup>
- a summary of any requests for clarification of the prequalification documents or invitation to tender, the responses thereto, and a summary of any amendment of those documents.<sup>77</sup>

The Revised Model Law adds that the procuring entity's decision as to what means of communication must be used in the procurement proceedings must be part of the record.<sup>78</sup>

All of the important information relating to the procurement process must be recorded. It is notable that in instances where the procuring entity uses methods of procurement other than tendering, it must give reasons for its decisions. Reasons must also be given as to why no tender was accepted. This should go a long way to ensure transparency, the fair treatment of parties, equitability, the integrity of the system, competition and the ability to review the proceedings. The

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detailed specifications and tendering proceedings that would be more appropriate taking into account the nature of the services to be procured, or that it would be more appropriate to use a method of procurement referred to in art 19 to 22, provided that the conditions for the use of that method are satisfied.

<sup>70</sup> Art 11(1)(i).

<sup>71</sup> Required under art 41(2).

<sup>72</sup> Art 11(1)(j).

<sup>73</sup> In accordance with art 37 (3).

<sup>74</sup> Art 11(1)(k).

<sup>75</sup> In accordance with art 8(1).

<sup>76</sup> Art 11(1)(l).

<sup>77</sup> Art 11(1)(m).

<sup>78</sup> Revised Model Law art 11(1)(b)*bis*.

possible liability of procuring entities is limited by the provision that it shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the provisions of article 11.<sup>79</sup>

Detailed provision is made for access to information, or portions thereof, with due regard to the interest of the procurement entity and tenderers that certain information be kept confidential.<sup>80</sup> Access to information is essential to ensure competition, participation, transparency, fairness, and the integrity of the system, and to enable parties to exercise their rights. The principles of the integrity of the system, fairness and competition require certain information to be kept confidential.

### 3.2.7 *Rejection of tenders*

All tenders<sup>81</sup> may be rejected if so provided in the invitation to tender.<sup>82</sup> Notice of such rejection must be given to all of the suppliers or contractors that submitted tenders.<sup>83</sup> The grounds for the rejection must be provided on request, but such grounds need not be justified.<sup>84</sup> This provision reflects the position under the law of contract, save that the grounds for such rejection need not be provided.

The Revised Model Law provides for the rejection of abnormally low tenders.<sup>85</sup> It is still being considered if it should be included that this right must be referred to in the tender documents.<sup>86</sup> Before such a rejection the procuring entity must, in writing, request from the tenderer details of the constituent elements of the

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<sup>79</sup> Art 11(4).

<sup>80</sup> Art 11(2). It is provided in art 11(3) that the procuring entity shall not disclose:

“(a) Information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition; (b) Information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1)(e)”.

<sup>81</sup> The Model Law refers to tenders, proposals, offers and quotations.

<sup>82</sup> Art 12(1).

<sup>83</sup> Art 12(3).

<sup>84</sup> Art 12(1).

<sup>85</sup> Revised Model Law art 12*bis*.

<sup>86</sup> Revised Model Law art 12*bis*(1)(a).

tender that give rise to the concern that the tenderer will be unable to perform.<sup>87</sup> It is essential that such an opportunity be afforded to tenderers as there may be special circumstances enabling a tenderer to provide goods or services at a particular rate. This will ensure fairness to the tenderer and will enhance transparency.

The Revised Model Law further provides that if the procuring entity, after taking into account the information supplied by the tenderer, is still on reasonable grounds of the opinion that the tender should be rejected, it can do so.<sup>88</sup> It has to record the reasons for its opinion.<sup>89</sup> The fact that reasons must be recorded will of course enhance transparency, fairness, and the integrity of the process, and will assist in the review of decisions. It is still being considered if it should be provided that the tender documents should include a statement that a procuring entity may carry out analyses of potential performance risks and prices submitted.<sup>90</sup> The inclusion thereof will enhance transparency, avoid unnecessary disputes, minimise risks, and ensure that value for money is obtained.

The decision of the procuring entity to reject a tender and the grounds for such a decision must be recorded in the record of proceedings and promptly communicated to the tenderer.<sup>91</sup> This provision is a vast improvement on the Model Law as it makes the provision of reasons for the decision obligatory. It is to be welcomed that the reasons for decisions should be provided from the outset and not only on request. This should encourage a proper evaluation before a decision is made and ensure that reasons are not determined *ex post facto*, when a request for reasons is received. Although it will increase the administrative burden of the procuring entity and have a cost and time implication the positive consequences of forcing the procuring entity to properly apply its mind outweighs the negative side of this provision. This will once again enhance transparency, fairness, and the integrity of the process, and will assist with review proceedings. The requirement of promptness is important as information

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<sup>87</sup> Revised Model Law art 12*bis*(1)(b).

<sup>88</sup> Revised Model Law art 12*bis*(1)(c).

<sup>89</sup> Revised Model Law art 12*bis*(1)(d).

<sup>90</sup> Revised Model Law art 12*bis*(2).

<sup>91</sup> Revised Model Law art 12*bis*(3).

is most useful during the procurement process to enable parties to exercise their rights and to prevent undue delays. This will also ensure the effectiveness of the process.

### *3.2.8 Notice of awards and inducements from tenderers*

The outcome of tender awards must be published.<sup>92</sup> A procuring entity has to reject a tender if the supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.<sup>93</sup> Such a rejection of the tender and the reasons for such a decision have to be recorded in the record of the procurement proceedings and communicated to the supplier or contractor.<sup>94</sup> These provisions should combat corruption and enhance the integrity and transparency of the process. They will also ensure fairness to participating tenderers.

### *3.2.9 Description of goods, construction and services*

Obstacles to participation in the procurement proceedings, including obstacles based on the nationality of suppliers or contractors, may not be included or used in the pre-qualification documents or other tender documents. This relates specifically to specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services.<sup>95</sup> These specifications, plans, drawings, designs and requirements or descriptions of goods, construction or services must as far as possible be based on the relevant objective technical

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<sup>92</sup> Art 14.

<sup>93</sup> Art 15.

<sup>94</sup> Art 15.

<sup>95</sup> Art 16(1).

and quality characteristics of the goods, construction or services to be procured.

There may be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured. Even in such instances words such as “or equivalent” must be included.<sup>96</sup> In the formulation of any specifications, plans, drawings and designs, standardised features, requirements, symbols and terminology must be used.<sup>97</sup> Similar provisions relate to the formulation of the procurement agreement to be entered into.<sup>98</sup> These provisions will ensure fairness to the potential tenderers, enhance competition and participation and further the objective of obtaining value for money. They will ensure the integrity of the system as objective criteria will be specified and applied in the evaluation and award of the tender.

### *3.2.10 Use of language*

All of the tender documents must be formulated in the language specified by the enacting state and in a language customarily used in international trade. The requirement of the use of a language used in international trade is not applicable where the procurement is limited to domestic suppliers, or if the procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested.<sup>99</sup> These provisions should enhance competition, fairness, transparency and cost-effectiveness.

### *3.2.11 Conclusion on general provisions*

It is clear in chapter one of the Model Law already that although a margin of choice is left to the enacting state, certain principles are entrenched. It is also apparent that many of these principles are interrelated, may overlap, may influence one another, may in certain circumstances even be in conflict, and that

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<sup>96</sup> Art 16(2).

<sup>97</sup> Art 16(3)(a).

<sup>98</sup> Art 16(3)(b).

<sup>99</sup> Art 17.

usually more than one principle is invoked by the same provision. It is also problematic to decide whether a specific goal, for instance the accessibility of information, should be regarded as a separate objective or should be classified under another principle, for instance that of transparency. At this stage it is not really important to decide whether the specific principle can stand on its own feet or be grouped under another principle. A possible classification will be attempted in the concluding chapter of this thesis.

The following principles can be extracted from the general provisions:

- Transparency is ensured through various provisions. These include provisions relating to the accessibility of legal and other texts,<sup>100</sup> participation by suppliers or contractors,<sup>101</sup> the form of communications to be used,<sup>102</sup> rules concerning documentary evidence provided by suppliers or contractors,<sup>103</sup> public notice of procurement contract awards,<sup>104</sup> the keeping of a record of proceedings,<sup>105</sup> and rules with regard to the description of goods, construction or services.<sup>106</sup> In particular, content is given to this objective by ensuring promptness, accessibility and the systematic maintenance of information. It is further ensured in that reasons must promptly be provided for certain decisions, a proper record must be kept that can be used for subsequent reference, criteria applicable to the procurement must be included in the tender documentation, and an official language of the state and one used in international trade must be prescribed.
- Competitiveness is enhanced by ensuring that the scope of application is as wide as possible,<sup>107</sup> by ensuring the publication of all relevant information,<sup>108</sup> by providing for electronic communication,<sup>109</sup> by providing for ascertainable uniform criteria with regard to the qualifications of

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<sup>100</sup> Art 5.

<sup>101</sup> Art 8.

<sup>102</sup> Art 9.

<sup>103</sup> Art 10.

<sup>104</sup> Art 14.

<sup>105</sup> Art 11.

<sup>106</sup> Art 16.

<sup>107</sup> Art 1.

<sup>108</sup> Art 5.

<sup>109</sup> Revised Model Law art 5*bis*.

suppliers<sup>110</sup> and the description of the goods and services to be procured<sup>111</sup> and by prescribing an international trade language to be used together with the national language.<sup>112</sup> In particular international participation is encouraged by providing for participation without regard to nationality, save if decided to the contrary by the procuring entity on grounds specified in the procurement regulations or other legislation.<sup>113</sup> In the initial tender documents it must be stated if participation is limited to nationals and this decision may not be altered during the process.<sup>114</sup>

- Issues like fairness and equitability are also addressed, in that the Model Law sets out in detail what requirements must be met, for instance, to qualify to tender.<sup>115</sup> These *inter alia* include the requirement that all obligations to pay taxes and social security contributions to the state must have been met.<sup>116</sup> Requirements must be set out in the pre-qualification and solicitation documents, and must apply equally to all suppliers or contractors.<sup>117</sup> No criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in the Model Law may be imposed.<sup>118</sup> The evaluation may be done only in accordance with such qualification criteria and procedures.<sup>119</sup> The principle of transparency and competitiveness also leads to fairness and equitability.
- Value for money is ensured through the principles of transparency, fairness and equitability and competitiveness mentioned above. It is further enhanced through the avoidance of risks by requiring pre-qualification of tenderers,<sup>120</sup> by prescribing objective qualification criteria,<sup>121</sup> the possibility to reject all tenders,<sup>122</sup> and guidance as to how to deal with abnormally low tenders.<sup>123</sup>

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<sup>110</sup> Art 6.  
<sup>111</sup> Art 16.  
<sup>112</sup> Art 17.  
<sup>113</sup> Art 8.  
<sup>114</sup> Art 8(3).  
<sup>115</sup> Art 6.  
<sup>116</sup> Art 6(1)(b)(iv).  
<sup>117</sup> Art 7.  
<sup>118</sup> Art 6(3).  
<sup>119</sup> Art 6(4).  
<sup>120</sup> Art 7.  
<sup>121</sup> Art 6.

- Effective remedies are ensured by requiring a proper record of proceedings<sup>124</sup> and reasons to be given for certain decisions.<sup>125</sup> This is also attained through the principle of transparency.
- The integrity of the process is ensured and corruption is curbed by providing for the disqualification of tenders because of dishonesty or incorrect information.<sup>126</sup> The integrity of the process is further enhanced by prescribing objective criteria for the evaluation of tenders and tenderers.<sup>127</sup>
- Effectiveness is generally ensured through all of the above objectives but in particular through the requirements of promptness,<sup>128</sup> the accessibility, publication and systematic maintenance of information,<sup>129</sup> and guidance in the use of electronic communication.<sup>130</sup>

One issue the Model Law does not specifically deal with is community participation in the procurement process. It has been identified as one of the matters the Working Group may look at.<sup>131</sup> Community participation has been successful in small-scale development but is not necessarily suited for larger-scale procurement, where there is a need for a high level of expertise.<sup>132</sup> The Working Group has not made any recommendations in this regard yet. This is an issue with relevance to the objective of promoting socio-economic policies, especially in developing countries.

A further issue that is not dealt with in the Model Law is contract administration. This is an area which can lead to abuse if not regulated properly. The beneficial results of competition can for instance be lost by amending contracts once the

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<sup>122</sup> Art 12.

<sup>123</sup> Revised Model Law art 12*bis*.

<sup>124</sup> Art 11.

<sup>125</sup> Art 7, 8, 12, 15 of the Model Law and Revised Model Law art 12*bis*.

<sup>126</sup> Art 6(6) and 12.

<sup>127</sup> Art 6.

<sup>128</sup> Revised Model Law art 5(1) and 12*bis*(3).

<sup>129</sup> Art 5.

<sup>130</sup> Revised Model Law art 5*bis*.

<sup>131</sup> Working Group, UNCITRAL document A/CN.9/WG.I/WP.32 dated 25 June 2004.

<sup>132</sup> *Id* par 62-64, 15 and 16.

tender has been awarded.<sup>133</sup> This has also not been dealt with in the Revised Model Law either.

### **3.3 Primary procurement method for goods and construction: Competitive tendering**

#### *3.3.1 Introduction*

Several procurement methods are provided for in the Model Law.<sup>134</sup> This enables different states to deal with varying circumstances and to choose methods compatible with the practices in those states. States may choose not to incorporate all of the alternative methods of procurement into their national law.<sup>135</sup> The Model Law differentiates between procurement methods for goods and construction and procurement methods for services. The procurement of services is dealt with separately in the Model Law and specific procedures are prescribed for the procurement of services.<sup>136</sup>

In the procurement of goods and services, preference is given to tender procedures, as procedural clarity generally deemed to be the most effective in promoting competition, economy and efficiency in procurement.<sup>137</sup> The Model Law also prescribes alternative methods that may be used in the case of goods, construction and services.<sup>138</sup>

Open or competitive tendering implies that an open invitation is sent out to the general public to tender in accordance with criteria and requirements set out in the invitation to tender. All tenders are evaluated and the responsive tender with the lowest price is awarded the contract. This method is generally recognised as being the most effective in promoting competition, economy, efficiency and most of the other principles of public procurement.<sup>139</sup> The Model Law provides for an unrestricted invitation to suppliers and contractors

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<sup>133</sup> Arrowsmith 2004 *ICLQ* 44-45.

<sup>134</sup> Ch II.

<sup>135</sup> Footnote to art 18.

<sup>136</sup> See ch IV of the Model Law.

<sup>137</sup> Guide to enactment par 14; Model Law art 18(1).

<sup>138</sup> Art 20, 21, 22 and 22*bis*.

<sup>139</sup> Guide to Enactment par 14; Arrowsmith *Public and Utilities Procurement* 423; Bolton *Law of Government Procurement* 131.

to tender for the procurement of goods and construction so as to ensure the widest and most competitive participation in the procurement process.<sup>140</sup> A distinction is made between domestic and international procurement. In the case of domestic procurement certain procedures need not be followed.<sup>141</sup>

### 3.3.2 *Invitation to tender and applications to pre-qualify*

Provision is made for the publication of invitations to tender or to pre-qualify in an official gazette<sup>142</sup> and in a language customarily used in international trade, in a newspaper of wide international circulation, or in a relevant trade publication or technical or professional journal of wide international circulation.<sup>143</sup> This should enhance competition and efficiency by ensuring wide and effective circulation of the invitation.

Detailed provision is made as to what has to be included in the advertisement of the invitation to tender<sup>144</sup> and to pre-qualify.<sup>145</sup> This detail will enable potential tenderers to determine whether they are interested in the opportunity and can in principle qualify to tender, and will enable them to obtain the tender documentation. This ensures transparency, competition and efficiency as the

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<sup>140</sup> Art 18(1).

<sup>141</sup> Art 23. This is the case where procurement is limited to domestic suppliers to art 8 and where the procuring entity decides, because of the low value of the procurement, that the only likely tenderers will be domestic ones.

<sup>142</sup> Art 24(1).

<sup>143</sup> Art 24(2).

<sup>144</sup> Art 25(1). The contents of the invitation must at a minimum include the name and address of the procuring entity; the nature and quantity, and place of delivery of the goods to be supplied; the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided; the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services; the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors; a declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality; the means of obtaining the solicitation documents and the place from which they may be obtained; the price, if any, charged by the procuring entity for the solicitation documents; the currency and means of payment for the solicitation documents; the language or languages in which the solicitation documents are available; and the place and deadline for the submission of tenders.

<sup>145</sup> Art 25(2). In addition to most of the above the following must be included: the means of obtaining the pre-qualification documents and the place from which they may be obtained; the price, if any, charged by the procuring entity for the pre-qualification documents; the currency and terms of payment for the pre-qualification documents; the language or languages in which the pre-qualification documents are available; and the place and deadline for the submission of applications to pre-qualify.

essential information necessary for suppliers to determine whether they want to participate will be available.

The tender documents must be supplied to contractors in accordance with the procedures and requirements specified in the advertised invitation to tender. In the instances where prequalification is applicable, the procuring entity must provide a set of tender documents to each supplier or contractor that has been pre-qualified and that pays the costs, if any, charged for those documents. The price of the tender documents requested may include only the cost of printing and providing the documents to suppliers or contractors.<sup>146</sup> These provisions should ensure efficiency, transparency and competition. The limitation as to costs will promote participation by potential tenderers.

The information that must be included in the tender documentation is prescribed in detail.<sup>147</sup> The prescribed information is comprehensive and ensures that

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<sup>146</sup> Art 26.

<sup>147</sup> Art 27 provides that at least the following should be included in the solicitation documents:

- “(a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 34 (6);
- (c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;
- (e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34(4)(b), (c) or (d) and the relative weight of such criteria;
- (f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (g) If alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;
- (h) If suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;
- (i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation

prospective tenderers are made aware of all of the criteria to be applied when evaluating the tender and of all of the formal requirements of the tender procedure. This should ensure transparency, that all tenderers are treated fairly, and that the process is effective and objective, in that everyone is aware of what

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- and insurance charges, customs duties and taxes;
- (j) The currency or currencies in which the tender price is to be formulated and expressed;
  - (k) The language or languages, in conformity with article 29, in which tenders are to be prepared;
  - (l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;
  - (m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;
  - (n) The manner, place and deadline for the submission of tenders, in conformity with article 30;
  - (o) The means by which, pursuant to article 28, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;
  - (p) The period of time during which tenders shall be in effect, in conformity with article 31;
  - (q) The place, date and time for the opening of tenders, in conformity with article 33;
  - (r) The procedures to be followed for opening and examining tenders;
  - (s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 34 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;
  - (t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;
  - (u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;
  - (v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to counter trade or to the transfer of technology;
  - (w) Notice of the right provided under article 52 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;
  - (x) If the procuring entity reserves the right to reject all tenders pursuant to article 12, a statement to that effect;
  - (y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 36, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;
  - (z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.”

they have to tender for, how they have to do so, and what the applicable criteria are.

Potential tenderers may ask for clarification of the invitation to tender. The procuring entity must respond within a reasonable time so as to enable the potential tenderer to make a timely submission of its tender. It must also communicate the clarification to all other potential tenderers to whom the tender documents were supplied.<sup>148</sup> This should ensure effectiveness and transparency in the process, in that potential misinterpretations can be timeously addressed.

The procuring entity is allowed to modify the tender documents before the expiry date for the tender. Such variation must be communicated to all potential tenderers who received documentation.<sup>149</sup> Minutes of a meeting with potential tenderers must be kept. The minutes must indicate all clarifications to the tender documentation. Such minutes must be provided to all potential tenderers who received tender documentation.<sup>150</sup> These provisions will make the process more effective, in that modifications can be made and meetings with tenderers held. Transparency is ensured in that clarifications and minutes of meetings must be provided to tenderers.

Tenders may be submitted in the language of the solicitation documents or in any other language specified by the procuring entity.<sup>151</sup>

A specific date and time and place where tenders must be submitted must be determined.<sup>152</sup> The deadline may be extended if necessary to afford potential tenderers time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.<sup>153</sup> The procuring entity may also, in its absolute discretion, extend the deadline if it is not possible for one or more suppliers or contractors, owing to any circumstance beyond their control, to

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<sup>148</sup> Art 28(1).

<sup>149</sup> Art 28(2).

<sup>150</sup> Art 28(3).

<sup>151</sup> Art 29.

<sup>152</sup> Art 30(1).

<sup>153</sup> Art 30(2).

submit their tenders by the deadline.<sup>154</sup> The possibility of extending the deadline will ensure effectiveness and fairness to tenderers. It will potentially lead to better tenders and may obviate the need to start a new tender process.

A signed, written tender must be submitted in a sealed envelope. Submission can also be made in a manner prescribed in the invitation to tender, as long as the manner provides a record of the content of the tender and at least a degree of authenticity, security and confidentiality similar to those in a written, signed tender.<sup>155</sup> A receipt must be provided on request and tenders received after the deadline must be returned unopened.<sup>156</sup> The Revised Model Law provides for a written, signed tender to be submitted in a sealed envelope in paper form,<sup>157</sup> or in any other form specified by the procuring entity which ensures a similar degree of authenticity, security, integrity and confidentiality.<sup>158</sup> The provision of a receipt is made compulsory.<sup>159</sup> The procuring entity must preserve the security, integrity and confidentiality of a tender, and ensure that its content is examined only after the opening thereof as prescribed by the Model Law.<sup>160</sup> These provisions will ensure the integrity of the process and fairness to the parties, and will combat abuse. The importance of authenticity, security, integrity and confidentiality in the use of electronic communication is emphasised in the Revised Model Law.<sup>161</sup>

Tenders must be effective for the time specified in the tender documents.<sup>162</sup>

The procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. Such a request may be refused by a tenderer.<sup>163</sup> Unless otherwise stipulated in the tender documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the

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<sup>154</sup> Art 30(3).

<sup>155</sup> Art 30(5).

<sup>156</sup> Art 30(5)(c) and 30(6).

<sup>157</sup> Revised Model Law art 30(5)(a)(i).

<sup>158</sup> Revised Model Law art 30(5)(a)(ii).

<sup>159</sup> Revised Model Law art 30(5)(b).

<sup>160</sup> Revised Model Law art 30(5)(c).

<sup>161</sup> The importance of authenticity, security, integrity and confidentiality in electronic communication are also addressed in the South African *Electronic Communication and Transaction Act* 25 of 2002 and the United Nations Convention on The Use of Electronic Communications in International Contracts.

<sup>162</sup> Art 31(1).

<sup>163</sup> Art 31(2).

submission of tenders.<sup>164</sup> These provisions should ensure fairness to the parties and effectiveness of the process.

The procuring entity may require suppliers or contractors submitting tenders to provide a tender security,<sup>165</sup> provided that the requirement shall apply to all such suppliers or contractors.<sup>166</sup> It may stipulate that the security must be acceptable to it.<sup>167</sup> A tender security may, save if it is against the law of the state, not be rejected on the grounds that the tender security was not issued in the state of the procuring entity.<sup>168</sup> The procuring entity must specify in the solicitation documents any requirements with respect to the issue and the nature, form, amount and other principal terms and conditions of the required tender security.<sup>169</sup> It is also provided under which circumstances the procuring entity may make any claim to the amount of the tender security and when it must be returned.<sup>170</sup> This should promote international competition and is fair to the tenderers and the procuring entity. It also limits the risks for the procuring entity.

### 3.3.3 *Evaluation and comparison of tenders*

Tenders must be opened at the time specified in the tender documents.<sup>171</sup> All suppliers or contractors that submitted tenders must be permitted to be present at the opening of tenders.<sup>172</sup> The name and address of each supplier or contractor whose tender is opened and the tender price must be announced to those persons present at the opening of tenders. The information must also, if requested, be communicated to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of the tenders. The above information must also be recorded in the record of the tender proceedings.<sup>173</sup> The Revised Model

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<sup>164</sup> Art 31(3).

<sup>165</sup> Art 32 (1).

<sup>166</sup> Art 32(1)(a).

<sup>167</sup> Art 32(1)(b).

<sup>168</sup> Art 32(1)(c).

<sup>169</sup> Art 32(1)(f).

<sup>170</sup> Art 32(2).

<sup>171</sup> Art 33(1).

<sup>172</sup> Art 33(2).

<sup>173</sup> Art 33(3).

Law adds the provision that tenderers shall be deemed to have been permitted to be present at the opening of the tenders if they were fully and contemporaneously appraised thereof.<sup>174</sup> This should ensure transparency, combat abuse, and enhance the integrity of the system.

Suppliers or contractors may be asked to clarify their tenders in order to assist in the examination, evaluation and comparison thereof. No change in a matter of substance, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered, or permitted.<sup>175</sup> Purely arithmetical errors that are discovered during the examination of tenders may be corrected. Notice of any such correction must be given to the supplier or contractor.<sup>176</sup> This should lead to effectiveness and is fair to all parties involved.

The procuring entity may regard a tender as responsive only if it is in accordance with all of the requirements set forth in the tender documents.<sup>177</sup> The procuring entity shall not accept a tender if the supplier or contractor that submitted the tender is not qualified, if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error, if the tender is not responsive, and where the tenderer unlawfully induced or attempted to induce<sup>178</sup> the awarding of the tender to it.<sup>179</sup> These provisions will ensure the integrity of the process, especially by overtly combating corrupt practices. It will enhance objectivity and to a large degree obviate arbitrary decisions. They will also ensure the effectiveness of tenderers and fairness to all parties.

The procuring entity must evaluate and compare the tenders in accordance with the procedures and criteria set forth in the tender documents. No criterion that

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<sup>174</sup> Revised Model Law art 33(2).

<sup>175</sup> Art 34(1)(a).

<sup>176</sup> Art 34(1)(b).

<sup>177</sup> Art 34(2)(a). In terms of art 34(2)(b) the procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders.

<sup>178</sup> This is provided for in art 15.

<sup>179</sup> Art 34(3).

has not been set forth in the tender documents may be used in the evaluation process.<sup>180</sup> The successful tender shall be the tender with the lowest tender price, subject to any margin of preference applied.<sup>181</sup> If criteria were specified, the successful tender will be the lowest evaluated tender, ascertained on the basis of the criteria specified in the tender documentation. These criteria must, as far as practicable, be objective and quantifiable, and be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.<sup>182</sup> These provisions should ensure objectivity, transparency, the integrity of the process, fairness to the parties, and that the best value for money is obtained.

In determining the lowest evaluated tender when criteria were stipulated, the procuring entity may consider only the following:<sup>183</sup>

- the tender price, subject to any margin of preference;
- the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;
- the effect that the acceptance of a tender would have on the balance of payments position and foreign exchange reserves of the state, the counter trade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, offered by tenderers, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills; and
- national defence and security considerations;

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<sup>180</sup> Art 34(4)(a).

<sup>181</sup> Art 34(4)(b)(i).

<sup>182</sup> Art 34(4)(b)(ii).

<sup>183</sup> Art 34(4)(c).

The enacting state may expand on the considerations listed immediately above.<sup>184</sup>

The above provisions should ensure the integrity of the system. They enhance effectiveness and value for money. In particular, most of the whole-life costs (operation, maintenance and reparation) are included. The costs of disposal ought, however, to be added, as they form part of the whole-life costs. It is realistic to include aspects like the time of delivery, other functional characteristics, and financial arrangements as they have a direct bearing on the effectiveness of the procurement. The economic effects are duly taken into account, including the socio-economic factors. These socio-economic factors are listed and not left open-ended. Although environmental criteria may be specifically provided for in the invitation to tender, the importance of environmental factors ought to be acknowledged by including them among the factors that must be considered when evaluating tenders.<sup>185</sup> As the evaluation of tenders in the procurement process is one of the primary elements of a successful process, the detailed provisions will ensure the integrity of the process, fairness to all involved, and that value for money is obtained within the economic reality of the country. In particular, an element of objectivity is ensured by providing for detailed criteria and that evaluations may be done only in accordance with such criteria.

If authorised by the procurement regulations, in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services.<sup>186</sup> Effect is given to the possibility for socio-economic factors to be included through allowing a margin of preference for domestic tenderers and

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<sup>184</sup> Art 34(4)(c)(iii).

<sup>185</sup> With regard to the importance of the environment in general, see in this regard the fourth Global Environment Outlook report, also referred to as the GEO 4 report, by UNEP, issued on 25 October 2007. In the South African context factors like energy efficiency and black economic empowerment might be seen as socio-economic factors that ought to be taken into account.

<sup>186</sup> Art 34(4)(d).

domestically produced goods. This may be done only if authorised by the procurement regulations.

The successful tenderer may be requested to again demonstrate its qualifications in accordance with the criteria and procedures set forth in the solicitation documents. If pre-qualification proceedings applied, the criteria should be the same as those used in the pre-qualification proceedings.<sup>187</sup> This will ensure effectiveness of the tenderer, combat possible abuse, and ensure that value for money is obtained in that risks are contained. The provision ensures fairness in that the criteria must remain the same throughout the process.

No negotiations may take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.<sup>188</sup> This will lead to objectivity and ensure the integrity of the process by combating the possibility of abuse.

Provision is made for the formal acceptance of the successful tender and the entry into force of the procurement contract.<sup>189</sup> The supplier or contractor whose tender has been accepted may be required to sign a written procurement contract conforming to the tender. Should the successful tenderer not sign a written agreement if required to do so, or fail to provide the necessary security, the procuring entity may either reject all remaining tenders or select a new successful tenderer from the remaining tenders that are in force.<sup>190</sup> Upon the entry into force of the procurement, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract, and the contract price.<sup>191</sup> This should enhance transparency and the integrity of the process. It allows

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<sup>187</sup> Art 34(6). In terms of art 34(8) information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in art 11.

<sup>188</sup> Art 35.

<sup>189</sup> Art 36.

<sup>190</sup> Art 35(5).

<sup>191</sup> Art 36(6).

unsuccessful tenderers to promptly exercise their rights if they wish to seek redress. The combating of fraud and abuse are also enhanced through these provisions.

#### *3.3.4 Conclusion on procurement methods for goods and construction*

The principles of transparency, integrity, fairness, effectiveness, value for money, economy, objectiveness and competition form the basis of the above provisions.

Content is given to these objectives by providing for the following:

- unrestricted invitations to tenderers to participate in the process, by means of proper and wide publication of the invitation. Such invitations must provide sufficient information to enable potential tenderers to decide whether or not they can qualify in principle, and if they are interested in participating.
- a comprehensive description and specification of the goods, construction or services to be procured, that must be set out in the tender documentation. This should provide sufficient information to enable tenderers to determine what exactly is to be procured and the formal requirements relating to the procurement, and provide a common basis on which tenderers can submit their tenders.
- fees payable to the procuring entity to participate that are limited to the direct expenses deriving from the provision of the tender documents.
- a full disclosure to tenderers of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender that must be made. These criteria may be price alone, or a combination of price and some other technical, economic or other criteria. Such criteria must as far as practical be objective and quantifiable and be given a relative weight or be expressed in monetary terms. The principle of whole-life costs is included, save that the costs of disposal are not referred to. The enacting state can add to the list of technical, economic or other criteria. These criteria include socio-economic

criteria. In the South African context issues like black economic empowerment, environmental and energy criteria could be added.

- the clarification and modification of tenders and the extension of the deadline on the basis of the communication of all information to all participating tenderers.
- a prohibition against negotiations by the procuring entity with suppliers or contractors as to the substance of their tenders.
- that tenders must be opened in public on the deadline for submission of tenders.
- that any formalities required for the procurement contract to enter into force must be disclosed.

The socio-economic aspects which are specifically mentioned are the following:

- the balance of payments position and foreign exchange reserves of the state;
- the counter-trade arrangements offered by suppliers or contractors;
- the extent of local content, including manufacture, labour and materials, offered by tenderers;
- the economic development potential offered by tenders, including domestic investment or other business activity;
- the encouragement of employment;
- the reservation of certain production for domestic suppliers;
- the transfer of technology and the development of managerial, scientific and operational skills.<sup>192</sup>

A margin of preference may also be allowed for the benefit of tenders for construction by domestic contractors, for domestically produced goods or domestic suppliers of services.<sup>193</sup> The socio-economic factors are incorporated as additional criteria in terms of which the tenders are evaluated.

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<sup>192</sup> Art 34(4)(c)(iii).  
<sup>193</sup> Art 34(4)(d).

The criteria in terms of which tenders may be evaluated are limited to the following: the tender price, the whole-life costs, the time of delivery, the functional characteristics, the terms of payment and guarantees, socio-economic factors, and national defence and security considerations.<sup>194</sup> What is of importance is that although provision is made for these socio-economic factors to be taken into account, the general provisions applicable to public procurement remain intact. It is for the procuring entity to determine what weight should be given to the different criteria which must be stipulated in the tender documents. The principles of transparency, fairness, objectivity, integrity, competition and value for money are still applicable in achieving socio-economic objectives.

Arrowsmith suggests that provision should be made for the scientific and rigorous evaluation of the impact of such policies so as to ensure that their objectives are reached.<sup>195</sup> She does concede that it would probably not be generally acceptable, but states that it can nevertheless be included as an option, should the enacting state wish to enact such a provision.<sup>196</sup>

### **3.4 Methods of procurement in the procurement of services**

#### **3.4.1 Introduction**

The procurement of services differs from the procurement of goods as it is more difficult to determine the exact content and quality of intangibles like services. The outcome of the procurement of services is largely dependent on the expertise and skills of the tenderer.<sup>197</sup> In order to ensure that the general principles of public procurement, *inter alia* those of value for money,

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<sup>194</sup> Art 34(4)(c).

<sup>195</sup> Arrowsmith 2004 *ICLQ* 44.

<sup>196</sup> Arrowsmith 2004 *ICLQ* 44.

<sup>197</sup> In par 11 of the Guidelines it is stated that in order to take account of certain differences between the procurement of goods and construction and the procurement of services, the Model Law sets forth a set of procedures especially designed for the procurement of services. The main differences arise from the fact that, unlike the procurement of goods and construction, procurement of services typically involves the supply of an intangible object whose quality and exact content may be difficult to quantify. The precise quality of the services provided is usually largely dependent on the skill and expertise of the suppliers or contractors. Thus, unlike procurement of goods and construction, where price is the predominant criterion in the evaluation process, the price of services is often not considered as important a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors.

transparency, competition, effectiveness, integrity, fairness and the combating of abuse are achieved in the procurement of services, the Model Law prescribes different methods of procurement for the procurement of services than for the procurement of goods.

### 3.4.2 *Methods of procurement of services*

In the case of the procurement of services the Model Law, although not excluding tender procedures completely,<sup>198</sup> prescribes that one of the three procurement methods provided in chapter IV must be used:<sup>199</sup>

- In terms of the first selection procedure, the procuring entity must either subject proposals that obtain a technical rating above a set threshold to a straightforward price competition, or accept the proposal with the best evaluation in terms of the prescribed criteria.<sup>200</sup> The thresholds must be established with respect to quality and technical aspects, in accordance with the relative weight as set out in the request for proposals.<sup>201</sup>
- The second selection procedure provides a method by which the procuring entity negotiates with suppliers and contractors who have submitted acceptable proposals,<sup>202</sup> after which they submit their best and final offers.<sup>203</sup> In the evaluation the price must be evaluated separately after completion of the technical evaluation.<sup>204</sup> The award must be made to the supplier whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals and the relative weight attached thereto as set out in the request for proposals.<sup>205</sup>

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<sup>198</sup> Art 18(3)(a) provides that if the procuring entity determines that it is feasible to formulate detailed specifications and that tendering proceedings would be more appropriate, taking into account the nature of the services to be procured, tender procedures may be used.

<sup>199</sup> Art 18(3).

<sup>200</sup> Art 42.

<sup>201</sup> Art 42(1).

<sup>202</sup> Art 43(1).

<sup>203</sup> Art 43(2).

<sup>204</sup> Art 43(3).

<sup>205</sup> Art 43(4).

- Under the third selection procedure, the procuring entity holds negotiations solely on price with the supplier or contractor who obtained the highest technical rating in accordance with the set criteria. The procuring entity may negotiate with the other suppliers or contractors in a sequential fashion, one by one, on the basis of their rating, but only after terminating negotiations with the previous, higher-ranked supplier or contractor, which negotiations, once terminated, may not be reopened.<sup>206</sup>

Exceptions are allowed under the circumstances provided for.<sup>207</sup>

In the request for proposals the method to be used must be set out.<sup>208</sup> The procuring entity must set out the grounds and circumstances on which it relied for using a particular method in the record of procurement.<sup>209</sup> The procuring entity may resort to an impartial panel of external experts in the selection procedure.<sup>210</sup> These methods gives due weight, in the evaluation process, to the qualifications and expertise of the service providers. This will lead to transparency and effectiveness, ensure the integrity of the process, enhance objectivity and ensure fairness and value for money.

Provisions similar to those which are applicable in tender procedures apply to these methods, ranging from the notice of solicitation of proposals to the award of the contract.<sup>211</sup> These provisions relate firstly to the notice of solicitation of proposals, where provision is made for unrestricted solicitation.<sup>212</sup> This notice must be widely advertised<sup>213</sup> and must include sufficient information to enable potential suppliers to identify if they qualify and

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<sup>206</sup> Art 44.

<sup>207</sup> The circumstances are set out in art 18(3)(a) and (b). These circumstances are if the procuring entity determines either that it is feasible to formulate detailed specifications and tendering procedures that would be more appropriate, taking into account the nature of the services to be procured, or that it would be more appropriate to use a method of procurement referred to in art 19 to 22, provided that the conditions for the use of such a method are satisfied.

<sup>208</sup> Art 41(1).

<sup>209</sup> Art 41(2).

<sup>210</sup> Art 41(3).

<sup>211</sup> Art 37-40.

<sup>212</sup> Art 37(1)

<sup>213</sup> Art 37(2).

what the subject matter of the proposed procurement is.<sup>214</sup> The costs of tender documentation may be only the direct costs to the procuring entity for providing such documentation.<sup>215</sup> The above provisions do not apply in exceptional circumstances, namely where the services to be procured are available only from a limited number of suppliers, provided that proposals are solicited from all such suppliers,<sup>216</sup> that the time and costs required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, that proposals are solicited from a large enough number of suppliers to ensure effective competition,<sup>217</sup> and, where direct solicitation is the only means of ensuring the confidentiality which is required because of national interest, provided that proposals are solicited from a large enough number of suppliers to ensure effective competition.<sup>218</sup> The objective of competition should be ensured in all of these circumstances. Due regard is given to objectives like value for money by allowing exceptions in the case of low-value procurement. The principle of effectiveness is also provided for in cases of national security or where a limited number of suppliers is available.

Secondly, these provisions relate to the contents of the request for proposals where the minimum information that must be included in the request for proposal is set out.<sup>219</sup> The information relates to the criteria applicable to

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<sup>214</sup> Art 37(1).

<sup>215</sup> Art 37(4).

<sup>216</sup> Art 37(3)(a).

<sup>217</sup> Art 37(3)(b).

<sup>218</sup> Art 37(3)(c).

<sup>219</sup> Art 38. The minimum information that needs to be included is: (a) The name and address of the procuring entity; (b) The language or languages in which proposals are to be prepared; (c) The manner, place and deadline for the submission of proposals; (d) If the procuring entity reserves the right to reject all proposals, a statement to that effect; (e) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7 (8); (f) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications; (g) The nature and required characteristics of the services to be procured to the extent known, including but not limited to the location where the services are to be provided and the desired or required time, if any, when the services are to be provided; (h) Whether or not the procuring entity is seeking proposals as to various possible ways of meeting its needs; (i) If suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted; (j) The currency or currencies in which the proposal price is to be formulated or expressed, unless the price is not a relevant criterion; (k) The manner in

qualify, the procedure for the evaluation of the proposal, the procedure for clarifications and meetings with suppliers, the terms and conditions and other formalities relating to the contract, and formal aspects like the means of communication, addresses, and similar particulars.<sup>220</sup> These provisions should ensure transparency, objectivity, the integrity of the process and fairness to the parties.

Thirdly, the provisions deal with the criteria for the evaluation of proposals.<sup>221</sup> The procuring entity must establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each and the manner in which they are to be applied. The potential suppliers and contractors must be notified of the criteria. Such criteria may concern only the qualifications, experience, reputation, reliability and professional and managerial

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which the proposal price is to be formulated or expressed, including a statement as to whether or not the price is to cover elements other than the cost of the services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes, unless the price is not a relevant criterion; (l) The procedure selected pursuant to article 41 (1) for ascertaining the successful proposal; (m) The criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 39 (2), and the relative weight of such criteria; (n) The currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used; (o) If alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared; (p) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary; (q) The means by which, pursuant to article 40, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors; (r) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties; (s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity; (t) Notice of the right provided under article 52 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings; (u) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval; (v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

<sup>220</sup> Art 38.

<sup>221</sup> Art 39.

competence of the suppliers, the effectiveness of meeting the needs of the procuring entity, the price, socio-economic aspects listed in art 39(1)(d), and, national defence and security considerations. A margin of preference for the benefit of domestic suppliers may be granted as provided for in the regulations and must be reflected in the record of procurement proceedings.<sup>222</sup> These provisions ensure effectiveness, value for money, fairness, transparency, competition and the integrity of the system.

Fourthly the provisions relate to the clarification and modification of requests for proposals.<sup>223</sup> The procuring entity must respond to a request for clarification of a request for proposals within a reasonable time so as to enable suppliers to make timeous submissions of their proposals. Such clarifications must be communicated to all participating suppliers.<sup>224</sup> The procuring entity may prior to the deadline for submissions of proposals modify the request for proposals. Such a modification must promptly be communicated to all participating suppliers.<sup>225</sup> Minutes of meetings with suppliers must be kept and promptly submitted to all participating suppliers.<sup>226</sup> These provisions enhance fairness, transparency, effectiveness and value for money.

### *3.4.3 Conclusion on the procurement of services*

The provisions of the Model Law relating to the procurement of services, as in the case of the procurement of goods, reflect the principles of value for money, transparency, competition, fairness, the integrity of the system, effectiveness, objectivity and the combating of abuse. Content is given to these objectives by providing for unrestricted solicitation of suppliers and contractors, for the pre-disclosure of the criteria for the evaluation of proposals, and for the pre-disclosure of the selection procedure, in the request for proposals. Content is

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<sup>222</sup> Art 39. They refer to the qualifications, experience, reputation, reliability and professional and managerial competence, the effectiveness of meeting the needs of the procuring entity, the price, socio-economic aspects listed in art 39(1)(d), and national defence and security considerations. A margin of preference for the benefit of domestic suppliers may be granted as provided for in the regulations and must be reflected in the record of procurement proceedings.

<sup>223</sup> Art 40.

<sup>224</sup> Art 40(1).

<sup>225</sup> Art 40(2).

<sup>226</sup> Art 40(3).

also given thereto by making specific provision for the publishing of a notice informing potential service providers of the invitation of proposals for the required services,<sup>227</sup> the minimum information to be included in such a notice,<sup>228</sup> the criteria for the evaluation of such proposals,<sup>229</sup> the clarification and modification of such an invitation,<sup>230</sup> the choice of a selection procedure,<sup>231</sup> and the confidential treatment of information and negotiations.<sup>232</sup>

The use of the open tender method for procurement of services is to an extent underplayed by the Model Law, in that it is possible to use the ordinary tender process to good effect in many instances of procuring services. It will generally speaking be more desirable to use the open tender procedure for services when it is feasible to formulate detailed specifications than the prescribed method, as it will ensure wider participation, better competition and value for money.<sup>233</sup>

### **3.5 *Alternative methods of procurement***

#### *3.5.1 Introduction*

Alternative methods of procurement are provided for the procurement of goods and construction as well as for services, when the normal or general methods prescribed by the Model Law are not appropriate or feasible. States may choose which, or all, of the alternative methods they wish to adopt.<sup>234</sup> The alternative methods of procurement are procurement by means of two-stage tendering,<sup>235</sup> restricted tendering,<sup>236</sup> a request for proposals,<sup>237</sup> competitive negotiation,<sup>238</sup> a request for quotations,<sup>239</sup> and single-source procurement.<sup>240</sup> In the Revised

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<sup>227</sup> Art 37.

<sup>228</sup> Art 38.

<sup>229</sup> Art 39.

<sup>230</sup> Art 40.

<sup>231</sup> Art 41.

<sup>232</sup> Art 45.

<sup>233</sup> Arrowsmith 2004 *ICLQ* 30-33.

<sup>234</sup> Footnote to art 18.

<sup>235</sup> Art 19 and art 46.

<sup>236</sup> Art 20 and art 47.

<sup>237</sup> Art 19 and art 48.

<sup>238</sup> Art 19 and art 49.

<sup>239</sup> Art 21 and art 50.

<sup>240</sup> Art 22 and art 51.

Model Law provision is made for electronic reverse auctions.<sup>241</sup> The circumstances under which a procuring entity may engage in these alternative methods of procurement are set out in detail in the Model Law.<sup>242</sup>

### 3.5.2 *Two-stage tendering*

Where it may not be feasible or possible for the procuring entity to formulate precise or final specifications for goods or services to be procured, the two-stage tendering method may be used in two instances. The first instance occurs when the exact manner in which to meet a particular need has not been determined and proposals are sought as to various possible solutions to

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<sup>241</sup> Revised Model Law art 51*bis-sexies*. In its further deliberations the Working Group also proposes provisions to regulate tendering with pre-selection and two-envelope tendering. See UNCITRAL document A/CN.9/WG.IWP.69/Add.3 dated 27 March 2009. The regulation of Framework Agreement Procedures is also specifically proposed by the Working Group. See UNCITRAL document A/CN.9/WG.IWP.69/Add.4 dated 30 March 2009.

<sup>242</sup> Art 19 states that the alternative methods may be used under the following circumstances namely if:

- “(1) (a) It is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,
- (i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; or,
  - (ii) Because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;
- (b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;
- (c) When the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defense or national security and determines that the selected method is the most appropriate method of procurement; or
- (d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article 12, 15 or 34 (3), and when, in the judgment of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.
- (2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:
- (a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,
  - (b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods”.

the problem.<sup>243</sup> The second occurs in the instance of the procurement of high-technology items such as large passenger aircraft or sophisticated computer equipment.<sup>244</sup> In this instance, because of the technical sophistication and complexity of the goods, it might be considered undesirable, in order to obtain the best value for money, for the procuring entity to proceed on the basis of specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations that can be offered.<sup>245</sup> Two-stage tendering may also be used when the procuring entity wants to enter into an agreement for the purposes of research, experiment, study or development, on condition that the contract does not include the commercially viable production of such goods.<sup>246</sup> It can also be used if appropriate for procurement involving national defence,<sup>247</sup> or where tender proceedings were unsuccessful and new tender proceedings are unlikely to result in a contract.<sup>248</sup>

The two-stage tendering process entails that the invitation to tender must in the first stage invite potential suppliers to submit initial tenders containing their proposals without a tender price. Such proposals may relate to the technical, qualitative or other characteristics of the goods, construction or services, as well as to contractual terms and conditions of supply, and the professional and technical competence and qualifications of the suppliers or contractors.<sup>249</sup> In the first stage the procuring entity may engage in negotiations with any supplier or contractor concerning his or her tender.<sup>250</sup> In the second stage the procuring entity must invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices. This is done in respect of a single set of specifications decided upon by the procuring entity upon the conclusion of the first stage.<sup>251</sup> The final tenders received must then be evaluated and compared,

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<sup>243</sup> Art 19(1)(a).

<sup>244</sup> Art 19(1)(b).

<sup>245</sup> Guide to Enactment par 18.

<sup>246</sup> Art 19(1)(b).

<sup>247</sup> Art 19(1)(c).

<sup>248</sup> Art 19(1)(d).

<sup>249</sup> Art 46(2).

<sup>250</sup> Art 46(3).

<sup>251</sup> Art 46(4). In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality

in accordance with the general rules for tendering,<sup>252</sup> in order to ascertain the successful tender.

As the provisions of chapter three apply *mutatis mutandis* to the two-stage tendering process,<sup>253</sup> the principles applicable in chapter three are applicable in this instance also.<sup>254</sup>

### 3.5.3 *Restricted tendering*

In essence, restricted tendering takes place when the invitation to tender is not extended to all possible tenderers but only to an identified limited number of suppliers or contractors. This process is usually used when the goods or services, because of their highly complex or specialised nature, are available from a limited number of suppliers or contractors only.<sup>255</sup> It can also be used if the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods or services to be procured.<sup>256</sup>

The Model Law provides that restricted tendering may be used only on the grounds referred to above.<sup>257</sup> The procuring entity must invite tenders from all suppliers and contractors who can provide the goods or services needed.<sup>258</sup> This will ensure competition and prevent abuse. When the procuring entity engages in restricted tendering because of the low value of the goods or services to be procured, it must select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner. It must also select a sufficient number of suppliers or contractors to ensure effective

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characteristics of the goods, construction or services to be procured. It may also delete or modify any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender. It may also add new characteristics or criteria. Any such deletion, modification or addition must be communicated to suppliers or contractors in the invitation to submit final tenders.

<sup>252</sup> Set out in ch 3.

<sup>253</sup> Art 46(1).

<sup>254</sup> These objectives were discussed in par 3.3 above.

<sup>255</sup> Art 20(a).

<sup>256</sup> Art 20(b).

<sup>257</sup> Art 20.

<sup>258</sup> Art 47(1)(a).

competition.<sup>259</sup> This will also ensure competition and prevent abuse. The procuring entity must publish a notice of the restricted tendering proceeding in the publication indicated in the legislation.<sup>260</sup> This will enhance transparency and assist to prevent corrupt practices. In so far as it is not in conflict with the above, the general provisions set out in chapter three of the Model Law apply to restricted-tendering proceedings.<sup>261</sup> The principles applicable to normal tender proceedings are applicable in this procedure too.<sup>262</sup>

#### 3.5.4 *Request for proposals*

In a request for proposals the procuring entity usually approaches a limited number of suppliers or contractors. It solicits various proposals, negotiates with them as to possible changes in the substance of their proposals, and requests best and final offers. Such offers are then assessed and compared in accordance with the relative weight and manner of application of the evaluation criteria, all of which must be pre-disclosed. In contrast with two-stage tendering, tender proceedings are not conducted at any stage conducted.<sup>263</sup>

Detailed provision is made in the Model Law for the request for proposals method of procurement. Such a request must be addressed to as many suppliers or contractors as practicable, three being the minimum number.<sup>264</sup> The other provisions relate to the publishing of a notice,<sup>265</sup> the establishment of criteria for evaluating the proposals and determining the relative weight to be accorded to each,<sup>266</sup> the information to be included in the request,<sup>267</sup> the

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<sup>259</sup> Art 47(1)(b).

<sup>260</sup> Art 47(2).

<sup>261</sup> Art 47(3).

<sup>262</sup> See the discussion in 3.3 above.

<sup>263</sup> Guide to Enactment par D 20.

<sup>264</sup> Art 48(1).

<sup>265</sup> Art 48(2).

<sup>266</sup> Art 48(3). In terms of this article the criteria must relate to:

- (a) The relative managerial and technical competence of the supplier or contractor;
- (b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and
- (c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction".

<sup>267</sup> Art 48(4). The following information must be included:

communication of any modification or clarification of the request for proposals, including the modification of the criteria for evaluating proposals,<sup>268</sup> non-disclosure of the contents of proposals to competitors,<sup>269</sup> negotiations with suppliers or contractors with respect to their proposals,<sup>270</sup> the submission of best and final offers,<sup>271</sup> the procedures to be followed in evaluating the proposals,<sup>272</sup> and the awarding of the tender.<sup>273</sup>

These provisions ensure competition in that as many suppliers as possible should be requested to participate and the request must be widely published. Effectiveness is ensured in that publication is not necessary if it is undesirable for reasons of economy and efficiency.<sup>274</sup> Transparency, effectiveness, value for money and fairness are ensured by providing for criteria with regard to the evaluation of proposals, the relative weight to be accorded to each criterion, and

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- (a) The name and address of the procuring entity;
  - (b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;
  - (c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and
  - (d) The desired format and any instructions, including any relevant timetables, applicable in respect of the proposal”.

<sup>268</sup> Art 48(5).

<sup>269</sup> Art 48(6).

<sup>270</sup> Art 48(7). The procuring entity may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

- “(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;
- (b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;
- (c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected”.

<sup>271</sup> Art 48(8).

<sup>272</sup> Art 48(9). This article provides:

- “(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;
- (b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;
- (c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation”.

<sup>273</sup> Art 48(10). It provides that the award by the procuring entity must be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals. It must also be in accordance with the relative weight and manner of application of those criteria as indicated in the request for proposals.

<sup>274</sup> Art 48(2).

the manner in which the criteria are to be applied in the evaluation process.<sup>275</sup> These principles are also promoted by prescribing the information that needs to be included in the request documents and the procedures for evaluation. Only the criteria set out in the request for proposals may be considered.<sup>276</sup> The contract must be awarded to the supplier whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria set out in the proposal.<sup>277</sup>

### 3.5.5 *Competitive negotiation*

Competitive negotiation differs from both two-stage tendering and the request for proposals procedure in that it is a relatively unstructured method of procurement. The procuring entity engages in negotiations with suppliers or contractors for the procurement need. Certain information and criteria are provided on which the negotiations are based. After completion of the negotiations the suppliers and contractors are requested to submit a best and final offer. The contract is then awarded on the basis of the best and final offers.<sup>278</sup>

The Model Law has detailed provisions relating to competitive negotiation. The procuring entity must engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.<sup>279</sup> Provision is made for the communication of any requirements, guidelines, documents, clarifications or other information on an equal basis to all suppliers or contractors.<sup>280</sup> Negotiations between the procuring entity and a supplier or contractor must be confidential.<sup>281</sup> After the completion of negotiations, the procuring entity must request all suppliers or contractors remaining in the proceedings to submit a best and final offer by a specified date. The procuring entity must then select the successful tenderer on the basis of such best and final offers.<sup>282</sup> Competitive negotiation may, in cases of urgency, be used as an alternative to single-source

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<sup>275</sup> Art 48(3).

<sup>276</sup> Art 48(10).

<sup>277</sup> Art 48(10).

<sup>278</sup> Guide to Enactment par 18.

<sup>279</sup> Art 49(1).

<sup>280</sup> Art 49(2).

<sup>281</sup> Art 49(3).

<sup>282</sup> Art 49(4).

procurement.<sup>283</sup> Once again the above provisions give content to the principles of transparency, effectiveness, integrity, fairness, value for money and competition.

### 3.5.6 *Request for quotations*

The request for quotations method is a simplified, accelerated and relatively inexpensive procurement procedure. It is generally used for cases of low-value procurement of standardised goods or services. It entails that written or oral quotations are obtained for goods and services that are generally available and are standardised, for instance lever-arch files. The lowest quotation is then accepted.<sup>284</sup>

In terms of the Model Law the request for quotation procedure may be used for the procurement of readily available goods or services, for which there is an established market. The goods or services may not specially be produced or provided in accordance with the particular specifications of the procuring entity. The estimated value of the procurement contract must also be less than the threshold amount set forth in the procurement regulations.<sup>285</sup> When quotations are requested this must be done from as many, suppliers or contractors as practicable but if possible from at least three.<sup>286</sup> Details must be given of what must be included in the price.<sup>287</sup> Only one quotation per supplier or contractor is permitted. No negotiations may take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.<sup>288</sup> The procurement contract must be awarded to the supplier or contractor that gave the lowest-priced quotation which meets the needs of the procuring entity.<sup>289</sup> Once again these provisions, taking into account the practicalities of low-value procurement, give content to the principles of transparency, effectiveness, integrity, fairness, value for money and competition.

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<sup>283</sup> Art 19(2)(a) and (b).

<sup>284</sup> Guide to Enactment par 22.

<sup>285</sup> Art 21(1). In terms of art 21(2) a procuring entity may not divide its procurement into separate contracts for the purpose of invoking art 21 (1) of this article.

<sup>286</sup> Art 50(1).

<sup>287</sup> Details such as any applicable transportation and insurance charges, customs duties and taxes.

<sup>288</sup> Art 50(2).

<sup>289</sup> Art 50(3).

### 3.5.7 *Single-source procurement*

Single-source procurement implies that the procurement is done from a single source only. This kind of procurement is of course not competitive. There are, however, often circumstances dictating such procurement. Urgency is one example. In a crisis, where time is of the essence and a helicopter is, for instance, needed for rescue purposes and there is only one supplier available, single-source procurement will be the only practical form of procurement. As this form of procurement is inherently non-competitive and open to misuse one can expect it to be strictly regulated.

The Model Law provides that single-source procurement may be utilised only in the following prescribed circumstances:

- If the goods, construction or services are available from only one particular supplier or contractor;<sup>290</sup>
- If there is an urgent need for the goods, construction or services, and other methods would be impractical. The circumstances giving rise to the urgency must, however, not have been foreseeable by the procuring entity nor the result of dilatory conduct on its part;<sup>291</sup>
- If owing to a catastrophic event, there is an urgent need for the goods, or services, which makes it impractical to use other methods;<sup>292</sup>
- If goods, equipment, technology or services have already been procured from a supplier or contractor, and for reasons of standardisation or because of the need for compatibility with existing goods, equipment, technology or services additional supplies must be procured from that same supplier or contractor. The effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question must, however, be taken into account;<sup>293</sup>

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<sup>290</sup> Art 22(1)(a).

<sup>291</sup> Art 22(1)(b).

<sup>292</sup> Art 22(1)(c).

<sup>293</sup> Art 22(1)(d).

- If the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development. The production of goods in quantities to establish their commercial viability or to recover research and development costs may, however, not be included,<sup>294</sup>
- If the procurement involves national defence or national security and the procuring entity determines that single-source procurement is the most appropriate method of procurement.<sup>295</sup>

Single-source procurement is also allowed when procurement from a particular supplier or contractor is necessary in order to promote a specific policy,<sup>296</sup> provided that procurement from no other supplier or contractor is capable of promoting that policy.<sup>297</sup>

The objectives of efficiency and cost effectiveness are well served by this method of procurement.

### 3.5.8 *Electronic reverse auctions*

The Revised Model Law introduces the possibility of using electronic reverse auction (ERA) procedures in the procurement process. An electronic auction is not a distinct award procedure but a practical method of conducting part of the tender procedure.

Electronic auctions are primarily intended to be used to procure goods that are standardised, simple and generally available, such as off-the-shelf products. The determining factor is price or quantity and a complicated evaluation process is not required. It is not suited for procurement involving

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<sup>294</sup> Art 22(1)(e).

<sup>295</sup> Art 22(1)(f).

<sup>296</sup> Such policies are specified in art 34(4)(c)(iii) and 39(10)(d). They include policies regarding the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of the state; counter-trade arrangements offered by suppliers or contractors; the extent of local content, including manufacture, labour and materials; the economic development potential offered by tenders, including domestic investment or other business activity; the encouragement of employment; the reservation of certain production for domestic suppliers; the transfer of technology; and the development of managerial, scientific and operational skills.

<sup>297</sup> Art 22(2).

multiple variables and where qualitative factors are as important as or more important than price.

Although different models exist,<sup>298</sup> in electronic reverse auctions electronic communication is in essence used by the procuring entity in a process that mimics a live auction. In its simple form the procuring entity sets up an electronic site on the internet, advertising the auction. Precise specifications of what is to be procured are set out. Potential tenderers (that qualify to participate) then log into the site to participate in the auction. At the appointed time the auction starts and tenderers put in their tenders electronically. The price of each tender (but not the particulars of the tenderer) is simultaneously available to all participants. This enables other participants to put in a lower bid. The tender is then awarded automatically to the lowest tenderer at the close of the auction. The close of the auction can occur at either a determined time or after the expiry of a set time (say two minutes) after the last bid. Other criteria than price, which is quantifiable, can be included in an ERA. For example, points could be awarded based on exact determinable quantities, or percentages awarded for the extent of local content of the product or, in the South African context, for the extent of Black Economic Empowerment involved in the bid. If criteria other than price are specified, such criteria are evaluated electronically by means of a mathematical formula. The results of each tender are immediately and simultaneously available to all participants.

The fact that the evaluation is done electronically is the biggest limitation in Electronic Reverse Auctions in that such evaluation can be performed only by means of a mathematical formula. This means that only exactly quantifiable criteria can be used in evaluating tenders electronically.

Some flexibility is possible in electronic auctions. A straight-forward electronic auction is one where the whole process, from the invitation to the award of the tender is done electronically. But there can also be a combination of manual, paper-based methods applicable to ordinary tenders and electronic

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<sup>298</sup> Arrowsmith *Public and Utilities Procurement* 1181.

auctioning. An example would occur when potential tenderers are evaluated as to their ability to perform and then included on a list of potential suppliers. Only those tenderers on the list may then partake in the Electronic Reverse Auction.<sup>299</sup>

The Revised GPA defines electronic auctions as follows:

Electronic auction means an interactive process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders.<sup>300</sup>

The EU Directives define it as follows:

An “electronic auction” is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.<sup>301</sup>

The Working Group on Public Procurement compiled the following definition:

[a] repetitive process that involves the use of electronic means for the presentation by bidders of either new prices, revised downwards, or [in addition] new values for quantifiable non-price elements related to the evaluation criteria, resulting in a ranking or re-ranking of bidders using automatic evaluation methods and a mathematical formula.<sup>302</sup>

The Revised Model Law proposes detailed regulation of the use of electronic reverse auctions. These relate to the issue of the notice of the auction,<sup>303</sup> the information to be included therein,<sup>304</sup> the preceding of an award by the use of

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<sup>299</sup> Arrowsmith *Public and Utilities Procurement* 1181. For a general discussion of the use of electronic auctions in the EU and USA see Yukins and Wallace 2005 *PPLR* 183-202.

<sup>300</sup> Revised GPA art I(e).

<sup>301</sup> European Union procurement directives (art 1(6) of 2004/17/EC and art 1(7) of 2004/18/EC). See in general the Commission Staff Working Document *Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC* Brussels, 8.7.2005 SEC (2005) 959.

<sup>302</sup> UNCITRAL document A/CN.9/WG.I/WP.55 dated 3 July 2007 at 5.

<sup>303</sup> Revised Model Law art 51 *bis*(1).

<sup>304</sup> Revised Model Law art 51 *bis*(2).

a reverse auction,<sup>305</sup> efficient participation in the auction,<sup>306</sup> the conducting of the auction<sup>307</sup> and the award of the contract on the basis of the results of the auction.<sup>308</sup>

As in the case of ordinary tender procedures, notice of the auction must be given.<sup>309</sup> This ensures transparency and competition. The information required is similar to the information required with ordinary tender procedures.<sup>310</sup> The model also stipulates that information as to criteria other than price that are to be used and the relative weight thereof, the mathematical formula to be used and the criteria that may not be altered during the auction must be provided.<sup>311</sup> The information that needs to be included further relates to the pre-qualification of tenderers,<sup>312</sup> the submission of initial bids,<sup>313</sup> access to the auction,<sup>314</sup> applicable deadlines,<sup>315</sup> the closing of the auction,<sup>316</sup> whether it is to be a single- or multiple-stage auction,<sup>317</sup> and the rules of conduct for the auction.<sup>318</sup> Provision is made for the equal treatment of suppliers and fairness and transparency by providing that where invitations are sent to a limited number of suppliers<sup>319</sup> to pre-qualify,<sup>320</sup> and where initial bids are required,<sup>321</sup> such invitations should be sent out individually and simultaneously to such suppliers identified. The fact of registration to participate must be promptly and individually confirmed with each supplier.<sup>322</sup> The auction may also not take place before the expiry of adequate time to allow suppliers to prepare for the auction.<sup>323</sup>

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<sup>305</sup> Revised Model Law art 51 *ter*.

<sup>306</sup> Revised Model Law art 51 *quater*.

<sup>307</sup> Revised Model Law art 51 *quinquies*.

<sup>308</sup> Revised Model Law art 51 *sexies*.

<sup>309</sup> Revised Model Law art 51 *bis*(1). This must be done as set out in art 24.

<sup>310</sup> Revised Model Law art 51 *bis*(2)(a). Reference is made to art 25(1)(a)(d) and (e) and art 27(d), (f), (h) to (j) and (t) to (y).

<sup>311</sup> Revised Model Law art 51 *bis*(2)(b).

<sup>312</sup> Revised Model Law art 51 *bis*(2)(d).

<sup>313</sup> Revised Model Law art 51 *bis*(2)(e).

<sup>314</sup> Revised Model Law art 51 *bis*(2)(f).

<sup>315</sup> Revised Model Law art 51 *bis*(2)(g).

<sup>316</sup> Revised Model Law art 51 *bis*(2)(h).

<sup>317</sup> Revised Model Law art 51 *bis*(2)(i).

<sup>318</sup> Revised Model Law art 51 *bis*(2)(j).

<sup>319</sup> Revised Model Law art 51 *bis*(4).

<sup>320</sup> Revised Model Law art 51 *bis*(5).

<sup>321</sup> Revised Model Law art 51 *bis*(6).

<sup>322</sup> Revised Model Law art 51 *bis*8.

<sup>323</sup> Revised Model Law art 51 *bis*9.

The Revised GPA further provides that the procuring entity must ensure that a sufficient number of suppliers is invited to participate and register for the auction, so as to ensure effective competition.<sup>324</sup> The auction must be cancelled if this objective cannot be ensured.<sup>325</sup>

In general it can be said that electronic reverse auctions can improve value for money for all parties, in that the procedure has the potential to increase competition amongst suppliers in an easily accessible, convenient, cost- and time-effective, dynamic and real-time setting.<sup>326</sup> It can also improve transparency and prevent abuse in the procurement process. Information on the results of the evaluation of successive bids is immediately made known to all participants at every stage of the auction. This includes the final result of the auction, which is made known to all bidders instantaneously and simultaneously. The possibility of fraud and abuse is limited as the evaluation process is fully automated and little human intervention takes place. The negative aspect of electronic reverse auctions is that they may encourage undue focus on price. They are also open to collusive behaviour by suppliers. Evaluation by means of software and mathematical formulae has limited application.

Transparency, fairness, value for money, and the integrity of the process are ensured during an Electronic Reverse Auction by providing that all participants should have an equal and continuous opportunity to submit their bids,<sup>327</sup> that the evaluation of bids should be automatic,<sup>328</sup> that successive results must be instantaneously and continuously communicated,<sup>329</sup> and that there must be no communication between the procuring entity and the bidders save as discussed above.<sup>330</sup> Provision is further made for the non-disclosure of the identity of bidders,<sup>331</sup> the closure of the auction in accordance with the specified criteria<sup>332</sup> and the suspension or termination of the auction in the

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<sup>324</sup> Revised Model Law art 51 *quater*.

<sup>325</sup> Revised Model Law art 51 *quater*(2).

<sup>326</sup> Provided that electronic media are readily available and affordable.

<sup>327</sup> Revised Model Law art 51 *quinquies*(1)(a).

<sup>328</sup> Revised Model Law art 51 *quinquies*(1)(b).

<sup>329</sup> Revised Model Law art 51 *quinquies*(1)(c).

<sup>330</sup> Revised Model Law art 51 *quinquies*(1)(d).

<sup>331</sup> Revised Model Law art 51 *quinquies*(2).

<sup>332</sup> Revised Model Law art 51 *quinquies*(3).

case of systems or communication failures or other reasons stipulated in the tender documents.<sup>333</sup>

With regard to the award of the contract it is provided that it should be awarded to the lowest-price bidder or the lowest evaluated bid as applicable,<sup>334</sup> notice of acceptance must be promptly given<sup>335</sup> and the name and address of the successful bidder must be promptly communicated to the other bidders.<sup>336</sup> These provisions should ensure value for money, transparency, fairness and the integrity of the process.

The UNCITRAL Model Law is a good example of a regulatory framework within which Electronic Reverse Auctions can be used, which should ensure that the general objectives of public procurement are achieved.

### *3.5.9 Conclusion on alternative methods of procurement*

The alternative methods of procurement provided for by the Model Law ensure a much needed flexibility in the procurement methods available to enacting states. These alternative methods are needed to ensure effectiveness. Although tender proceedings may provide the most competitive procedure, they will not always be cost-effective and suitable for situations of emergency or where confidentiality is required.

The Model Law strives to ensure as wide as possible participation by suppliers as is practical in all of the methods of procurement in order to have sufficient competition. These alternatives are realistic and cost-effective methods of procurement in situations where cost is a priority,<sup>337</sup> in emergencies, in the context of national security, and where there are highly technical requirements and single suppliers. Within these limitations the alternative methods strive to ensure sufficient participation to enable proper

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<sup>333</sup> Revised Model Law art 51 *quinquies*(4).

<sup>334</sup> Revised Model Law art 51 *sexies*(1).

<sup>335</sup> Revised Model Law art 51 *sexies*(2).

<sup>336</sup> Revised Model Law art 51 *sexies*(3).

<sup>337</sup> Cost is an important factor in low value procurement.

competition, which will result in value for money being obtained by the procuring entity. Advertising could, however, be made compulsory in all closed procurement procedures in order to limit the possibility of abuse and to ensure transparency.<sup>338</sup>

The Model Law tries to ensure within the bounds of possibility that the same principles which apply in the ordinary tender process also apply in the use of the alternative methods of procurement.

The stress laid on achieving objectivity in the use of alternative methods of procurement is noticeable. The requirements of the Model Law with regard to the criteria for pre-qualification, qualification, evaluation of the tender and specifications for the subject matter of the procurement are designed to ensure objectivity. This would lead to fairness towards the suppliers and would curb fraud, corruption and collusion. The objective of effectiveness and the integrity of the process would be realised in this way.

The problem of arbitrariness is addressed by providing for the use of detailed criteria which must be used where applicable, without discarding the benefits of discretionary decisions. In particular, it is provided that the tender that “best suits the needs” of the procuring entity as described in the published criteria will be the successful tenderer. This will also ensure value for money in that a too rigid evaluation can lead to the award of a tender that does not necessarily fulfil the needs of the procuring entity optimally.

The Model Law enhances the principles of objectivity and fairness by limiting and circumscribing the factors that can be taken into account in the evaluation of tenders. The various provisions regulating communication, the provision of reasons, the provision of information and the keeping of a record of decisions should lead to transparency which serves to make the process fair, curbs abuses, ensures the integrity of the proceedings, and results in value for money being obtained.

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<sup>338</sup> Arrowsmith 2004 *ICLQ* 31-33.

The requirement that the use of an alternative method of procurement has to be justified by the procuring entity serves to enhance transparency and curb abuses. This is important as the use of alternative methods of procurement has the potential to limit participation and to open up the process for abuse.

The inclusion of Electronic Reverse Auctions in the Revised Model Law ensures that the advantages of electronic communication can be utilised.<sup>339</sup> However, the provisions in this regard are neutral in that they do not encourage or prescribe the use of the system. Although Electronic Reverse Auctions will only be feasible for specific kinds of procurement, it is nevertheless important that the principles of objectivity, transparency, efficiency, competition and value for money should be properly implemented.

Criticism that can be levelled against the alternative methods of procurement in the Model Law is that they do not provide for supplier lists.<sup>340</sup> Supplier lists are lists that suppliers need to register for to be eligible to participate. These lists can constitute only a list of names, on the one hand, or on the other hand such a list could be compiled only after a full investigation as to eligibility has been conducted. Many variations in between these two extremes are possible. Such lists are used by many countries to good effect. Their purpose is generally to streamline the procurement process by ensuring wide publication, the proper dissemination of information, and the limiting of the time spent on evaluating suppliers, with a concomitant saving of costs.<sup>341</sup> Provision can be made for optional and compulsory lists, depending on the circumstances, but the necessary provisions need to be in place to ensure competition and transparency.<sup>342</sup>

The Revised Model Law does not provide for suppliers lists. In its further deliberations the Working Group also decided that provision should not be

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<sup>339</sup> For a general discussion of the use of electronic auctions in the EU and USA see Yukins and Wallace 2005 *PPLR* 183-202.

<sup>340</sup> Arrowsmith 2004 *ICLQ* 33.

<sup>341</sup> Arrowsmith 2004 *ICLQ* 33.

<sup>342</sup> Wallace warns that the use of lists can unduly inhibit participation. See Wallace 1995 *PPLR* 60.

made for suppliers lists in the Model Law.<sup>343</sup> The use of framework agreements was seen as a better alternative. A further reason for not providing for suppliers' lists was that the provisions to properly address the use of such lists would be excessively lengthy and complex.<sup>344</sup>

The next criticism against the methods of procurement provided for in the Model Law is that framework agreements are not provided for.<sup>345</sup> Quite often procuring entities need to procure goods or services over a period of time. The exact quantities, nature and time thereof are not always known beforehand. This is usually the case with maintenance needs and consumables, like stationary, that are used on a regular basis. Many procuring entities make use of framework agreements with suppliers to fulfil such needs.<sup>346</sup> At its Thirteenth and Fifteenth Sessions the Working Group did deal with framework agreements in detail, and provisions for framework agreements will be incorporated in the final Revised Model Law.<sup>347</sup>

### **3.6 Review**

#### *3.6.1 Introduction*

One of the essential features of a public procurement system is the possibility to challenge any aspect of the procurement process. Although different forms of challenge procedures exist, it is essential that in the last instance any aggrieved party must be able to put its case before an independent tribunal for adjudication.

The Model Law provides that any supplier or contractor that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed by

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<sup>343</sup> Report of Working Group I (Procurement) on the work of its Thirteenth Session, UNCITRAL document A/CN.9/648 dated 21 April 2008 par 14 and 134-136. This decision was based on the deliberations as set out in UNCITRAL documents A/CN.9/568, par 55-68, A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1.

<sup>344</sup> *Id* par 135.

<sup>345</sup> Arrowsmith 2004 *ICLQ* 36-38.

<sup>346</sup> Arrowsmith 2004 *ICLQ* 36-38.

<sup>347</sup> Report of the Working Group I on its Thirteenth Session, UNCITRAL document A/CN.9/648, 6-29, s IV. See also Nicholas 2006 *PPLR* 161-166. See further the Report of Working Group I (Procurement) on the work of its Fifteenth Session UNCITRAL document A/CN.9/668 dated 16 February 2009 and UNCITRAL document A/CN.9/WG.I/WP.69/Add4 dated 20 March 2009, where the proposed provisions are set out.

the Model Law on the procuring entity, has the right to review.<sup>348</sup> However, review is not available with regard to certain aspects of or decisions in the procurement process. The excluded aspects are the selection of a method of procurement, the choice of a selection procedure, the limitation of procurement proceedings on the basis of nationality, a decision by the procuring entity to reject all tenders, proposals, offers or quotations, a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings, or an omission to refer, in the tender documents,<sup>349</sup> to the provisions of the Model Law, procurement regulations, and other laws and regulations directly pertinent to the procurement proceedings.<sup>350</sup>

In the Revised Model Law it is proposed that these provisions be deleted. This development should be welcomed as the decisions referred to above can have a direct influence on the realisation of the objectives of value for money in public procurement. Decisions on the method of procurement can, for instance, potentially be used to favour certain suppliers. The decisions can also impact on the achievement of the principles of accountability, transparency, competitiveness, efficiency, the combating of abuse, and fairness and equitability.

The procedure proposed by the Model Law entails that review is in the first instance to be sought from the procuring entity itself, in particular where the procurement contract is yet to be awarded. This is proposed to facilitate economy and efficiency.<sup>351</sup> The procuring entity may in many instances be willing to correct errors, in particular if they are of a procedural nature. Secondly, the option of review by a higher administrative organ of government is provided. This option need not be enacted by the enacting state if it will be inconsistent with the constitutional, administrative and judicial structures of the particular state.<sup>352</sup> In

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<sup>348</sup> Art 52(1).

<sup>349</sup> See art 27(t) and art 38(s).

<sup>350</sup> Art 52(2).

<sup>351</sup> Guide to Enactment par 32.

<sup>352</sup> Guide to Enactment par 32.

the final instance, judicial review has to take place in terms of the state's national law.<sup>353</sup>

### 3.6.2 *Review by the procurement entity or approving authority*

Provision is made for review by the procuring entity, or if the award of the tender is subject to the approval of another authority, the approving authority. This must be done before the contract enters into force.<sup>354</sup> In such instances a written complaint to the head of the procuring entity, or the head of the approving authority should there be one, must be made. The complaint must be entered within 20 days of the date upon which the supplier or contractor became aware of the circumstances giving rise to the complaint, or the date upon which that supplier or contractor should have become aware of those circumstances, whichever is earlier.<sup>355</sup> Such a complaint need not be entertained after the contract comes into force.<sup>356</sup>

Unless the complaint is resolved by mutual agreement, the head of the procuring entity (or of the approving authority) must, within 30 days after the submission of the complaint, issue a written decision. The decision must state the reasons for the decision and, if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.<sup>357</sup> The decision of the head of the procuring entity (or of the approving authority) shall be final unless further proceedings are instituted.<sup>358</sup> If the head of the procuring entity (or of the approving authority) does not issue a decision within the prescribed time, the supplier or contractor is entitled to immediately thereafter institute further proceedings. As soon as such proceedings are instituted, the head of the procuring entity (or of the approving authority) has no further jurisdiction to entertain the complaint.<sup>359</sup>

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<sup>353</sup> Art 54.

<sup>354</sup> Art 53(1).

<sup>355</sup> Art 53(2).

<sup>356</sup> Art 53(3).

<sup>357</sup> Art 53(4).

<sup>358</sup> Art 53(6).

<sup>359</sup> Art 53(5).

By providing for time limits for the provision of reasons for decisions made and for the taking of corrective measures, the objectives of efficiency, transparency and accountability are served. This procedure will serve to swiftly and cost-efficiently dispose of many minor disputes. It may in certain instances prevent future unnecessary delays, litigation, and the uncertainty associated with normal litigation.

### 3.6.3 Administrative review

The possibility of administrative review by an administrative body is included as an option for countries whose legal system can include such a structure.<sup>360</sup> Administrative review may be used in the following circumstances: if the procuring entity (or the approving authority) cannot entertain a review because the procurement contract has been entered into;<sup>361</sup> if the complaint is not entertained by the procuring entity (or the approving authority);<sup>362</sup> if the contract has, after referring the complaint to the procuring entity (or the approving authority), come into force;<sup>363</sup> or if the supplier or contractor claims to be adversely affected by a decision of the procuring entity (or of the approving authority).<sup>364</sup> Time limits of 20 days are imposed on the application for a review.<sup>365</sup>

The administrative body must, on receipt of the complaint, give notice thereof to the procuring entity (or the approving authority).<sup>366</sup> If it does not dismiss the complaint, the administrative body may grant or recommend any of the remedies provided.<sup>367</sup> The administrative body must within 30 days issue a

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<sup>360</sup> Art 54 and the footnote thereto.

<sup>361</sup> Art 54(1)(a). It is a precondition that the complaint must have been submitted within 20 days after the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances, whichever is the first.

<sup>362</sup> Art 54(1)(b). It is a precondition that if the complaint must have been submitted within 20 days after the issuance of the decision, not to entertain the complaint.

<sup>363</sup> Art 54(1)(c). It is a precondition that the complaint must have been submitted within 20 days after the expiry of the period referred to in art 53(4).

<sup>364</sup> Art 53(1)(d). It is a precondition that the complaint must have been submitted within 20 days after the issuance of the decision.

<sup>365</sup> Art 54(1).

<sup>366</sup> Art 54(2).

<sup>367</sup> Art 54(3). It may: declare the legal rules or principles that govern the subject-matter of the complaint; prohibit the procuring entity from acting or deciding unlawfully or from following an

written decision, stating the reasons for the decision and the remedies granted.<sup>368</sup> The decision is final, but judicial review may be instituted.<sup>369</sup>

Administrative review also allows for a swift, inexpensive, effective and practical way to resolve disputes. This ensures transparency, efficiency, accountability and fair-ness. The remedies allowed also ensure that the disputes can be effectively resolved. This will serve to create trust in the system and certainty in the outcomes, which again will lead to wider participation by suppliers. In many instances delays in procurement detrimentally affect all parties involved, including the public at large. Administrative review can alleviate many of the detrimental effects of expensive, time-consuming dispute resolution. It is interesting to note that with regard to the award of compensation two options are provided for in the Model Law. In terms of the first option compensation is limited to any reasonable costs incurred, and in terms of the second option compensation can include loss or injury suffered.<sup>370</sup> It is for the enacting state to decide as a matter of policy which of the two options it wants to adopt.

#### *3.6.4 Rules applicable to both review proceedings by the procuring entity (or approving authority) and an administrative body*

After the submission of a complaint, the procuring entity (or the approving authority) or administrative body must notify all tenderers participating in the procurement proceedings of the submission of the complaint and of its substance.<sup>371</sup> Any such tenderer or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in

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unlawful procedure; require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision; annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force; revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force; require the payment of compensation for either any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity, or for loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings; and order that the procurement proceedings be terminated.

<sup>368</sup> Art 54(4).

<sup>369</sup> Art 54(5).

<sup>370</sup> Art 54(3)(f). For the position in South African law see the decision in *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

<sup>371</sup> Art 55(1).

the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.<sup>372</sup> This will ensure transparency and effectiveness. In particular the duplication of litigation will be avoided.

Within five days after the decision has been made, a copy thereof must be furnished to the tenderer who submitted the complaint, to the procuring entity, and to any other tenderer or governmental authority that participated in the review proceedings. The complaint and the decision must also be made available for inspection by the general public. No information may, however, be disclosed if it would be contrary to the law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the parties, or would inhibit fair competition.<sup>373</sup> These provisions will ensure transparency, accountability, effectiveness and fairness to the parties. The provision of information is made subject to reasonable limitations, which is inherently fair.

The timely submission of a complaint to either the procuring entity (or the approving authority) or administrative body suspends the procurement proceedings for a period of seven days. The complaint must, however, not be frivolous. It must contain a declaration which, if proven, demonstrates that the supplier or contractor will suffer irreparable injury in the absence of a suspension, that it is probable that the complaint will succeed, and that the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.<sup>374</sup> After the procurement agreement has come into force, the timely submission of a complaint to the administrative body shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the above requirements.<sup>375</sup> The procuring entity (or the approving authority) or the administrative body may extend the suspension in order to preserve the rights of the supplier or contractor, pending the institution

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<sup>372</sup> Art 55(2).

<sup>373</sup> Art 55(3).

<sup>374</sup> Art 56(1).

<sup>375</sup> Art 56(2).

of the review proceedings. The total period of suspension may not exceed 30 days.<sup>376</sup>

The procuring entity may certify that urgent public interest considerations require the procurement to proceed, and the suspension will then lapse. Such a certificate, which shall state the grounds for the finding that such urgent considerations exist, is conclusive with respect to all levels of review except judicial review. It must be made part of the record of the procurement proceedings.<sup>377</sup> Any decision by the procuring entity in this regard and the grounds and circumstances for such a decision shall be made part of the record of the procurement proceedings.<sup>378</sup>

The provision of time limits will ensure efficiency. The suspension of the procurement proceedings for limited periods only is practical and fair towards the successful tenderer and procuring entity. In any event, disputes should not be permitted unnecessarily to delay the procurement process, if due consideration is to be given to the public interest. The provision that the procuring entity may certify that urgent public interest considerations require the procurement to proceed can be questioned, as this provision could easily be misused. It is usually more difficult to stop the execution of a tender which is in progress than one that is still to be executed, for which reason the decision to do so should be in the hands of the administrative or judicial review body rather than in the hands of the procuring entity. Transparency and accountability are once again ensured by requiring that reasons be provided for decisions taken, and that the reasons must be made part of the record of proceedings.

### 3.6.5 *Judicial review*

Provision is made for judicial review,<sup>379</sup> including review of the decisions made by the above review bodies, or of the failure of those bodies to make

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<sup>376</sup> Art 56(3).

<sup>377</sup> Art 56(4).

<sup>378</sup> Art 56(5).

<sup>379</sup> In terms of art 52(1) any supplier or contractor that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed on the procuring entity may seek

decisions within the prescribed time-limit.<sup>380</sup> Details of such review are not set out as they will depend on the municipal law of each state.

### 3.6.6 *Conclusion on review:*

One of the essential elements to ensure accountability, fairness and the integrity of the procurement process is the provision of effective remedies in the case of unlawful actions. The following essential provisions emerge from the procedures provided for in the Model Law:

- the reference in the first instance of disputes to the procuring entity (or approving authority) itself;
- the adherence to strict timeframes;
- the provision of written decisions with reasons;
- the existence of effective and various remedies and corrective measures;
- cost efficiency;
- the requirement of notification to all tenderers of the initiation of review procedures and the opportunity to participate;
- the availability of information to the public;
- confidentiality with regard to legitimate commercial interests, the possible inhibition of fair competition, and matters of public interest;
- the suspension of proceedings during review proceedings;
- the inclusion of minimum information in the record of proceedings; and
- the availability of judicial review in terms of administrative law.

The above provisions should ensure transparency, efficiency, fairness to all parties, accountability, and the integrity of the system.

The Model Law ensures that the swift, effective and inexpensive resolution of disputes is possible. It does not exclude the use of ordinary judicial review procedures in terms of the ordinary laws of the enacting state. One of the

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<sup>380</sup> review. The grounds for review that are excluded are set out in art 52(2).  
Art 57.

issues that warrants attention is the fact that it is not a specific requirement that the administrative review be performed by an independent and impartial body.<sup>381</sup> The element of the independence of the review would serve to ensure confidence in the procedure and that the principles of accountability and the integrity of the system are achieved. Another possibility that has been suggested to ensure an efficient and transparent procurement system is the appointment of a Public Procurement Ombudsman.<sup>382</sup> This suggestion was made in connection with the EU and has not been put forward as a possibility for the Model Law.

### **3.7 Overall conclusions**

In the preamble to the Model Law its objectives are stated to be the following:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors especially, where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the goods, construction, or services to be procured;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of and fairness and public confidence in the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement.<sup>383</sup>

In the Guide to Enactment it is stated that the objectives of the Model Law, namely maximising competition, according fair treatment to tenderers, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement, and for curbing abuses.<sup>384</sup>

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<sup>381</sup> Arrowsmith 2004 *ICLQ* 41 and 42.

<sup>382</sup> Lindahl 1997 *PPLR* 218-220.

<sup>383</sup> See the Preamble of the Model Law. In the Guidelines it is stated that “the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.”

<sup>384</sup> Guide to Enactment par 8.

These objectives are achieved by setting forth a framework within which procurement must take place.<sup>385</sup> Some flexibility does exist, which allows for enacting states to choose between certain options and to issue regulations determining the detail of the public procurement procedures.

These objectives are important for and serve the legitimate rights and expectations of the general public in its capacity as the beneficiary of the procurement and as the source of financing the procurement, the government as the institution that has to act in the public interest and is responsible for the procurement, and the tenderers who provide the goods and services in the open market.

In evaluating the Model Law and how content is given to the stated objectives, it is notable that it essentially decentralises the procurement system.<sup>386</sup> It provides that the procurement shall be arranged and carried out by the procuring entity. The procuring entity takes the decisions in the procurement process but also bears the accountability for doing so. This does not mean that there can not be mechanisms in place to oversee the proper implementation of the provisions of the procurement system.<sup>387</sup> It does, however, entail that there is no central agency carrying out procurement on behalf of all other organs of state.

The Model Law further strives for an objective approach in all the stages of the procurement process by trying as far as is practically possible to provide for the application of objective criteria in the procurement process. However, exceptions are allowed in all of the stages of the procurement process. A discretion is allowed to the procuring entity to deviate from a strictly objective approach, for instance by providing for a choice in the method of procurement,<sup>388</sup> the verification of the qualifications of tenderers,<sup>389</sup> and the

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<sup>385</sup> See Arrowsmith "National and International Perspectives" 7-10; Hunja "UNCITRAL Model Law" 105-106.

<sup>386</sup> See Hunja "UNCITRAL Model Law" 105.

<sup>387</sup> Guide to Enactment par 36-40.

<sup>388</sup> Alternative methods of procurement are provided for in ch V of the Model Law.

<sup>389</sup> See ch III s I of the Model Law.

evaluation of tenders.<sup>390</sup> This is done in order to adapt the particular procurement proceeding to a procuring entity's particular needs and requirements.<sup>391</sup>

The effect of the detailed provisions of the Model Law is also to ensure uniformity in the procurement process by procuring entities. This is achieved by the detailed provisions regulating all of the phases of the procurement process. An important result hereof is certainty, which is conducive to participation in the public procurement process, as the private sector is risk adverse. The fact that all public procuring entities are bound by the same rules ensures the integrity of the process and promotes knowledge, capacity and the confidence to participate in the public procurement process.<sup>392</sup>

The predominant method for procurement is competitive tendering in the case of procurement of goods<sup>393</sup> and the "principal method"<sup>394</sup> of procurement of services. The criteria which may be used to determine the lowest evaluated tender are limited. They are price, operating costs, the time for delivery, functional characteristics, the terms of payment and guarantees, socio-economic aspects listed by the enacting state, and national defence and security considerations.<sup>395</sup> Alternative methods of procurement are provided for to allow for particular circumstances. The "principal method" of procurement of services ensures that due weight in the evaluation process is given to the qualifications and expertise of the service providers. Competitive tendering could, however, have been allowed more prominence in the procurement of services, where the services to be procured can be readily specified.

The contract and implementation phase of public procurement are not addressed in the Model Law and are left to the municipal laws of the respective states. Because of the possibility of abuse during the contract and implementation phase, it is desirable that the Model Law should address this

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<sup>390</sup> See ch III s III of the Model Law.

<sup>391</sup> See in general Dischendorfer 2003 *PPLR* 100-107.

<sup>392</sup> For a discussion of the objective of uniformity in the US, see Schooner 2002 *PPLR* 103-110.

<sup>393</sup> Art 18(1).

<sup>394</sup> Art 37.

<sup>395</sup> Art 34(4)(c).

issue as well.<sup>396</sup> It is desirable that the principle of impartiality and independence be provided for in administrative review. Although some commentators<sup>397</sup> believe that more detail should be provided as to the possible remedies available in cases of unlawful actions in the procurement process, it might be best to allow a margin of appreciation for the enacting state's municipal law. A solution could be to allow for optional provisions relating to available remedies, thus enabling enacting states to decide which remedies should be included in their procurement laws.

The following are key elements in the procurement regime provided for in the Model Law, which give content to the stated objectives:

- The accessibility and availability of tender laws, regulations, guidelines and administrative and judicial decisions;
- The unrestricted solicitation of participation by suppliers or contractors;
- The form of communication that has to be used between the procuring entity and suppliers and contractors;
- The documentary evidence that has to be provided by suppliers and contractors concerning their qualifications;
- The use of both the state's official and an international trade language in documents for the solicitation of tenders, proposals, offers or quotations;
- The comprehensive descriptions and specifications that must be given in the tender documents of the goods, construction or services to be procured;
- The full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender;
- The strict prohibition of negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders;
- The public opening of tenders after the deadline for submission of tenders;

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<sup>396</sup> Nicholas 2006 *PPLR* 165.

<sup>397</sup> Arrowsmith 2004 *ICLQ* 42; Working Group document A/CN.9/WG.I/WP.32 dated 25 June 2004; Working Group document A/CN.9/615 dated 6 October 2006.

- The strict and objective evaluation of tenders in accordance with the pre-disclosed criteria;
- The disclosure of any formalities required for the entry into force of the procurement contract;
- The flexibility of the methods of procurement;
- The keeping of a proper record of proceedings;
- The public notification of awards;
- The mandatory rejection of tenders in the case of improper inducements; and
- The provision for different review procedures.

The above is achieved in a decentralised regime underpinned by principles of objectivity and uniformity; transparency, competitiveness, effectiveness, fairness, accountability, integrity, and the avoidance of abuse.

The Model Law provides for socio-economic or collateral objectives to be achieved through public procurement.<sup>398</sup> It recognises the fact that in some cases enacting states need to or may wish to protect certain economic sectors against foreign competition. This may be done only on the grounds specified by the enacting state in the procurement regulations or pursuant to other provisions of the enacting state's laws.<sup>399</sup> The purpose is to promote transparency and to prevent arbitrary and excessive resort to a restriction of foreign participation.

Account is also taken of the possibility that foreign aid arrangements may require that procurement should be from suppliers and contractors in the donor country and that restrictions on the basis of nationality may result from regional economic integration groupings and international treaties.<sup>400</sup>

Allowance is made for a margin of preference to be allowed to local suppliers and contractors.<sup>401</sup> This enables the state to foster and protect national suppliers

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<sup>398</sup> Art 8(2), 34(4)(c)(iii), 34(4)(d), 39(1)(d), 39(2), 27(v) and 22(2).

<sup>399</sup> Art 18(1).

<sup>400</sup> Art 3.

<sup>401</sup> Art 34(4)(d) and 39(2).

and contractors as well as its industrial and economic objectives without resorting to purely domestic procurement. The system permits the procuring entity to favour local suppliers and contractors which fall within the margin without simply excluding foreign competition. This ensures that foreign competition is not absolutely excluded. Total exclusion might perpetuate lower levels of economy, inefficiency and the lack of competitiveness of the relevant sectors of national industry.<sup>402</sup>

To ensure that socio-economic criteria are objective and quantifiable, as far as is practical, the Model Law provides that such criteria should be given a relative weight in the evaluation procedure or be expressed in monetary terms. This is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This will reduce the scope for discretionary or arbitrary decisions. The criteria can be quantified in monetary terms or assigned weightings (eg, “coefficients” or “merit points”) relative to the various aspects of each tender in relation to the criteria set forth in the tender documents. The tender with the most favourable aggregate weighting would be the lowest evaluated tender.

Some commentators are of the opinion that the use of collateral policies could be provided for in more detail in the Model Law.<sup>403</sup> Collateral objectives are of importance especially in developing countries. A balanced approach by such countries as rely on the Model Law as a benchmark and those that adopt it will be enhanced if provisions regarding collateral objectives are provided in more detail. This issue is still the subject of discussion in the Working Group.<sup>404</sup>

Despite the above criticism, the Model Law has largely achieved what it set out to do as envisaged in its preamble. It remains a benchmark for public procurement. Accordingly it also provides a very good matrix for evaluating the current South African public procurement regime.

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<sup>402</sup> Guide to Enactment par 25-27.

<sup>403</sup> Arrowsmith 2004 *ICLQ* 43.

<sup>404</sup> Nicholas 2006 *PPLR* 162; UNCITRAL document A/CN.9/615 dated 6 October 2006.

## CHAPTER 4

### THE GOVERNMENT PROCUREMENT AGREEMENT

#### 4.1 Introduction

The trading of goods and services is a feature of human history. It has played and still plays a fundamental role in economic, social, technological and cultural development.<sup>1</sup> The second half of the twentieth century witnessed a liberalisation of international trade. One of the most prominent and important instruments influencing this liberalisation was the General Agreement on Tariff and Trade (GATT) of 1947.<sup>2</sup> The present day World Trade Organisation<sup>3</sup> was established in 1995 and builds on the former GATT.<sup>4</sup>

During the discussions which led to GATT in 1946, the United States proposed that government purchases and contracts should also be subject to the general principles on which the GATT was based, including that of non-discrimination. No consensus could be reached on the issue and government procurement was excluded from GATT.<sup>5</sup> However, discussions on including government procurement under GATT were kept alive, in particular through the work of the OECD.<sup>6</sup> The discussions culminated in the first Government Procurement Agreement,<sup>7</sup> which was signed during 1979 and entered into force in 1981. This agreement formed the basis of the present GPA of 1994.<sup>8</sup> The 1994 GPA was negotiated and concluded in parallel with the Uruguay Round of negotiations.<sup>9</sup> Although the GPA falls under the umbrella of the WTO, it does not form part of the single undertaking which constituted the WTO in January 1995.

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<sup>1</sup> Ortino *Basic Legal Instruments* 1.

<sup>2</sup> Lowenfeld *International Economic Law* 21.

<sup>3</sup> Hereafter referred to as the "WTO". For a general background on the WTO see Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* and Lowenfeld *International Economic Law*.

<sup>4</sup> Ortino *Basic Legal Instruments* 1.

<sup>5</sup> Trepte *Regulating Procurement* 369.

<sup>6</sup> Trepte *Regulating Procurement* 370.

<sup>7</sup> Hereafter referred to as the "GPA".

<sup>8</sup> Trepte *Regulating Procurement* 370.

<sup>9</sup> The WTO was established on 1 January 1995 by the Uruguay round of negotiations which commenced in 1983 and lasted until 1994. See Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 6-9.

The GPA is a plurilateral agreement<sup>10</sup> and is exclusively concerned with trade in goods and services for government consumption. It determines a framework for the national procurement regime, which governs the procurement practices of a signatory's government entities identified in the agreement, subject to agreed value thresholds.<sup>11</sup> The applicable threshold depends on the category of the subject of procurement and on the procuring entity's position in the governmental structure.<sup>12</sup> The commitments undertaken under the GPA are solely determined by the GPA itself and extend only to GPA members.<sup>13</sup> The GPA applies to any law, regulation, procedure or practice with regard to procurement by entities covered by the agreement. It does not replace national procurement systems but such systems must conform to the principles contained in the GPA.<sup>14</sup> The national public procurement regimes of signatory states must ensure the practical implementation of the principles contained in the GPA.

The objective of the 1994 GPA is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement. It is envisaged that this will achieve greater liberalisation and expansion of world trade and improve the international framework for the conduct of world trade.<sup>15</sup>

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<sup>10</sup> Trepte *Regulating Procurement* 374: "A 'plurilateral' agreement in the context of the GATT/WTO is an agreement which imposes obligations only on a subset of WTO/GATT Members, while a 'multilateral' agreement sets out disciplines which are applicable to all Members". On the origin of these terms, see Reich 1997 *Journal of World Trade* 125.

<sup>11</sup> The following WTO Members are covered by the GPA: Canada; the European Communities, including its 27 Member States; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; and the USA. Twenty WTO Members have observer status in the Committee on Government Procurement. These are: Albania, Argentina, Armenia, Australia, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, the Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Sri Lanka, Chinese Taipei and Turkey. In addition, four intergovernmental organisations, namely the International Monetary Fund ("IMF"), the Organisation for Economic Co-operation and Development ("OECD"), the United Nations Conference on Trade and Development ("UNCTAD") and the International Trade Centre, also have observer status in the Committee.

<sup>12</sup> Dischendorfer 2000 *PPLR* 1-38.

<sup>13</sup> *Ibid.*

<sup>14</sup> GPA art VII:1 and XXIV:5.

<sup>15</sup> Preamble GPA. See also Trepte *Regulating Procurement* 368 and De Lima e Silva 2008 *PPLR* 61.

A commitment to further negotiations by the parties to the GPA in order to improve and update the agreement was included in the GPA.<sup>16</sup> This was done in view of developments in information technology and procurement methods, in order to extend the coverage of the GPA, and to eliminate whatever discriminatory measures remained. In December 2006 the text of the Revised GPA was conditionally agreed upon by the present parties to the GPA.<sup>17</sup> It is subject to a legal check and a mutually satisfactory outcome on an expansion of coverage.<sup>18</sup>

This GPA is an important instrument influencing international public procurement.<sup>19</sup> The prospect of eventual accession to the GPA by new state parties<sup>20</sup> is expected to enhance the importance of the agreement over time.<sup>21</sup> Its importance also lies in the principles embodied therein, which can be used as a benchmark against which national procurement systems can be evaluated.<sup>22</sup> The GPA is important for South Africa as it is a member of the WTO, because of the expected increase of international public procurement in future, and because pressure will probably be put on South Africa to become a signatory to the GPA.<sup>23</sup>

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<sup>16</sup> Art XXIV:7(b) and (c).

<sup>17</sup> WTO 2006 *Revision of the Agreement* [docsonline.wto.org/](http://docsonline.wto.org/).

<sup>18</sup> WTO 2009 *Re-negotiation* [www.wto.org/](http://www.wto.org/).

<sup>19</sup> Trepte *Regulating Procurement* 374. Anderson 2006 *PPLR* 167-178.

<sup>20</sup> Accession to the GPA is open to all WTO member states.

<sup>21</sup> Anderson and Gray 2006 *Anti Corruption* [web.worldbank.org/](http://web.worldbank.org/) 167. They also state that nine WTO Members are in the process of acceding to the Agreement on Government Procurement: Albania, Bulgaria, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and Chinese Taipei. A further six WTO Members have provisions in their respective Protocols of Accession to the WTO regarding accession to the Agreement on Government Procurement: Armenia, China, Croatia, the Former Yugoslav Republic of Macedonia, Mongolia and (most recently) Saudi Arabia. China has also recently confirmed that it will formally initiate its process of accession to the GPA no later than the end of 2007.

<sup>22</sup> *Id* at 167: "The WTO Agreement on Government Procurement promotes effective competition (including international competition), consistent with the principles of comparative advantage, in two distinct ways. First, the Agreement provides a vehicle for progressive opening of Parties' markets to international competition through market access commitments that are negotiated and embodied in Appendix I of the Agreement. Secondly, the various provisions of the text of the Agreement relating to the provision of information to potential suppliers, contract awards, qualification of suppliers and other elements of the procurement process provide a framework that is intended to ensure transparent and non-discriminatory conditions of competition between suppliers. In promoting these values, the Agreement on Government Procurement contributes to the objectives of 'good governance' and is consistent with the values supported by other international instruments such as the UNCITRAL Model Law on Procurement and relevant guidelines of the World Bank."

<sup>23</sup> Green Paper on Public Sector Procurement Reform in South Africa April 1997 par 4.4.

For a proper understanding of the GPA, a short discussion of the WTO, the principles governing it and its objectives are necessary. Thereafter the GPA will be discussed in detail with regard to its background, purpose, special rules for developing countries, scope and coverage, tendering procedures, post-award information and publication, and enforcement. Where necessary the Revised GPA will be referred to. The Working Group on Transparency in government procurement will then be dealt with, as transparency forms one of the core issues in public procurement and as it gives an indication of the principles that are acceptable to the participating states.<sup>24</sup> In conclusion, comments will be made on the principles contained in the GPA and on which the GPA is premised. In so doing, the history, purpose and nature of the WTO and the GPA must be kept in mind, as these factors have had a direct influence on the objectives of the GPA and how content is given thereto.

#### **4.2 The World Trade Organisation**

After the global recession in the 1930s and the devastating effects of the Second World War, international trade was identified by the post-war planners<sup>25</sup> as a key factor to rebuild countries' economies.<sup>26</sup> It was believed that the establishment of multilateral organisations would lead to both prosperity and peace.<sup>27</sup> It was also believed that international trade would generate growth and assist to maintain peace and political stability.<sup>28</sup> The basic assumption was that trade across national borders should be encouraged. It was to be done by private enterprise, and government intervention in international trade was to be subject to a code of conduct designed to limit interference with the free movement of goods.<sup>29</sup> One of the ways to reach this goal would be for countries to cut tariffs imposed on

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<sup>24</sup> The Working Group on Services and the review process of the GPA will not be discussed as most of the principles pertinent to public procurement were dealt with extensively by the Working Group on Transparency.

<sup>25</sup> Including world leaders like Churchill and Roosevelt. See Lowenfeld *International Economic Law* 22.

<sup>26</sup> Lowenfeld *International Economic Law* 21. He describes the modern law of international trade as a product of World War II.

<sup>27</sup> Lowenfeld *International Economic Law* 22.

<sup>28</sup> CPA Study Group 2002 *Report* [www.cpahq.org/](http://www.cpahq.org/). See also Lowenfeld *International Economic Law* 22-23. For a general background of the WTO see August *International Business Law*. The WTO 2009 *Home* [www.wto.org/](http://www.wto.org/) also provides useful information on its history, structure and workings.

<sup>29</sup> Lowenfeld *International Economic Law* 22.

imported goods.<sup>30</sup> Two organisations were created during 1944 at Bretton Woods, namely the International Monetary Fund and the World Bank.<sup>31</sup>

As early as in 1943, discussions took place between the United Kingdom and the United States relating to international trade. In November 1945 the United States government issued a document “Proposals for Expansion of World Trade and Employment” to be considered by an International Conference on Trade and Employment. Amongst other proposals, it called for a detailed code of conduct relating to governmental restraints on international trade and for the creation of an international trade organisation.<sup>32</sup> The United States also issued an invitation to fifteen states to enter into negotiations for a multilateral trade agreement.

The United Nations Economic Council at its first meeting in 1946 accepted the proposal for an international conference on trade and employment. A Preparatory Committee of nineteen countries was appointed to draft a document to be considered at such an international conference. Whilst this Preparatory Committee worked on a draft, the United States and the fifteen states it had invited, together with eight others that had joined, engaged in tariff-cutting negotiations during April to October 1947 in Geneva. The outcome of these negotiations was recorded in a single document called the General Agreement on Tariffs and Trade. In 1947 twenty-three countries<sup>33</sup> signed the General Agreement on Tariffs and Trade, which took effect on 1 January 1948.<sup>34</sup> This agreement set out a schedule for tariff bindings and contained a code of conduct designed to safeguard the undertakings given by the countries and to set a standard of behaviour for international trade.<sup>35</sup>

During the discussions in 1946 which led to the GATT, the United States proposed that government purchases and contracts should also be subject to the general principles on which the GATT were based, including that of non-

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<sup>30</sup> Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 1-5.

<sup>31</sup> Lowenfeld *International Economic Law* 22.

<sup>32</sup> Lowenfeld *International Economic Law* 22.

<sup>33</sup> Also known as contracting parties.

<sup>34</sup> Hereinafter referred to as GATT.

<sup>35</sup> Lowenfeld *International Economic Law* 24-25.

discrimination. No consensus could be reached on the issue and government procurement was excluded from the GATT.<sup>36</sup>

The Geneva negotiations set the precedent for subsequent rounds of negotiations which played a major role in the development of international trade in the second half of the 20<sup>th</sup> century.<sup>37</sup> From 1948 to 1994 the GATT provided the rules for a large portion of world trade. Much of the growth was achieved through a series of eight multilateral trade negotiations known as “trade rounds”. The trade rounds concentrated on reducing tariffs between countries. In the latter rounds, however, other elements were also addressed or introduced.<sup>38</sup> In time the GATT became an international agreement, that is, a document setting out rules for conducting trade, and an *ad hoc* international organisation to support the agreement.<sup>39</sup> The first GPA was signed in 1979 and entered into force on 1 January 1981.<sup>40</sup> It covered only products and not services.

By the mid 1980s it was realised that the system under GATT needed to be amended. This led to the Uruguay Round of trade negotiations, which took place from 1986 to 1994. The World Trade Organisation came into being in 1995 with 123 participants and the achievement of final agreements<sup>41</sup> covering the most important aspects of international trade.<sup>42</sup> At its heart were the WTO agreements, negotiated and signed by most of the world’s trading nations.<sup>43</sup> These documents provide the legal ground-rules for international commerce.<sup>44</sup> They are essentially international agreements, binding governments to keep their

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<sup>36</sup> Trepte *Regulating Procurement* 369.

<sup>37</sup> Lowenfeld *International Economic Law* 24.

<sup>38</sup> The Kennedy Round in the mid-1960s brought about a GATT Anti-Dumping Agreement and a section on development, and the Tokyo Round in the 1970s saw the first major attempt to tackle trade barriers that did not take the form of tariffs, and to improve the system.

<sup>39</sup> Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 2-3.

<sup>40</sup> Trepte *Regulating Procurement* 372.

<sup>41</sup> About 60 agreements, annexures, decisions and understandings were agreed upon. They related to tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, the creation of the WTO and other issues.

<sup>42</sup> See Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 7-8 for an exposition thereof.

<sup>43</sup> As at 23 July 2008 there were 153 signatories to the agreement. See WTO 2009 *Members* [www.wto.org/](http://www.wto.org/).

<sup>44</sup> See WTO 2009 *Legal texts* [www.wto.org/](http://www.wto.org/).

trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters and importers, to conduct their business, while allowing governments to meet their social and environmental objectives.<sup>45</sup> Unlike the other documents referred to above, which are mandatory, the GPA remained a plurilateral agreement, and members have a free choice to become parties thereto. The new GPA, which broadened the entity coverage to include services, was also signed by 28 members<sup>46</sup> in 1994 as part of the Uruguay round.<sup>47</sup>

At present the WTO has 153 members, accounting for more than 90% of world trade.<sup>48</sup> Approximately three-quarters of the members are developing countries and least-developed countries, and a quarter are developed countries.<sup>49</sup> Nearly 30 further applicants are at present negotiating to become members of the WTO. The WTO is a member-driven organisation and decisions are taken by the entire membership, typically by consensus.<sup>50</sup>

Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements also cover trade in services as well as in intellectual property. Not all areas of international trade are included. The important issues of competition law and the environment are excluded.

The WTO's main objective is to help trade flow smoothly, freely, fairly and predictably. It pursues this objective by

- administering the WTO trade agreements;
- acting as a forum for trade negotiations;
- settling trade disputes;

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<sup>45</sup> The WTO was formally established by art 1 of the WTO agreement and is registered in accordance with art 102 of the United Nations Charter.

<sup>46</sup> They were Canada, the EU which at that stage consisted of 15 members, Hong Kong, China, Iceland, Korea, Japan, Israel, Liechtenstein, the Netherlands with respect to Aruba, Norway Singapore, Switzerland and the United States. See WTO 2009 *Parties and observers* [www.wto.org/](http://www.wto.org/).

<sup>47</sup> Trepte *Regulating Procurement* 375.

<sup>48</sup> See WTO 2009 *Members* [www.wto.org/](http://www.wto.org/).

<sup>49</sup> The developed countries' share of world trade amounts to approximately 70%. See Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 373.

<sup>50</sup> See WTO 2009 *What is the WTO?* [www.wto.org/](http://www.wto.org/).

- reviewing national trade policies;
- assisting developing countries in trade policy issues, through technical assistance/training; and
- co-operating with other international organisations.<sup>51</sup>

Numerous specialised committees, working groups and working parties deal with individual agreements and other important areas.<sup>52</sup> There are, however, a few simple and fundamental principles that run throughout all of the agreements.<sup>53</sup> These principles are:

- *Non-discrimination* – The two key principles involved here are the most favoured-nation<sup>54</sup> treatment and national treatment. Most Favoured Nation (MFN) treatment implies that countries cannot normally discriminate between their trading partners. If a country grants one member a special favour (such as a lower customs duty rate for one of their products) that country is obliged to do the same for all other WTO members. National Treatment implies that imported and locally-produced goods must be treated equally after the foreign goods have entered the market. National Treatment applies only once a product, service or item of intellectual property has entered the market. Charging customs duty on an import is not a violation of National Treatment even if locally produced products are not charged an equivalent tax.<sup>55</sup>
- *Freer trade* – The WTO wants trade to flow openly and fairly among members. One of the most obvious means of encouraging trade is to lower trade barriers, including tariff barriers, and to exclude non-tariff barriers.<sup>56</sup>

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<sup>51</sup> Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 9-11. See also WTO 2009 *Principles* [www.wto.org/](http://www.wto.org/); and the WTO *Understanding the WTO*, previously published as “Trading into the Future”. An up-to-date version of this text also appears at WTO 2009 *Understanding the WTO* [www.wto.org/](http://www.wto.org/).

<sup>52</sup> Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 9-11.

<sup>53</sup> See WTO 2009 *Principles* [www.wto.org/](http://www.wto.org/); and the WTO *Understanding the WTO*, previously published as “Trading into the Future”. An up-to-date version of this text also appears at WTO 2009 *Understanding the WTO* [www.wto.org/](http://www.wto.org/). See generally the WTO 2009 *Home* [www.wto.org/](http://www.wto.org/).

<sup>54</sup> Hereinafter referred to as “MFN”.

<sup>55</sup> Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 143-177.

<sup>56</sup> Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 112-142. Barriers

- *Predictability* – The WTO contracting parties are bound by their commitments. An undertaking not to raise a trade barrier can be as important as lowering one. It gives businesses a clearer view of their future opportunities. With predictability and stability, investment is encouraged, jobs are created and consumers can enjoy the benefits of competition, choice and lower prices.<sup>57</sup>
- *Promoting fair competition* – The WTO is a system of rules dedicated to open, fair and undistorted competition. It does, however, allow for tariffs and, in limited circumstances, other forms of protection.<sup>58</sup>
- *Special Provisions for Developing Countries* – The WTO system contributes to development. It recognises that developing countries need flexibility in the time they take to implement the various WTO agreements and allows for special assistance and trade concessions for developing countries.<sup>59</sup>

Although government procurement was not included in the GATT in 1948,<sup>60</sup> the issue of government procurement was kept alive by the OECD. The main problem was that the parties could not agree on how to ensure that the agreement would bring trade advantages of equal value to all signatories. The solution reached was to use a system whereby offers and requests were made by different states. Coverage of government procurement, by such an agreement, would then be limited to an agreed list of governmental entities of the particular party.

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include border measures like tariffs, quotas, customs, licensing and similar measures; international protective regulations like subsidies, procurement policies and monopolies; private business practises like social and cultural differences; and barriers that stem from economic and structural characteristics of the importing country like credit, investment, industrial and macro-economic policies.

<sup>57</sup> See WTO 2009 *Principles* [www.wto.org/](http://www.wto.org/); WTO *Understanding the WTO*; and WTO 2009 *Understanding the WTO* [www.wto.org/](http://www.wto.org/).

<sup>58</sup> See WTO 2009 *Principles* [www.wto.org/](http://www.wto.org/); WTO *Understanding the WTO*; and WTO 2009 *Understanding the WTO* [www.wto.org/](http://www.wto.org/).

<sup>59</sup> Specific provision was also made for developing countries in the GATT See WTO 2009 *What is the WTO?* [www.wto.org/](http://www.wto.org/). See also Matsushita, Schoenbaum and Mavroidis *World Trade Organisation* 375.

<sup>60</sup> Purchases by government agencies of products for governmental purposes are exempt from national treatment obligations under the GATT in terms of art III:8.

The first GPA was signed in 1979 and entered into force on 1 January 1981.<sup>61</sup> It covered only products and not services. It was based on the system of lists of entities included as an annexure to the GPA, to which the agreement would apply. These lists were negotiated by the different parties. The further issue pertinently dealt with was that of thresholds, which entailed deciding on a minimum value of a contract before the GPA would apply to it.<sup>62</sup> Common tendering procedures were imposed, to govern the signatories' procurement under the agreement. The principles of Most Favoured Nation and National Treatment were also incorporated in the agreement. The agreement established a Committee on Government Procurement as a forum for continued negotiation. These negotiations were in essence bilateral and entrenched the plurilateral character of the GPA.<sup>63</sup>

A new GPA was signed in 1994, also as part of the Uruguay Round. The agreement remained the same in essence, though it broadened the entity coverage and now included services.<sup>64</sup> The problem still remained that general consensus could not be reached. It was clear that the GPA would remain a plurilateral agreement for the foreseeable future.<sup>65</sup> A commitment by the parties to the GPA to further negotiations, in order to improve and update the GPA in view of developments in information technology and procurement methods, to extend the coverage thereof and to eliminate remaining discriminatory measures, was included in the GPA.<sup>66</sup> In December 2006 the text of the Revised GPA was conditionally agreed upon by the parties thereto.<sup>67</sup> In addition to the parties to the GPA, 19 members of the WTO with observer status and 4 NGO's with observer status participated in the discussions on the amendments to the GPA.<sup>68</sup> The Revised GPA is still subject to a legal check

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<sup>61</sup> Trepte *Regulating Procurement* 372.

<sup>62</sup> A threshold value of SDR150 000 was agreed upon. This refers to the full cost of the product including any VAT or customs duties. Trepte *Regulating Procurement* 372.

<sup>63</sup> Trepte *Regulating Procurement* 374-375.

<sup>64</sup> Trepte *Regulating Procurement* 375.

<sup>65</sup> Trepte *Regulating Procurement* 375. The three areas of work in the WTO on government procurement are the, transparency in government procurement and government procurement in services.

<sup>66</sup> GPA art XXIV:7(b) and (c). See also De Lima e Silva 2008 *PPLR* 61-98.

<sup>67</sup> WTO 2006 *Revision of the Agreement* [docsonline.wto.org/](http://docsonline.wto.org/).

<sup>68</sup> See WTO 2009 *Parties and observers* [www.wto.org/](http://www.wto.org/). The four NGOs are the International Monetary Fund, the Organisation for Economic Cooperation and Development, the United

and a mutually satisfactory outcome on an expansion of coverage.<sup>69</sup> To date the Revised GPA has not become operational. Eight further WTO members, namely Albania, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and Chinese Taipei are in the process of negotiating accession to the Revised GPA. China also indicated during 2007 its intention to initiate negotiations to become a party to the Revised GPA.<sup>70</sup>

### **4.3 Provisions of the GPA**

#### **4.3.1 Background**

As stated above, an agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. Its purpose was to open as much of public procurement as possible to international competition. The agreement was designed to make laws, regulations, procedures and practices with regard to government procurement more transparent, and to ensure that contracting parties did not therewith protect domestic products or suppliers, or discriminate against foreign products or suppliers.<sup>71</sup>

This agreement started off with 28 parties. It had two core elements, namely general rules and obligations, and secondly schedules of national entities in each member country whose procurements were subject to the agreement. A large part of the general rules and obligations concerned tender procedures.<sup>72</sup>

The present agreement and commitments were negotiated in the Uruguay Round<sup>73</sup> and took effect on 1 January 1996.<sup>74</sup> The GPA is one of the plurilateral

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Nations Conference on Trade and Development and the International Trade Centre. The members with observer status are Albania, Argentina, Australia, Armenia, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, Moldova, Kyrgyz Republic, Mongolia, Oman, Panama, Sri Lanka, Chinese Taipei and Turkey.

<sup>69</sup> See WTO 2009 *Re-negotiation* [www.wto.org/](http://www.wto.org/).

<sup>70</sup> See WTO 2009 *Re-negotiation* [www.wto.org/](http://www.wto.org/).

<sup>71</sup> Trepte *Regulating Procurement* 372.

<sup>72</sup> Trepte *Regulating Procurement* 372.

<sup>73</sup> The Uruguay Round of trade negotiations lasted from 1986 to 1994.

<sup>74</sup> It was signed in Marrakesh on 15 April 1994, at the same time as the Agreement Establishing the WTO. See WTO 2000 *Overview* [www.wto.org/](http://www.wto.org/). The members are the United Nations, Japan, Canada, the European Union, Iceland, Israel, Korea, Lichtenstein, Netherlands, Norway, Singapore Switzerland and Hong Kong. During the period 1990 to 1994 the annual expenditure on procurement covered by the agreement amounted to \$30 billion. See WTO 2000 *Overview* [www.wto.org/](http://www.wto.org/).

agreements included in annex 4 to the Agreement Establishing the WTO. All WTO members are not bound by it, but only the signatories to it.<sup>75</sup> The Revised GPA has not become operational yet.

The GPA consists of the main agreement and five annexures. The five annexures are:

- the list of central government agencies the particular government has committed to comply with the agreement;
- the list of sub-central government agencies the particular government has committed to comply with the agreement;
- lists of services and construction subject to the agreement;
- lists of publications the government use to publish tender notices; and
- qualification lists.

In the main agreement the procurement rules and procedures that apply are set out in detail.<sup>76</sup>

The Revised GPA also consists of the main agreement and six annexures contained in appendix I. The six annexures are:

- the central government entities whose procurement is covered by the agreement;
- the sub-central government entities whose procurement is covered by the agreement;
- all other entities whose procurement is covered by the agreement;
- the services covered by the agreement; the construction services covered by the agreement; and
- any General Notes applicable to the annexures of the Party.<sup>77</sup>

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<sup>75</sup> Gordon, Rimmer and Arrowsmith "Economic Impact" 31.

<sup>76</sup> Art I:1, Appendix I.

<sup>77</sup> Revised GPA art II:4.

The basic obligations of national treatment and non-discrimination are provided for in articles III and IV of the GPA and also ensured by detailed operational rules for tendering to be followed by procuring entities. These obligations are provided for in article V of the Revised GPA. The GPA prescribes three methods of tendering<sup>78</sup> and an additional method, namely competitive negotiation, which may be applied. The Revised GPA provides for procurement in a transparent and impartial manner that is consistent with the agreement using methods such as open tendering, selective tendering and limited tendering.<sup>79</sup> Methods of procurement are not limited in the Revised GPA. They have, however, to be transparent and impartial, and to comply with and be consistent with the Revised GPA. In the GPA, detailed provisions regulate the following aspects of the tender process: technical specifications,<sup>80</sup> tendering procedures,<sup>81</sup> the qualification of suppliers,<sup>82</sup> the invitation to participate,<sup>83</sup> selection procedures,<sup>84</sup> time limits,<sup>85</sup> tender documentation,<sup>86</sup> the submission, receipt and opening of tenders and the award of contracts,<sup>87</sup> negotiation procedures,<sup>88</sup> offsets,<sup>89</sup> transparency,<sup>90</sup> the publication of information regarding tenders,<sup>91</sup> the publication of laws, regulations, decisions, administrative rulings and court decisions,<sup>92</sup> and challenge procedures.<sup>93</sup> The Revised GPA provides for developing countries,<sup>94</sup> general principles,<sup>95</sup> information on the procurement system,<sup>96</sup> notices,<sup>97</sup> conditions for participation,<sup>98</sup> the qualification of suppliers,<sup>99</sup> technical specifications and tender

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<sup>78</sup> Art VII. They are open, selective and limited tendering.

<sup>79</sup> Revised GPA art V:4(a).

<sup>80</sup> Art VI.

<sup>81</sup> Art VII.

<sup>82</sup> Art VIII.

<sup>83</sup> Art IX.

<sup>84</sup> Art X.

<sup>85</sup> Art XI.

<sup>86</sup> Art XII.

<sup>87</sup> Art XIII.

<sup>88</sup> Art XIV.

<sup>89</sup> Art XVI.

<sup>90</sup> Art XVII.

<sup>91</sup> Art XVIII.

<sup>92</sup> Art XIX.

<sup>93</sup> Art XX.

<sup>94</sup> Revised GPA art IV.

<sup>95</sup> Revised GPA art V.

<sup>96</sup> Revised GPA art VI.

<sup>97</sup> Revised GPA art VII.

<sup>98</sup> Revised GPA art VIII.

<sup>99</sup> Revised GPA art IX.

documentation,<sup>100</sup> time-periods,<sup>101</sup> negotiation,<sup>102</sup> limited tendering,<sup>103</sup> electronic auctions,<sup>104</sup> the treatment of tenders and contract awards,<sup>105</sup> the transparency of procurement information,<sup>106</sup> the disclosure of information,<sup>107</sup> and domestic review procedures for supplier challenges.<sup>108</sup>

Although the GPA does not seek to replace national procurement systems, it does apply to any law, regulation, procedure or practice regarding procurement by entities covered by the agreement.<sup>109</sup> This entails that such laws, regulations, procedures or practices must conform to the principles provided for in the GPA. The Revised GPA's provision is wider. It refers to any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement.<sup>110</sup> It is important to assess the GPA in particular with regard to its provisions relating to the tender process. The GPA and Revised GPA will be discussed as to their purpose, scope and coverage, special rules for developing countries, tendering procedures, post-award information, and publication and challenge procedures.

#### 4.3.2 Purpose

The preamble to the GPA deals in some detail with its purpose and the objectives on which it is based. It is stated that its purpose is to achieve greater liberalisation and expansion of world trade and to improve the international framework for the conduct of world trade. It is further stated that to achieve the above in public procurement, it is desirable that governments do not protect domestic products or services or domestic suppliers and that they do not discriminate against foreign products or services or against foreign suppliers. It is desirable to provide for the transparency of laws, regulations, procedures and practices regarding government procurement. In this regard international

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<sup>100</sup> Revised GPA art X.

<sup>101</sup> Revised GPA art XI.

<sup>102</sup> Revised GPA art XII.

<sup>103</sup> Revised GPA art XIII.

<sup>104</sup> Revised GPA art XIV.

<sup>105</sup> Revised GPA art XV.

<sup>106</sup> Revised GPA art XVI.

<sup>107</sup> Revised GPA art XVII.

<sup>108</sup> Revised GPA art XVIII.

<sup>109</sup> Art VII:I and XXIV:5.

<sup>110</sup> Revised GPA art II:1 read with the definition of "measure".

procedures on notification, consultation, surveillance and dispute settlement need to be established with a view to ensuring a fair, prompt and effective enforcement.

The Revised GPA in essence echoes the above purpose and objectives in its preamble. It also states that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies, and the functioning of the multilateral trading system. It recognises that the procedural arrangements should be sufficiently flexible to accommodate the specific circumstances of each Party as well as the importance of carrying out procurements in a transparent and impartial manner, and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments such as the United Nations Convention against Corruption. The use of electronic means for procurement is emphasised.

In the preambles of the GPA and the Revised GPA it is also recognised that the development, financial and trade needs of developing countries, in particular those of the least-developed countries, need to be taken into account. It is accepted that it is necessary to broaden and improve the agreement on the basis of mutual reciprocity and to expand the coverage of the agreement to include service contracts, and in this regard the acceptance of and accession to the agreement by governments not party to it need to be encouraged.<sup>111</sup>

It is important to note that the Revised GPA, over and above the principles stated in the GPA, already in its preamble emphasises the principles of integrity and predictability, impartiality, the avoidance of conflicts of interest and corrupt practices, and the use of electronic communication in public procurement. Reference is specifically made to international instruments on corruption.

When evaluating the purpose of the GPA and Revised GPA it must be kept in mind that the core purpose is to liberalise and expand world trade. This entails

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<sup>111</sup> Preamble to the GPA. For a general discussion see Mattoo 1996 *Government Procurement Agreement* [www.wto.org/](http://www.wto.org/).

that domestic products and services must not be protected and foreign suppliers not discriminated against. To achieve this certain principles have to be adhered to. They include transparency, the integrity and predictability of the process, efficient and effective management of public resources, flexibility and impartiality, and the avoidance of conflicts of interest and corrupt practices.<sup>112</sup> The development, financial and trade needs of developing countries need also to be taken into account. Although the purpose of the GPA is aimed at increasing world trade through public procurement, which is mainly an economic objective, similar principles are applicable to the economic objectives of public procurement on national level. Most of these principles can be achieved only by ensuring that content is given thereto in the public procurement process itself. The GPA deals in detail with the public procurement process itself. Arrowsmith sees the primary goal of the GPA as the removal of trade barriers in order to promote free trade.<sup>113</sup> National procurement regimes on the other hand primarily seek, according to her, value for money through an efficient process and the pursuit of secondary or socio-economic objectives.<sup>114</sup> One of the common objectives between the GPA and national procurement systems is that of transparency, as it is used as the main tool to achieve its objectives in both regimes.<sup>115</sup> The GPA and national regimes can not be seen in complete isolation, and although the goals may differ, similar principles are used to achieve the goals.

#### 4.3.3 *Scope and coverage of the GPA*

In terms of article I of the GPA, the agreement applies to any law, regulation, procedure or practice<sup>116</sup> regarding any procurement,<sup>117</sup> by any contractual

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<sup>112</sup> See Schnitzer 2005 *PPLR* 63-90. He states that most bilateral agreements, in order to open up public procurement markets, are based on the key principles of national treatment and non-discrimination. He sees transparency as the common characteristic and as the cornerstone of the agreements, as a lack of transparency is in itself a barrier to trade. This translates into fair, objective and predictable award and challenge procedures. Publication, time limits, the provision of reasons and the keeping of records are, according to him, all principles of such agreements.

<sup>113</sup> Arrowsmith "National and International Perspectives" 10.

<sup>114</sup> *Id* 10. See also Arrowsmith 2002 *JIEL* 766.

<sup>115</sup> De Lima e Silva 2008 *PPLR* 63. In the Revised GPA further emphasis is put on transparency. In terms of art V procurement must be covered in a transparent manner that is consistent with the agreement.

<sup>116</sup> Art I:1 It is interesting to note that any "procedure and practice" is referred to and not only laws and regulations. This makes its application very wide.

<sup>117</sup> Art I:1 Procurement includes public procurement for goods and services.

means,<sup>118</sup> by entities covered by the agreement,<sup>119</sup> above a determined threshold value.<sup>120</sup> The Revised GPA refers to any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement.<sup>121</sup> It covers procurement for governmental purposes of goods, services or any combination thereof, as specified in each Party's appendix I;<sup>122</sup> not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;<sup>123</sup> by any contractual means, including purchase, lease, and rental or hire purchase, with or without an option to buy;<sup>124</sup> for which the value, equals or exceeds the relevant threshold specified in Appendix I;<sup>125</sup> by a procuring entity,<sup>126</sup> that is not otherwise excluded from coverage in paragraph 3 or in a Party's Appendix I.<sup>127</sup> The agreement also, save if provided otherwise, does not apply to:

- (a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
- (b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
- (c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- (d) public employment contracts;

<sup>118</sup> Art I:2 It includes such methods as purchase or lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

<sup>119</sup> Art 1:1, The entities as specified in Appendix I. For each party, Appendix I is divided into five Annexures:

- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by the Agreement.
- Annex 5 specifies covered construction services.

Relevant thresholds are specified in each Party's Annexures. It is necessary in each instance of procurement to determine whether or not it is covered by the agreement and whether or not it is above the agreed threshold.

<sup>120</sup> Art I:4. The relevant threshold is specified in Appendix 1.

<sup>121</sup> Revised GPA art I:1 read with the definition of "measures".

<sup>122</sup> Revised GPA art II:2(a)(i).

<sup>123</sup> Revised GPA art II:2(a)(ii).

<sup>124</sup> Revised GPA art II:2(b).

<sup>125</sup> Revised GPA art II:2(c).

<sup>126</sup> Revised GPA art II:2(d). "Procuring entity" is defined in Art I as an entity covered under Annex 1, 2, or 3 of Appendix I of each Party.

<sup>127</sup> Revised GPA art II:2(e).

- (e) procurement conducted:
  - (i) for the specific purpose of providing international assistance, including development aid;
  - (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or
  - (iii) under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Agreement.<sup>128</sup>

In terms of the GPA, all forms of remuneration, including any premiums, fees, commissions and interest receivable must be taken into account to determine the value of the contract.<sup>129</sup> For the purchases of goods and services by central government, the threshold is SDR 130,000.<sup>130</sup> For the purchase of goods and services by sub-central government entities the threshold varies but is generally in the region of SDR 200,000. The thresholds for goods and services purchased by utilities are generally in the area of SDR 400,000 and for construction contracts SDR 5,000,000. The Revised GPA has similar provisions but also contains specific provisions on the valuation of recurring contracts.<sup>131</sup>

The Revised GPA further provides for exceptions to the coverage of the Agreement. It specifically provides that a party may under particular

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<sup>128</sup> Revised GPA art II:3.

<sup>129</sup> Art II:1 In terms of art II:3 the application of this agreement may not be avoided by the selection of a valuation method or division of the procurement. Art II:4 sets out the basis for valuation if the procurement results in the award of more than one contract, or in contracts being awarded in separate parts. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price art II:5 sets out the basis for valuation. Art II:6 provides that in cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

<sup>130</sup> SDR is the acronym for special drawing rights. It has its origin in the International Monetary Fund's objective that all member states should strive for equilibrium in their balance of payments. During 1969 SDRs were created by the IMF to entitle member states to draw on a special drawing account for the purposes of clearing outstanding balances on their balance of payments. The value of SDRs was initially defined in terms of gold but is now calculated on the basis of a basket of four currencies, namely the US dollar, the British pound, the Japanese yen and the euro, weighed in accordance with their relative share in world trade and finance. The value of the basket of currencies is determined every five years and the daily rate is quoted on the IMF website. The SDR has evolved as a unit of account in long-term transactions and in international treaties. The rate as on 10 May 2007 was \$1,51993 per SDR. For a more detailed discussion see Lowenfeld *International Economic Law* 515-529.

<sup>131</sup> Revised GPA art II:7.

circumstances take certain action, or refuse to disclose information. These are under circumstances that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defence purposes.<sup>132</sup> Parties are also not prevented from imposing or enforcing measures necessary to protect public morals, order, or safety,<sup>133</sup> to protect human, animal or plant life or health,<sup>134</sup> to protect intellectual property;<sup>135</sup> or measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.<sup>136</sup> The aforementioned is subject to the requirement that such measures may not be applied in a manner that would constitute a means of arbitrarily or unjustifiably discriminating between parties or constitute a disguised restriction on international trade.<sup>137</sup>

In terms of the GPA, foreign products, services and suppliers covered by the agreement have to be accorded treatment which is no less favourable than that accorded to domestic products, services and suppliers, and than that accorded to products, services and suppliers of any other party to the agreement.<sup>138</sup> Article III further provides that the parties must ensure that their entities do not treat a locally-established supplier less favourably than another locally-established supplier on the basis of the degree of foreign affiliation or ownership. Parties may not discriminate against locally-established suppliers on the basis of the country of production<sup>139</sup> of the goods or service being supplied.<sup>140</sup> The above provisions do not apply to customs duties or charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government

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<sup>132</sup> Revised GPA art III:1.

<sup>133</sup> Revised GPA art III:2(a).

<sup>134</sup> Revised GPA art III:2(b).

<sup>135</sup> Revised GPA art III:2(c).

<sup>136</sup> Revised GPA art III:2(d).

<sup>137</sup> Revised GPA art III:2.

<sup>138</sup> Art III. This is in accordance with the Most Favoured Nation and National Treatment principles.

<sup>139</sup> Provided that the country of production is a party to the agreement in accordance with the provisions of art IV.

<sup>140</sup> Art III.2.

procurement covered by this agreement.<sup>141</sup> Rules of origin may not be applied to products or services imported or supplied for purposes of government procurement that differ from the rules of origin applied in the normal course of trade, at the time of the transaction in question, to imports or supplies of the same products or services from the same parties.<sup>142</sup> Similar rules are provided for in the Revised GPA.<sup>143</sup> The GPA and Revised GPA do not address the problem of states' not allowing foreign firms to set up locally based firms.<sup>144</sup>

Under the GPA there are no uniform rules on coverage for parties. The procuring entities, thresholds and contracts covered depend on the negotiations among the different parties and differ from state to state.<sup>145</sup> The parties set out the goods, services and entities covered by the GPA in the annexures to appendix I to the agreement. Procurement below the threshold values listed by the parties is also excluded from the GPA. This is more in accordance with bilateral agreements than a multilateral agreement as state parties have to reach separate agreement on the scope and coverage with all existing parties to the GPA.<sup>146</sup> A further problem with the thresholds is that they do not allow locally established firms, based on foreign ownership, to compete in the local market.<sup>147</sup> National Treatment and MFN principles are subject to the GPA, which means that they are applicable only to parties to the GPA and not to other WTO members in instances of public procurement. These principles can further be subjected to unilateral derogations by state parties. In appendix I provision is made for parties to exclude economic sectors or entities because of socio-economic policies on national level.<sup>148</sup> The possibility of derogations detracts from the general application of the agreement and the uniformity of coverage. This can create problems with the negotiations to accession and the scope of coverage.

Although the purpose of the negotiations on the Revised GPA was to broaden the scope of coverage and remove discriminatory restrictions on existing

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<sup>141</sup> Art III.3.

<sup>142</sup> Art IV.1.

<sup>143</sup> Revised GPA art V:1, 2, 5 and 7.

<sup>144</sup> Gordon, Rimmer and Arrowsmith "Economic Impact".

<sup>145</sup> Arrowsmith *Public and Utilities Procurement* 1328.

<sup>146</sup> Arrowsmith *Public and Utilities Procurement* 1330.

<sup>147</sup> De Lima e Silva 2008 *PPLR* 71-72.

<sup>148</sup> *Id* 72.

coverage,<sup>149</sup> the principle that state parties have to reach separate agreement on the scope and coverage with all existing parties to the GPA still remains. The Revised GPA, however, defines the scope and coverage in much more detail and it circumscribes the applicable exceptions and how the valuation of procurement should be done extensively. This will lead to much more clarity and avoid disputes. The problem with thresholds still persists in the Revised GPA. The high thresholds makes it difficult for developing countries to compete internationally as developed countries usually have a distinct advantage with regard to larger contracts, because of the lack of capacity, knowledge, technology and financial means in developing countries.<sup>150</sup>

#### *4.3.4 Special rules for developing countries*

The GPA has since its inception failed to attract signatories from the developing world.<sup>151</sup> It was realised that special provision should be made for developing countries and that the agreement should be made more accessible to non-parties. In order to address this aspect the GPA has specific provisions relating to developing countries.<sup>152</sup>

Article V:1 provides that in the implementation and administration of the agreement, parties must duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to

- (a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;
- (b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and the economic development of other sectors of the economy;
- (c) support industrial units so long as they are wholly or substantially dependent on government procurement; and
- (d) encourage their economic development through regional or global arrangements among developing countries presented to

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<sup>149</sup> Arrowsmith *Public and Utilities Procurement* 1330.

<sup>150</sup> De Lima e Silva 2008 *PPLR* 80.

<sup>151</sup> *Id* 5.

<sup>152</sup> Trepte *Regulating Procurement* 379-380.

the Ministerial Conference of the WTO and not disapproved by it.<sup>153</sup>

Parties must also facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.<sup>154</sup> To ensure that developing countries are able to adhere to this agreement on terms which are consistent with their development, financial and trade needs, article V:3 provides that the objectives listed in article V:1 must be duly taken into account in negotiations with respect to the procurement of developing countries to be covered by this agreement. Developed countries, in the preparation of their coverage lists under the provisions of this agreement, must endeavour to include entities procuring products and services of export interest to developing countries.<sup>155</sup>

A developing country may negotiate for mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists. A developing country participating in regional or global arrangements, among developing countries, referred to in article V:1(d),<sup>156</sup> may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, *inter alia*, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.<sup>157</sup>

A developing country party may modify its coverage lists<sup>158</sup> having regard to its development, financial and trade needs. It may also request the Committee on Government Procurement to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its

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<sup>153</sup> Art V:1.

<sup>154</sup> Art V:2.

<sup>155</sup> Art V:3.

<sup>156</sup> Art V:1(d) encourages their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the WTO and not disapproved by it.

<sup>157</sup> Art V:4.

<sup>158</sup> In accordance with the provisions for modification of such lists contained in par 6 of art XXIV.

coverage lists.<sup>159</sup> A developing country party may also request the relevant committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries.<sup>160</sup>

Developed country parties must provide technical assistance relating, *inter alia*, to the solution of particular technical problems having to do with the award of a specific contract and any other problem the parties agree to deal with in the context of this assistance.<sup>161</sup>

Information centres must be established by developed country parties to respond to reasonable requests from developing country parties for information relating *inter alia* to laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, the addresses of the entities covered by this agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders.<sup>162</sup>

Special treatment<sup>163</sup> must be granted to least-developed country parties and to the suppliers in those countries with respect to products or services originating in those countries. A party may also grant the benefits of this agreement to suppliers in least-developed countries which are not parties to the agreement, with respect to products or services originating in those countries.<sup>164</sup>

Each developed country party must provide assistance to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as

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<sup>159</sup> In general see McCrudden 1999 *JIEL* 3-48.

<sup>160</sup> Art V:5. Regard must be had to the particular circumstances of each case and the provisions of subpar 1(d) must duly be taken into account.

<sup>161</sup> Art V:8, V:9 and V:10.

<sup>162</sup> Art V:11.

<sup>163</sup> Having regard to par 6 of the Decision of the Contracting Parties to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205).

<sup>164</sup> Art V:12.

to suppliers in least developed countries. They must also assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.<sup>165</sup> Provision is made for the review of this article<sup>166</sup> as to the operation and effectiveness thereof.<sup>167</sup>

Although developing countries must take the above aspects into account it is not indicated how this should be done when implementing the GPA. De Lima e Silva<sup>168</sup> suggests that most of the regulations and procedures on special and differential treatment for developing countries lack effectiveness and are not enforceable.<sup>169</sup> The fact that offsets have to be negotiated by developing countries during the accession process makes this measure ineffective to assist, because of the balance of the bargaining power favours developed countries.

Despite the existence of the provisions relating to developing countries, they have been reluctant to accede to the GPA. De Lima e Silva identified reasons from factors outside of the GPA and reasons endogenous to the GPA itself.<sup>170</sup> The external factors identified are protectionism, corruption, the promotion of secondary policies that focus on social, political and similar goals and not on economic benefits, and procurement regimes that do not adopt a uniform approach which necessarily corresponds with the GPA approach.<sup>171</sup> The obstacles presented by the GPA itself are the costs of the implementation of the agreement, the limitations to market access especially because of the high thresholds, derogations from the MFN principle which lead to concessions based on reciprocity, which disadvantages developing countries, and the positive list approach for coverage by the agreement whereby only sectors that are of interest to developed countries are included in the list.<sup>172</sup>

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<sup>165</sup> Art V:13.

<sup>166</sup> Art V.

<sup>167</sup> Art V:14.

<sup>168</sup> De Lima e Silva 2008 *PPLR* 73.

<sup>169</sup> See also Arrowsmith *Government Procurement* 113.

<sup>170</sup> De Lima e Silva 2008 *PPLR* 68.

<sup>171</sup> *Id* 69.

<sup>172</sup> *Id* 70-72.

The Revised GPA deals with developing countries in some detail in article IV thereof. It provides for special consideration to the development, financial, and trade needs and the circumstances of developing countries and least-developed countries. Such special consideration should be allowed in negotiations on accession to, and in the implementation and administration of, the Revised GPA. This must be done where and to the extent that this special and differential treatment meets such countries' development needs. It must also be recognised that circumstances may differ significantly from country to country.<sup>173</sup> Upon accession the most favourable coverage, subject to any terms negotiated between the parties in order to maintain a balance of opportunities under the Revised GPA must be afforded.<sup>174</sup> The provision of a balance of opportunities provides a mechanism to ensure a fair dispensation for developing countries, which are often at a disadvantage in relation to developed countries.

To encourage accession by developing countries, transitional measures based on their development needs are provided for. Developing countries may adopt or retain the transitional measures set out in their annex to their appendix I in a manner that does not discriminate between parties. The measures are price preference programmes,<sup>175</sup> offsets,<sup>176</sup> the phased-in addition of specific entities or sectors,<sup>177</sup> and a threshold that is higher than their permanent threshold.<sup>178</sup>

Parties may also agree to the delay of the application of a specific obligation under the Revised GPA.<sup>179</sup> The implementation periods are limited to five

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<sup>173</sup> Revised GPA art IV:1.

<sup>174</sup> Revised GPA art IV:2.

<sup>175</sup> Revised GPA art IV:3(a). This is on condition that the programme –  
“(i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement; and  
(ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement.”

<sup>176</sup> Revised GPA art IV:3(b).

<sup>177</sup> Revised GPA art IV:3(c).

<sup>178</sup> Revised GPA art IV:3(d).

<sup>179</sup> Revised GPA art IV:4. The obligation provided for in art V:1(b) – that each party should accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to goods, services, and suppliers of any other Party – are excluded.

years for least-developed countries and three years for other developing countries.<sup>180</sup> Provision is made for the extension of the transition periods given, and for new transitional measures.<sup>181</sup> The developing country benefiting from a transitional measure or extension of time must take steps during the transition period or implementation period to ensure that at the end of such a period it is in compliance with the Revised GPA.<sup>182</sup> Parties must also give due consideration to a request by a developing country for technical cooperation and capacity building in relation to the accession to or implementation of the agreement.<sup>183</sup>

Under the Revised GPA the provisions with regard to developing countries have been clarified and modified to increase the rights of developing countries. Special and differential treatment must be provided, depending on the country's special needs. The provision<sup>184</sup> that MFN treatment must be immediately afforded to a developing country will favour developing countries.<sup>185</sup> The provisions for the use of price preferences, offsets, phased in addition of entities and sectors, and the setting of a higher threshold than the permanent one will be attractive to developing countries. These benefits are, however, severely limited by the fact that the transitional periods have to be agreed upon.<sup>186</sup> The time periods provided for in article IV:4 in terms of which developing countries may delay the implementation of certain obligations are also too short to be of assistance for small economies, as it will probably be difficult to implement the GPA in the 3 years given in the case of developing countries and the 5 years given in the case of least-developed countries.<sup>187</sup>

If account is taken of the present signatories to the GPA<sup>188</sup> it is clear that it has to date failed to attract developing countries. However, the picture is a bit different if

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<sup>180</sup> Revised GPA art IV:4(a) and (b).

<sup>181</sup> Revised GPA art IV:6.

<sup>182</sup> Revised GPA art IV:7.

<sup>183</sup> Revised GPA art IV:8.

<sup>184</sup> Revised GPA art IV:2.

<sup>185</sup> De Lima e Silva 2008 *PPLR* 79.

<sup>186</sup> Revised GPA art IV:3.

<sup>187</sup> De Lima e Silva 2008 *PPLR* 79.

<sup>188</sup> Canada, the European Community (including its 25 member States: Austria, Belgium,

regard is had to the countries that are negotiating accession<sup>189</sup> and those that are observers<sup>190</sup> at the working group. The GPA does address some of the concerns of developing countries, but there is still a reluctance to enter into a legally binding agreement. Some of the reasons for this are that many developing countries believe doing so would limit their ability to use public procurement as a policy tool, they are afraid of the effect on their balance of payments, they are afraid of the costs, they believe that the developed countries will be the beneficiaries and the developing countries the losers, and they do not see clear benefits for themselves.<sup>191</sup> Sceptics even believe that some developing countries are reluctant to accede to the GPA as it will limit corruption.<sup>192</sup>

The Revised GPA also tries to address the above problems by including detailed provisions applicable to developing countries. The nature and scope thereof are broader than those of the GPA. Developing countries traditionally use public procurement to bolster local industries and keep certain economic sectors viable and they fear that accession to the GPA will limit this practice.<sup>193</sup> The problem probably also lies with the history of exploitation by developed countries and a deep-rooted mistrust by the developing countries of the developed worlds, as is evident from the protraction of the Doha negotiations.<sup>194</sup> Before economic benefits for developing countries are easily apparent, accession to the GPA by developing countries will remain limited. It remains to be seen if developing countries will be less reluctant to accede to the Revised GPA than to the present GPA.

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Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland and the United States.

<sup>189</sup> They are Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, and China.

<sup>190</sup> They are Albania, Argentina, Australia, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Republic of Armenia, Sri Lanka, Chinese Taipei, Turkey.

<sup>191</sup> See the discussion on the economic benefits of transparency in public procurement by Evenett and Hoekman 2005 *EJPE* 163-183.

<sup>192</sup> Hunja "Obstacles" 17; Arrowsmith 2003 *Journal of World Trade* 286. See also Linarelli "Corruption" 132 and Mosoti 2004 *University of Pennsylvania JIEL* 593.

<sup>193</sup> Mosoti 2004 *University of Pennsylvania JIEL* 595.

<sup>194</sup> See in general TWN 2008 *Home* [www.twinside.org.sg/](http://www.twinside.org.sg/) on which various articles appear which echo these sentiments. See in particular Khor 2008 *Government Procurement* [www.twinside.org.sg/](http://www.twinside.org.sg/). See also Kelsey "Investment".

The principle that developing countries need to use public procurement to address their socio-economic objectives is acknowledged by the GPA and the Revised GPA. This need is specifically addressed by providing for the special and differential treatment of developing countries when acceding to the GPA. The use of the mechanisms of price preference and offsets are in principle available for developing countries, to enable them to achieve their socio-economic objectives.

#### *4.3.5 Tendering procedures*

If it is kept in mind that the GPA applies to any law, regulation, procedure or practice regarding procurement by entities covered by the agreement,<sup>195</sup> the implications of the provisions of the GPA relating to tendering procedures on the national laws of signatory countries are evident. The provisions of the Revised GPA are even broader in that, in addition to the above, it also refers to “administrative guidance or practice or any action of a procuring entity relating to a covered procurement”.<sup>196</sup> This makes the scope very broad and should ensure the integrity, transparency and fairness of the system. One would expect that the GPA and Revised GPA to provide broad guidelines with regard to tender procedures in order to allow some flexibility to signatories but at the same time to achieve its objectives. Although the main objective is the promotion of international trade, one would expect that signatories to the GPA would have ensured that the tendering procedures would be in accordance with internationally accepted principles for public procurement and that they would be compatible with their own national procurement regimes. The tendering procedures will be discussed, in order to determine the principles involved and how they are to be achieved.

It is provided in the GPA that technical specifications<sup>197</sup> may not be prepared, adopted or applied with a view to or with the effect of creating unnecessary

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<sup>195</sup> Art VII:I and XXIV:5 of the GPA.

<sup>196</sup> Revised GPA art I(h) definition of “measure” read with art II:1.

<sup>197</sup> Technical specifications that lay down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities. See art VI.

obstacles to international trade.<sup>198</sup> Technical specifications must, if possible, be prepared in terms of performance rather than design or descriptive characteristics and be based on international standards. If international standards do not exist they must be designed in terms of national technical regulations, recognised national standards, or building codes.<sup>199</sup> No requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier is allowed, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as “or equivalent” are included in the tender documentation.<sup>200</sup> Advice which may be used in the preparation of specifications for a tender may not be sought from a firm that may have a commercial interest in the procurement.<sup>201</sup> Although the GPA requires<sup>202</sup> that technical specifications must be based on international standards or, if this is not possible, on national standards, such standards do not exist for many products.<sup>203</sup>

The Revised GPA has similar provisions.<sup>204</sup> However, it specifically provides in addition that parties may prepare, adopt, or apply technical specifications to promote the conservation of natural resources or to protect the environment.<sup>205</sup> The latter inclusion reflects the importance of environmental issues worldwide.<sup>206</sup> These provisions should enhance efficiency, uniformity, objectivity, transparency, competition, fairness, the integrity of the system, and that value for money is obtained.

Parties to the agreement must ensure that tender procedures are applied in a non-discriminatory manner and are consistent with articles VII to XVI of the GPA.<sup>207</sup> Suppliers may not be supplied with information in a way which would

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<sup>198</sup> Art VI:1.

<sup>199</sup> Art VI:2(a) and (b).

<sup>200</sup> Art VI:3.

<sup>201</sup> Art VI:4.

<sup>202</sup> Art VI.

<sup>203</sup> For a general discussion see Gordon, Rimmer and Arrowsmith “Economic Impact” 27.

<sup>204</sup> Revised GPA art X.

<sup>205</sup> Revised GPA art X:6.

<sup>206</sup> See in general Kunzlik 2003 *Journal on Budgeting*.

<sup>207</sup> Art VII:1.

have the effect of precluding competition.<sup>208</sup> The GPA provides for open tendering<sup>209</sup> (where all interested suppliers may submit a tender), selective tendering<sup>210</sup> (where those suppliers invited to do so may submit a tender), and limited tendering (where the entity contacts suppliers individually).<sup>211</sup> The Revised GPA also provides for procurement methods such as open tendering,<sup>212</sup> selective tendering<sup>213</sup> and limited tendering.<sup>214</sup> It further provides that the procurement must be conducted in a transparent and impartial manner, is consistent with the Agreement, avoids conflicts of interest, and prevents corrupt practices.<sup>215</sup> These provisions should promote competition, transparency, efficiency, militate against the abuse of the system, and ensure value for money.

With regard to the qualifying of suppliers, in terms of the GPA the procuring entities may not discriminate among suppliers of other parties or between domestic suppliers and suppliers of other parties.<sup>216</sup> Qualification procedures have to be consistent with the following:

- any conditions for participation in tendering procedures must be published in adequate time to enable interested suppliers to initiate and complete the qualification procedures;<sup>217</sup>
- any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question;<sup>218</sup>

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<sup>208</sup> Art VII:2.

<sup>209</sup> Art VII:3(a).

<sup>210</sup> Art VII:3(b). Such tenders must be consistent with art X.3.

<sup>211</sup> Art VII:3(c), only under the conditions provided for in art XV.

<sup>212</sup> Open tendering is defined in art I of the Revised GPA to mean a procurement method where all interested suppliers may submit a tender.

<sup>213</sup> Selective tendering is defined in art I of the Revised GPA to mean a procurement method where only suppliers satisfying the conditions for participation are invited by the procuring entity to submit a tender.

<sup>214</sup> Limited tendering is defined in art I of the Revised GPA to mean a procurement method where only suppliers satisfying the conditions for participation are invited by the procuring entity to submit a tender.

<sup>215</sup> Revised GPA art V:3.

<sup>216</sup> Art VIII.

<sup>217</sup> Art VIII(a).

<sup>218</sup> Art VIII(b). Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial,

- the process of and the time required for qualifying suppliers shall not be used in order to keep suppliers of other parties off a suppliers' list or from being considered for a particular intended procurement;<sup>219</sup>
- entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time and that all qualified suppliers so requesting are included in the lists within a reasonably short time;<sup>220</sup>
- if after publication of the notice a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;<sup>221</sup>
- any supplier that requested to become a qualified supplier shall be advised by the procuring entity concerned of its decision. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;<sup>222</sup>
- each party shall ensure that each entity and its constituent parts follow a single qualification procedure, except in cases of a duly substantiated need for a different procedure, and that efforts be made to minimise differences in qualification procedures between entities;<sup>223</sup>
- the above shall not preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of the agreement.<sup>224</sup>

The Revised GPA has more detailed provisions with regard to the qualifications of suppliers and distinguishes between conditions for participation<sup>225</sup> and the qualification of suppliers.<sup>226</sup> Any condition for participation must be limited to those that are essential to ensure that a supplier has the legal, commercial,

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commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organisations.

<sup>219</sup> Art VIII(c).

<sup>220</sup> Art VIII(d).

<sup>221</sup> Art VIII(e).

<sup>222</sup> Art VIII(f).

<sup>223</sup> Art VIII(g).

<sup>224</sup> Art VIII(h).

<sup>225</sup> Revised GPA art VIII.

<sup>226</sup> Revised GPA art IX.

technical, and financial abilities to undertake the relevant procurement.<sup>227</sup> To determine if a supplier satisfies the conditions for participation, a procuring entity must: evaluate the financial, commercial, and technical abilities of a supplier;<sup>228</sup> base its determination on the conditions specified;<sup>229</sup> not impose the condition that in order to participate the supplier must previously have been awarded a contract;<sup>230</sup> and may require relevant prior experience where essential to meet the requirements of the procurement.<sup>231</sup> A supplier may be excluded on the following grounds: bankruptcy;<sup>232</sup> false declarations;<sup>233</sup> significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;<sup>234</sup> final judgments in respect of serious crimes or other serious offences;<sup>235</sup> professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier;<sup>236</sup> or failure to pay taxes.<sup>237</sup>

With regard to the qualifications of suppliers the Revised GPA allows for a procuring entity to maintain a supplier registration system,<sup>238</sup> but it may not adopt or apply it with the purpose or the effect of creating unnecessary obstacles to the participation of foreign suppliers in its procurement.<sup>239</sup> Parties must further ensure that their procuring entities make efforts to minimise differences in their qualification procedures<sup>240</sup> and that where registration systems are maintained, efforts are made to minimise differences in the registration systems of the different procuring entities.<sup>241</sup>

The above provisions should enhance fairness, objectivity, competition, effectiveness, transparency, accountability, the combating of abuse and the integrity of the system.

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<sup>227</sup> Revised GPA art VIII:1.

<sup>228</sup> Revised GPA art VIII:2(a).

<sup>229</sup> Revised GPA art VIII:2(b).

<sup>230</sup> Revised GPA art VIII:2(c).

<sup>231</sup> Revised GPA art VIII:2(d).

<sup>232</sup> Revised GPA art VIII:3(a).

<sup>233</sup> Revised GPA art VIII:3(b).

<sup>234</sup> Revised GPA art VIII:3(c).

<sup>235</sup> Revised GPA art VIII:3(d).

<sup>236</sup> Revised GPA art VIII:3(e).

<sup>237</sup> Revised GPA art VIII:3(a).

<sup>238</sup> Revised GPA art IX:1.

<sup>239</sup> Revised GPA art IX:3.

<sup>240</sup> Revised GPA art IX:2(a).

<sup>241</sup> Revised GPA art IX:2(b).

Detailed provision<sup>242</sup> is made in the GPA for the publishing of invitations to participate, save as otherwise provided for in the case of limited tendering.<sup>243</sup> The invitation may take the form of a notice of proposed procurement<sup>244</sup> and in certain instances the form of a notice regarding a qualification system.<sup>245</sup> The information that needs to be included is set out in detail.<sup>246</sup> The Revised GPA distinguishes between a notice of an intended procurement,<sup>247</sup> a summary notice<sup>248</sup> and a notice of planned procurement for the fiscal year.<sup>249</sup> In particular provision is made for the use of electronic media to disseminate the

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<sup>242</sup> Art IX.

<sup>243</sup> Art XV.

<sup>244</sup> Art IX.2.

<sup>245</sup> Art IX.3.

<sup>246</sup> Art IX.6. It includes –

- (a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;
- (b) whether the procedure is open or selective or will involve negotiation;
- (c) any date for starting delivery or completion of delivery of goods or services;
- (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;
- (e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents

For each case of intended procurement article IX.8 applies and the notice shall contain at least the following information:

- (a) the subject matter of the contract;
- (b) the time-limits set for the submission of tenders or an application to be invited to tender; and
- (c) the addresses from which documents relating to the contracts may be requested.
- (f) any economic and technical requirements, financial guarantees and information required from suppliers;
- (g) the amount and terms of payment of any sum payable for the tender documentation; and
- (h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

In the case of selective tendering in terms of article IX.9 entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:

- (a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;
- (b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and
- (c) the period of validity of the lists, and the formalities for their renewal.

When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:

- (d) the nature of the products or services concerned;
- (e) a statement that the notice constitutes an invitation to participate.

<sup>247</sup> Revised GPA art VII:1 and 2.

<sup>248</sup> Revised GPA art VII:3.

<sup>249</sup> Revised GPA art VII:4.

information.<sup>250</sup> The notice of procurement, save in the case of limited procurement, for which provision is made in Article XIII, must be widely disseminated and remain readily accessible to the public, at least until the expiration of the time period indicated in the notice. It must also be accessible by electronic means free of charge.<sup>251</sup> The information that needs to be included is more detailed than under the GPA, ensuring that all essential information is included in the notice.<sup>252</sup> A summary notice in a WTO language<sup>253</sup> which is readily accessible, containing the subject matter of the procurement, the final date for submission or for the submission of a request for participation or for inclusion on a multi-use list, and the address from which documentation can be requested must be published.<sup>254</sup> Parties are also encouraged to publish, as early as possible in each fiscal year, particulars of their future procurement plans.<sup>255</sup> The purpose of the summary notice and notice of planned procurement is to ensure better participation by suppliers.

The above provisions should in particular ensure efficiency, fairness and transparency, and should promote competition.

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<sup>250</sup> Revised GPA art VII:1 and 4. See also Revised GPA art V:3.

<sup>251</sup> Revised GPA art VII:1.

<sup>252</sup> Revised GPA art VII:2 namely: "(a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any; (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity; (c) for recurring contracts, if possible, an estimate of the timing of subsequent notices of intended procurement; (d) a description of any options; (e) the time-frame for delivery of goods or services or the duration of the contract; (f) the procurement method that will be used and whether it will involve negotiation or electronic auction; (g) where applicable, the address and any final date for the submission of requests for participation in the procurement; (h) the address and the final date for the submission of tenders; (i) the language or languages in which tenders or requests for participation must be submitted, if other than an official language of the Party of the procuring entity; (j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement; (k) where, pursuant to Article IX, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and (l) an indication that the procurement is covered by this Agreement".

<sup>253</sup> These languages are English, French and Spanish. See WTO 2009 *Languages* [www.wto.org/](http://www.wto.org/).

<sup>254</sup> Revised GPA art VII:3.

<sup>255</sup> Revised GPA art VII:4.

Provision is made in the GPA for amendments of tenders after publication thereof but before the time set for opening or receipt thereof. This is on condition that the re-issued notice must be given the same circulation as the original documents upon which the amendment is based.<sup>256</sup> It is important to note that any significant information given to one supplier with respect to a particular intended procurement must simultaneously be given to all of the other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.<sup>257</sup> The Revised GPA has similar provisions.<sup>258</sup> This should lead to fairness, efficiency, competition and transparency, and enhance the integrity of the system.

In the case of selective tendering procedures, tenders must be invited from the maximum number of domestic suppliers and suppliers of other parties.<sup>259</sup> In the case of permanent lists of qualified suppliers, suppliers to be invited to tender may be selected from the list. Any selection shall allow for equitable opportunities for suppliers on the lists.<sup>260</sup> Limited tendering may be used in the circumstances prescribed by the agreement,<sup>261</sup> provided that limited tendering

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<sup>256</sup> Art IX:10.

<sup>257</sup> Art IX:10.

<sup>258</sup> Revised GPA art X:11.

<sup>259</sup> Art X.1.

<sup>260</sup> Art X.2. In terms of art X.3 suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under art VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system. In terms of art X:4 requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.

<sup>261</sup> Art XV:1

- “(a) In the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;
- (b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;
- (d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the

is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other parties or the protection of domestic producers or suppliers.<sup>262</sup> A report in writing on each contract so awarded must be prepared.<sup>263</sup>

The Revised GPA deals in much more detail with limited tendering,<sup>264</sup> selective tendering<sup>265</sup> and multi-use lists<sup>266</sup> than the GPA. Limited tendering may be used on condition that it is not used for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other parties

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entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services;

- (e) when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Arts VII through XIV;
- (f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;
- (g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Arts VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;
- (h) for products purchased on a commodity market;
- (i) for purchases made under exceptionally advantageous conditions which arise only in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;
- (j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Art IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners."

<sup>262</sup> Art XV.

<sup>263</sup> Art XV.2.

<sup>264</sup> Revised GPA art I defines limited tendering to mean: "a procurement method where the procuring entity contacts a supplier or suppliers of its choice".

<sup>265</sup> Revised GPA art I defines selective tendering to mean: "a procurement method where only suppliers satisfying the conditions for participation are invited by the procuring entity to submit a tender".

<sup>266</sup> Revised GPA art I defines multi-use lists to mean: "a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once".

or protects domestic suppliers.<sup>267</sup> The procuring entity may only under prescribed circumstances choose not to comply with Articles VII up to IX, X (paragraphs 7 through 11), XI, XII, XIV, and XV of the Revised GPA. These circumstances deal with instances where no tenders, or no responsive tenders or only collusive tenders were received;<sup>268</sup> where the goods or services can be supplied only by a particular supplier;<sup>269</sup> for additional deliveries by the original supplier;<sup>270</sup> for reasons of extreme urgency;<sup>271</sup> for goods purchased on a commodity market;<sup>272</sup> where a prototype or a first good or service is developed for research, experiment, study or original development;<sup>273</sup> for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals;<sup>274</sup> and where a contract is awarded to a winner of a design contest.<sup>275</sup> A written report on each such contract awarded must be prepared by the procuring entity.<sup>276</sup>

In the case of selective tendering the Revised GPA prescribes what information should be included in the notice of intended procurement.<sup>277</sup> Any domestic or other party supplier that meets the conditions for participation shall be recognised as a qualified supplier. The procuring entity may state in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.<sup>278</sup> In the latter instance tender documentation must be made available at the same time to all qualified suppliers selected.<sup>279</sup>

Procuring entities may, in terms of the Revised GPA, maintain multi-use lists of suppliers, provided that a notice inviting interested suppliers to apply for inclusion

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<sup>267</sup> Revised GPA art XIII:1.

<sup>268</sup> Revised GPA art XIII:1(a).

<sup>269</sup> Revised GPA art XIII:1(b).

<sup>270</sup> Revised GPA art XIII:1(c).

<sup>271</sup> Revised GPA art XIII:1(d).

<sup>272</sup> Revised GPA art XIII:1(e).

<sup>273</sup> Revised GPA art XIII:1(f).

<sup>274</sup> Revised GPA art XIII:1(g).

<sup>275</sup> Revised GPA art XIII:1(c).

<sup>276</sup> Revised GPA art XIII:2.

<sup>277</sup> Revised GPA art IX:4.

<sup>278</sup> Revised GPA art IX:5.

<sup>279</sup> Revised GPA art IX:6.

on the list is published annually<sup>280</sup> and it is made available continuously where it is published by electronic means.<sup>281</sup> The information that must be included in the list is given in the Revised GPA.<sup>282</sup> Suppliers must be allowed to apply at any time for inclusion on a multi-use list. All qualified suppliers must be included in the list within a reasonably short time.<sup>283</sup> A request for participation in a particular procurement, by a supplier not included in a multi-use list, must be entertained by the procuring entity.<sup>284</sup>

The above provisions should lead to competition, transparency, fairness to all of the parties, effectiveness and the integrity of the system.

The GPA provides that the prescribed time-limits must be adequate to allow local and foreign suppliers to prepare and submit tenders before the closing date. These time-limits must be determined taking into account the procuring entities' reasonable needs and such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail. Due account must also be taken of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.<sup>285</sup> Different minimum periods are prescribed for open and selective tendering<sup>286</sup> and the circumstances under which they may be reduced.<sup>287</sup>

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<sup>280</sup> Revised GPA art IX:9 provides that where a multi-use list will be valid for three years or less, a procuring entity may publish the notice only once, at the beginning of the period of validity of the list.

<sup>281</sup> Revised GPA art IX:7.

<sup>282</sup> Revised GPA art IX:8. They are: "(a) a description of the goods or services, or categories thereof, for which the list may be used; (b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity will use to verify a supplier's satisfaction of the conditions; (c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list; (d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and (e) an indication that the list may be used for procurement covered by this Agreement".

<sup>283</sup> Revised GPA art IX:10.

<sup>284</sup> Revised GPA art IX:11.

<sup>285</sup> Art XI.

<sup>286</sup> Art XI:2.

<sup>287</sup> Art XI:3.

The Revised GPA has more detailed provisions on time periods and deadlines. It provides that sufficient time must be provided by procuring entities, taking into account its own needs, for suppliers to prepare and submit requests for participation and responsive tenders.<sup>288</sup> In doing so factors such as the nature and complexity of the procurement,<sup>289</sup> the extent of subcontracting anticipated<sup>290</sup> and the time for transmitting tenders from foreign parts as well as domestic points where electronic means are not used must be taken into account.<sup>291</sup> Time-periods and extensions thereof must be the same for all interested or participating suppliers.<sup>292</sup> When selective tendering is used the final date for the submission of requests for participation may not be less than 25 days from the date of publication of the notice of intended procurement. This period may be reduced to not less than 10 days in a case of urgency.<sup>293</sup> The final date for submission of tenders may not be less than 40 days from the date on which the notice of intended procurement is published, in the case of open tendering,<sup>294</sup> and in the case of selective tendering, the date on which the procuring entity notifies suppliers that they will be invited to submit tenders.<sup>295</sup> The above time period may be reduced to not less than 10 days under prescribed circumstances.<sup>296</sup> If the electronic means is used to publish the notice of

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<sup>288</sup> Revised GPA art XI:1.

<sup>289</sup> Revised GPA art XI:1(a).

<sup>290</sup> Revised GPA art XI:1(b).

<sup>291</sup> Revised GPA art XI:1(a).

<sup>292</sup> Revised GPA art XI:1.

<sup>293</sup> Revised GPA art XI:2.

<sup>294</sup> Revised GPA art XI:3(a).

<sup>295</sup> Revised GPA art XI:3(b).

<sup>296</sup> Revised GPA art XI:4. These circumstances are:

- “(a) the procuring entity published a notice of planned procurement under Art VII:4 at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
  - (i) a description of the procurement;
  - (ii) the approximate final dates for the submission of tenders or requests for participation;
  - (iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
  - (iv) the address from which documents relating to the procurement may be obtained; and
  - (v) as much of the information that is required under Article VII:2 for the notice of intended procurement, as is available;
- (b) the procuring entity, for procurements of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time periods for tendering based on this paragraph; or
- (c) a state of urgency duly substantiated by the procuring entity renders such time-period impracticable”.

intended procurement and to make available all tender documentation, and the tenders may be received by electronic means, the 40 days referred to above may be reduced by five days.<sup>297</sup> Where a procuring entity purchases commercial goods or services, it may reduce the time-period for tendering to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period to not less than 10 days.<sup>298</sup> Commercial goods and services are defined as goods and services of a type generally sold or offered for sale in the commercial marketplace to and customarily purchased by non-governmental buyers for non-governmental purposes.<sup>299</sup>

These provisions should enhance transparency, effectiveness and competition, and ensure fairness for all parties.

The GPA provides that if tenders are allowed to be submitted in several languages, an official WTO language<sup>300</sup> must be one of them.<sup>301</sup> With regard to the compulsory use of a WTO language, the Revised GPA provides that the summary notice of intended procurement must be in one of the WTO languages.<sup>302</sup> This should ensure competition, effectiveness and fairness.

In terms of the GPA all of the information necessary to permit suppliers to submit responsive tenders must be included in the tender documentation.<sup>303</sup> The

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<sup>297</sup> Revised GPA art XI:5. In terms of art XI:6 a minimum of 10 days must be allowed if art XI:4 is applicable.

<sup>298</sup> Revised GPA art XI:7.

<sup>299</sup> Revised GPA art I.

<sup>300</sup> They are English, French and Spanish.

<sup>301</sup> Art XII:1.

<sup>302</sup> Revised GPA art VII:3.

<sup>303</sup> Art XII:2. Also included must be the following:

- (a) the address of the entity to which tenders should be sent;
- (b) the address where requests for supplementary information should be sent;
- (c) the language or languages in which tenders and tendering documents must be submitted;
- (d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;
- (e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;
- (f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;

Revised GPA also states that tender documentation must include all of the information necessary to permit suppliers to submit responsive tenders but adds that it must also enable them to prepare responsive tenders.<sup>304</sup> The essence of the information to be included relates to the nature, quantity and requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings, or instructional materials of the goods and services to be procured;<sup>305</sup> the conditions for participation,<sup>306</sup> all evaluation criteria to be considered in the awarding of the contract and, save where price is the sole criterion, the relative importance of such criteria;<sup>307</sup> in the case of electronic procurement, authentication and encryption requirements;<sup>308</sup> in the case of electronic auctions the rules, including the elements of the tender related to the evaluation criteria;<sup>309</sup> the date, time, and place for the opening and the persons authorised to be present;<sup>310</sup> any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted;<sup>311</sup> and any dates for the delivery of goods or the supply of services.<sup>312</sup> The evaluation criteria may include price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery.<sup>313</sup>

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- (g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;
  - (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment;
  - (i) the terms of payment;
  - (j) any other terms or conditions;
  - (k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained."

<sup>304</sup> Revised GPA art X:7.

<sup>305</sup> Revised GPA art X:7(a).

<sup>306</sup> Revised GPA art X:7(b). A list of information and documents that suppliers are required to submit in connection therewith must be included.

<sup>307</sup> Revised GPA art X:7(c).

<sup>308</sup> Revised GPA art X:7(d).

<sup>309</sup> Revised GPA art X:7(e).

<sup>310</sup> Revised GPA art X:7(f).

<sup>311</sup> Revised GPA art X:7(g).

<sup>312</sup> Revised GPA art X:7(h). Art X:8 provides that factors such as the complexity of the procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the point of supply or for supply of services must be taken into account when determining such dates.

<sup>313</sup> Revised GPA art X:9.

These provisions should ensure fairness, objectivity, transparency, efficiency, competition, and the integrity of the system.

The GPA provides that the tender documentation must be forwarded upon request to any supplier entitled to participate and that reasonable requests for explanations must be promptly replied to.<sup>314</sup> Any reasonable request for relevant information submitted by a supplier participating in the tendering procedure must be responded to on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract,<sup>315</sup> The Revised GPA has similar provisions in this regard.<sup>316</sup> This should promote transparency, efficiency and fairness.

In terms of the GPA tenders must be submitted in writing directly or by mail.<sup>317</sup> The tender must be confirmed promptly by letter or by the dispatch of a signed copy of the telex, telegram or facsimile.<sup>318</sup> In terms of the Revised GPA a tender must be in writing and must, at the time of opening, comply with the essential requirements set out in the notices and tender documentation. It must also be from a supplier that satisfies the conditions for participation.<sup>319</sup> This should enhance integrity, accountability and fairness to all parties.

The GPA provides that all tenders solicited under open or selective procedures shall be received and opened under procedures and conditions guaranteeing the regularity thereof.<sup>320</sup> To be considered for an award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation.<sup>321</sup> The award<sup>322</sup> of the tender shall be made to the tenderer who

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<sup>314</sup> Art XII:3(a) and (b).

<sup>315</sup> Art XII:3(c).

<sup>316</sup> Revised GPA art X:10.

<sup>317</sup> Art XIII:1 Tenders by telex, telegram or facsimile may be permitted.

<sup>318</sup> Art XIII:1.

<sup>319</sup> Revised GPA art XV:4.

<sup>320</sup> Art XIII:3.

<sup>321</sup> Art XIII:4(a). If an entity has received a tender abnormally lower than other tenders submitted, it may make enquiries to ensure that the tenderer can comply with the conditions of participation and will be capable of fulfilling the terms of the contract.

<sup>322</sup> Art XIII:4(c). Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

has been determined to be fully capable of undertaking the contract and whose tender, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous, unless, in the public interest, it is decided not to issue the contract.<sup>323</sup> Provision for negotiations with tenderers may be made<sup>324</sup> which provision must be used primarily to identify the strengths and weaknesses in tenders. The provisions of the Revised GPA are similar to the above. In addition the Revised GPA provides for confidentiality in the receipt, opening and treatment of tenders.<sup>325</sup> It also prohibits the modification of awarded contracts or the cancellation of a procurement to circumvent the obligations of the Revised GPA.<sup>326</sup> These provisions should promote fairness, accountability, transparency, efficiency, competition, and the integrity of the system.

Offsets<sup>327</sup> may not be imposed, sought or considered in the qualification and selection of suppliers, products or services.<sup>328</sup> A developing country may, however, at the time of accession, negotiate conditions for the use of offsets.<sup>329</sup>

The Revised GPA has similar provisions with regard to offsets. To assist developing countries it makes provision as transitional measures during a transition period, in addition to offsets, for a price preference programme, the phased – in addition of specific entities or sectors, and a threshold that is higher than its permanent threshold.<sup>330</sup> The principle of taking socio-economic factors into account in the public procurement system is acknowledged in both the GPA and the revised GPA.

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<sup>323</sup> Art XIII:4(b).

<sup>324</sup> Art XIV.

<sup>325</sup> Revised GPA art XV:1.

<sup>326</sup> Revised GPA art XV:7.

<sup>327</sup> Offsets are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. In South Africa the IPP is an example thereof.

<sup>328</sup> Art XVI.

<sup>329</sup> Art XVI.2. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.

<sup>330</sup> Revised GPA art IV:3.

Unlike the GPA, the Revised GPA pertinently addresses the issue of electronic auctions. In the case of electronic procurement all participants must be provided with the automatic evaluation method, including the mathematical formula<sup>331</sup> and all other relevant information relating to the conduct of the auction. Where the contract is to be awarded on the basis of the most advantageous tender, the results of any initial evaluation of the elements of its tender must be provided to the tenderer.<sup>332</sup> This should enhance transparency, effectiveness and competition, and may lead to cost savings.

Important principles with regard to the tender process are addressed by the above procedures in both the GPA and the Revised GPA. These are the following:

- Technical specifications may not be used as an obstacle to eliminate possible tenderers. Information must be supplied to all potential suppliers. The Revised GPA, however, specifically provides that parties may prepare, adopt, or apply technical specifications to promote the conservation of natural resources or to protect the environment. This should enhance objectivity, equity, transparency, competition and fairness.
- The qualifying procedures must allow adequate time to comply therewith and be used only to ensure capability on the part of tenderers. Invitations to participate must be published. This should ensure fairness, competition, transparency and effectiveness.
- All suppliers must be provided with all of the necessary information, which should ensure transparency, competition and fairness.
- Time limits must enable foreigners to participate, which should ensure competition.
- A WTO language must be used, which should enhance competition.
- All tender documentation must be forwarded to potential tenderers and aspects of the documentation explained on request. This should

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<sup>331</sup> This refers to the mathematical formula that is based on the evaluation criteria set out in the tender documentation that will be used in the automatic ranking or re-ranking during the auction.

<sup>332</sup> Revised GPA art XIV.

promote fairness, competition, effectiveness, and the integrity of the system.

- The procedure for the opening of tenders must guarantee the regularity thereof, which should promote the integrity of the system and combat abuse.
- The award must be made to a tenderer fully capable of performing and who is either the lowest tenderer of the most advantageous tender, save if it is in the public interest to do otherwise. Principles of integrity, effectiveness, fairness and value for money should be served by these provisions.

Both the GPA and Revised GPA provide for open tendering, selective tendering and limited tendering. The provisions applicable, in particular in the Revised GPA, are developed to ensure, as far as possible, transparency, efficiency and competition in the tendering process.<sup>333</sup> Although it is implied in the GPA, the Revised GPA states categorically that the registration systems and qualification procedures for tenderers may not be adopted with the purpose or effect of creating unnecessary obstacles to the participation of foreign suppliers in relevant procurements.<sup>334</sup> The Revised GPA, unlike the GPA, also provides for the use of electronic procurement. The importance of using and of encouraging the use of electronic means in procurement is referred to as early as in the Preamble to the Revised GPA. The applicability of the Revised GPA to all measures with regard to procurement in terms of the Revised GPA, whether or not they are conducted by electronic means, is recognised.<sup>335</sup> The terms “written” and “in writing” are defined to include electronically transmitted and stored information.<sup>336</sup>

Specific electronic tools that are recognised in the Revised GPA are the following:

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<sup>333</sup> Anderson 2007 *PPLR* 258.

<sup>334</sup> Revised GPA art IX:3, see also Anderson 2007 *PPLR* 256.

<sup>335</sup> Revised GPA art II:1.

<sup>336</sup> Revised GPA art I(f).

- (i) the publication of general information on the procurement system;<sup>337</sup>
- (ii) the publication of notices of intended procurement;<sup>338</sup>
- (iii) the publication of notices of planned procurement;<sup>339</sup>
- (iv) the publication of multi-use supplier lists;<sup>340</sup>
- (v) the making available of tender documentation;<sup>341</sup>
- (vi) the receipt of tenders;<sup>342</sup>
- (vii) electronic auctions;<sup>343</sup>
- (viii) the publication of post-contract award information;<sup>344</sup> and
- (ix) the reporting of required statistical information on contracts.<sup>345</sup>

The Revised GPA also contains requirements relating to the general availability of the information technology systems and software used;<sup>346</sup> the availability of mechanisms to ensure the integrity of requests for participation and tenders;<sup>347</sup> and the maintenance of data to ensure the traceability of the conduct of procurement by electronic means.<sup>348</sup> It also provides for the inclusion of authentication and encryption requirements in tender documentation.<sup>349</sup> These requirements are intended to ensure that electronic procurement enhances access to and the integrity of the procurement process.

In general it can be concluded that the tender processes provided for in both the GPA and the Revised GPA have transparency as a core principle, in order to enhance competition and non-discrimination. The Revised GPA's provisions are more structured, simpler, and include the added possibility of using electronic procurement. However, little discretion is left to the procuring entities, in an attempt to ensure transparency and non-discrimination and to prevent corruption. This might compromise sophisticated procurement

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<sup>337</sup> Revised GPA art VI:1(a) and VI:2(a)-(c).

<sup>338</sup> Revised GPA art VII:1

<sup>339</sup> Revised GPA art VII:4

<sup>340</sup> Revised GPA art IX:7. See also art IX:9.

<sup>341</sup> Revised GPA art X:7-10 in conjunction with art XI:5(b).

<sup>342</sup> Revised GPA art XI:5(c).

<sup>343</sup> Revised GPA art XIV.

<sup>344</sup> Revised GPA art XVI:2.

<sup>345</sup> Revised GPA art XVI:4-6.

<sup>346</sup> Revised GPA art V:3(a).

<sup>347</sup> Revised GPA art V:3(b).

<sup>348</sup> Revised GPA art XVI:3(b).

<sup>349</sup> Revised GPA art X:7(d).

regimes' ability to obtain value for money and to achieve a balance between the goal of transparency and the optimum use of procurement under different circumstances.<sup>350</sup> Because of the differences in the levels of sophistication among the procurement regimes of different states one can, however, expect that a compromise will be found to be necessary, as efficiency must at times be subject to the goal of transparency.

#### 4.3.6 *Post-award information and publication*

The GPA includes specific measures to ensure transparency and the availability and accessibility of information with regard to the tender process after the award of the tender. This is essential to ensure the integrity of the process, especially if account is taken of the fact that some of the tenderers will be foreigners. These provisions are also essential to ensure that participants in the process can enforce their rights.

These provisions include that within 72 days after making an award, a notice to that effect must be published.<sup>351</sup> On request from a supplier<sup>352</sup> an entity has to give an explanation of its procurement practices and procedures, provide pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end, or why it was not selected. On request, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer must be provided to an unsuccessful tenderer.<sup>353</sup>

In terms of the Revised GPA a procuring entity must promptly inform participating suppliers of the entity's contract award decisions, if requested, in writing.<sup>354</sup> Unsuccessful suppliers must, on request, be provided with an explanation of the

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<sup>350</sup> See in this regard Arrowsmith 2003 *Journal of World Trade* 283-303.

<sup>351</sup> Art XVIII. These notices must contain: (a) the nature and quantity of products or services in the contract award; (b) the name and address of the entity awarding the contract; (c) the date of award; (d) the name and address of winning tenderer; (e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract; (f) where appropriate, means of identifying the notice issued under par 1 of art IX or justification according to art XV for the use of such procedure; and (g) the type of procedure used.

<sup>352</sup> Such a supplier must be from a contracting state.

<sup>353</sup> Art XVIII:2.

<sup>354</sup> Revised GPA art XVI:1.

reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender.<sup>355</sup> Not later than 72 days after the award of each contract, the procuring entity must publish a notice<sup>356</sup> to this effect.<sup>357</sup> Where only an electronic medium is used, the information shall remain readily accessible for a reasonable period of time. The importance of transparency is underlined by the above provisions.

Provision is made under the GPA for withholding certain information. Information on the contract award may be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, or might prejudice fair competition between suppliers.<sup>358</sup> The Revised GPA has similar provisions. Information may not be provided to a particular supplier that might prejudice fair competition between suppliers.<sup>359</sup> Confidential information that might impede law enforcement, or prejudice fair competition between suppliers, or prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property, or that would otherwise be contrary to the public interest may not be provided.<sup>360</sup> Fairness to all parties involved and fair competition should be ensured by the above.

In terms of the GPA the laws, regulations, judicial decisions, administrative rulings of general application, and procedures regarding government procurement must be published in such a manner as to enable other parties and suppliers to become acquainted with them.<sup>361</sup> The provisions of the Revised

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<sup>355</sup> Revised GPA art XVI:1.

<sup>356</sup> The notice shall include at least the following information: "(a) a description of the goods or services procured;(b) the name and address of the procuring entity; (c) the name and address of the successful supplier;(d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;(e) the date of award; and (f) the type of procurement method used, and in cases where limited tendering was used pursuant to Article XIII, a description of the circumstances justifying the use of limited tendering".

<sup>357</sup> Revised GPA art XVI:2.

<sup>358</sup> Art XVIII:3.

<sup>359</sup> Revised GPA art XVII:2.

<sup>360</sup> Revised GPA art XVII:3.

<sup>361</sup> Art XIX:1.

GPA are much more detailed.<sup>362</sup> In terms thereof parties must promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clauses mandated by law or regulation and incorporated by reference in notices and tender documentation, and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public. Explanations thereof must be provided on request.<sup>363</sup> The principles of transparency, competition and fairness are well served by the above.

In terms of the GPA the government of an unsuccessful tenderer may seek such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price.<sup>364</sup> The Revised GPA does not contain similar provisions.

The essence of the above provisions is twofold. Firstly, tenderers will have the right to information as well as to being given reasons for the decisions made by the procuring entity. This will ensure transparency, impartiality and the integrity of the system. Secondly, tenderers will be able to acquaint themselves with the legal and administrative requirements of the particular country so as to ensure that foreigner tenderers can compete on an equal footing with their domestic counterparts. This should lead to competition and value for money.

#### *4.3.7 Challenge procedures*

Possibly the most important addition to the 1994 GPA was the provision for independent challenge procedures.<sup>365</sup> This gives tenderers the possibility to enforce their rights in a court of law or other impartial body within the jurisdiction of the procuring country. It does not exclude the possibility of using the WTO's dispute settlement body at an intergovernmental level.

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<sup>362</sup> Revised GPA art VI.

<sup>363</sup> Revised GPA art VI:1.

<sup>364</sup> Art XIX:2.

<sup>365</sup> Trepte *Regulating Procurement* 376.

Article XIX provides for the challenging of an award.<sup>366</sup> Complaints must first be addressed to the procuring entity itself.<sup>367</sup> Non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches must be in place and parties must make these procedures generally available in writing.<sup>368</sup>

The provisions of the Revised GPA relating to challenge procedures are quite detailed. In terms thereof each party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure. The procedural rules for all challenges must be in writing and made generally available.<sup>369</sup> Resolution of complaints through consultation between the procuring entity and tenderer must be encouraged by the parties to the Revised GPA.<sup>370</sup> Impartial and timely consideration to any complaint must be afforded by the procuring entity. It must also be afforded in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement, or its right to seek corrective measures under the administrative or judicial review procedure.<sup>371</sup>

In terms of the GPA, documentation relating to all aspects of the procurement process must be retained for three years.<sup>372</sup> The Revised GPA makes provision for the documentation and reports and data to be maintained for three years.<sup>373</sup>

The GPA provides that time limits for initiating challenges may be prescribed.<sup>374</sup> Challenges must be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement, and the members must be secure from outside influence.<sup>375</sup> Challenge procedures must provide for rapid

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<sup>366</sup> The GPA is an exception to the rule that the WTO agreements do not provide for challenge procedures by individuals against party states. See Dendauw 2000 *JENRL* 254.

<sup>367</sup> Art XX.1.

<sup>368</sup> Art XX.2.

<sup>369</sup> Revised GPA art XVIII:1.

<sup>370</sup> Revised GPA art XVIII:2.

<sup>371</sup> Revised GPA art XVIII:2.

<sup>372</sup> Art XX.3.

<sup>373</sup> Revised GPA art XVI:3.

<sup>374</sup> Art XX:5. It may not be less than 10 days.

<sup>375</sup> Art XX:6. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

(a) participants can be heard before an opinion is given or a decision is reached;

interim measures to correct breaches and to preserve commercial opportunities;<sup>376</sup> an assessment and the possibility for a decision on the justification of the challenge;<sup>377</sup> and the correction of a breach of the agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.<sup>378</sup>

In terms of the Revised GPA a sufficient period of time, but not less than 10 days from the date when the basis of the challenge became known or reasonably should have become known to the supplier, must be allowed to prepare and submit a challenge.<sup>379</sup> At least one impartial and independent administrative or judicial authority must be established or designated to receive and review such challenges.<sup>380</sup> If a body other than the one referred to above initially reviews a challenge, an appeal against a decision by it must be possible to an impartial administrative or judicial authority. This authority must be independent of the procuring entity whose procurement is the subject of the challenge.<sup>381</sup> If a review body is not a court it must either be subject to judicial review or have specific procedures to ensure a proper and fair hearing.<sup>382</sup> Procedures that provide for rapid interim measures to preserve the supplier's opportunity to participate in the procurement must be available. Such interim measures may include the suspension of the procurement process. It may also be provided that the overriding adverse consequences,

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- (b) participants can be represented and accompanied;
  - (c) participants shall have access to all proceedings;
  - (d) proceedings can take place in public;
  - (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
  - (f) witnesses can be presented;
  - (g) documents are disclosed to the review body.

<sup>376</sup> Art XX:7(a).

<sup>377</sup> Art XX:7(b).

<sup>378</sup> Art XX:7(c).

<sup>379</sup> Revised GPA art XVIII:3.

<sup>380</sup> Revised GPA art XVIII:4.

<sup>381</sup> Revised GPA art XVIII:5.

<sup>382</sup> Revised GPA art XVIII:6. These procedures are (a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body; (b) the participants to the proceedings ("participants") shall have the right to be heard prior to a decision of the review body being made on the challenge; (c) the participants shall have the right to be represented and accompanied; (d) the participants shall have access to all proceedings; (e) the participants shall, have the right to request that the proceedings take place in public and that witnesses may be presented; and (f) decisions or recommendations relating to supplier challenges shall be provided, in a timely fashion, in writing, with an explanation of the basis for each decision or recommendation.

including the public interest, may be taken into account when deciding whether or not such measures should be applied.<sup>383</sup>

Where a review body has determined that there has been a breach of the Revised GPA, corrective action or compensation for the loss or damages suffered or both may be ordered, but these may be limited to either the costs for the preparation of the tender or the costs relating to the challenge.<sup>384</sup>

The important principles contained in the challenge procedures are:

- the availability and accessibility of the procedures;
- the impartiality and independence of the review body;
- the setting of time limits;
- the provision of interim measures to correct breaches; and
- the correction of breaches and the possibility for compensation for the loss or damages suffered.

The above will enhance the integrity of the system, promote accountability, combat abuse, and ultimately lead to a more efficient and competitive system.

#### 4.3.8 Conclusion

The GPA and the Revised GPA are peculiar in the WTO regime in that they are plurilateral agreements binding only the WTO members which accede thereto. The reason why this rationale was adopted is because of the fact that all WTO parties did not agree on the creation of such an agreement and a plurilateral agreement was the only solution.<sup>385</sup> Government procurement was, for these reasons, excluded from the general principle of National Treatment.<sup>386</sup> De Lima e Silva argues that it has also been excluded from obligations under the MFN principle.<sup>387</sup> MFN and National Treatment, however, remain the basic objectives of the GPA and Revised GPA, even though they allow extensive derogations

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<sup>383</sup> Revised GPA art XVIII:7(a).

<sup>384</sup> Revised GPA art XVIII:7(b).

<sup>385</sup> De Lima e Silva 2008 *PPLR* 62.

<sup>386</sup> Under art.III:8 of the GATT 1947.

<sup>387</sup> De Lima e Silva 2008 *PPLR* 64; Anderson 2007 *PPLR* 260. See art III of the GATT.

therefrom. Arrowsmith is of the opinion that the primary goal of the GPA is the removal of trade barriers in order to promote free trade based on the comparative advantage of countries. For this purpose the GPA targets trade liberalisation by prohibiting discrimination against foreign suppliers, goods and services, a prohibition which is supported by a set of detailed rules governing contract awards. She states that this must not be confused with the two main goals shared by most national procurement systems, namely firstly to obtain value for money through an efficient process, which is achieved through recourse to transparency, and secondly to pursue socio-economic policies.<sup>388</sup> The similarity between the GPA and national procurement regimes can be explained by the use of transparency as a tool for achieving their respective goals.<sup>389</sup> The GPA and Revised GPA contain detailed transparency requirements for the conduct of all aspects of tender procedures to assure that discrimination against products, services and suppliers will not occur.<sup>390</sup>

New features in the Revised GPA are the inclusion of definitions of relevant terms,<sup>391</sup> the overt reference to transparency as a requirement for the avoidance of conflicts of interests and corrupt practices,<sup>392</sup> and the inclusion of provisions on e-procurement. One of the major revisions<sup>393</sup> relates to the provisions relating to developing countries, which substantially increase their rights. In principle developing countries' needs must be assessed individually, as the needs may differ from country to country.<sup>394</sup> However, no criteria for assessing such needs are provided, a lacuna which may lead to uncertainty. One of the significant benefits granted is that the MFN treatment must be afforded to developing countries on accession to the Revised GPA.<sup>395</sup> Unfortunately this provision is subject to the proviso that terms may be negotiated between the parties. The imbalance of powers in negotiation in international trade between developed and undeveloped countries might undo the full benefits of this provision. The

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<sup>388</sup> Arrowsmith 2002 *JIEL* 766 and Arrowsmith "National and International Perspectives" 7-10.

<sup>389</sup> De Lima e Silva 2008 *PPLR* 65.

<sup>390</sup> De Lima e Silva 2008 *PPLR* 78.

<sup>391</sup> Revised GPA art I.

<sup>392</sup> Revised GPA art V.

<sup>393</sup> Revised GPA art IV.

<sup>394</sup> Revised GPA art IV:1.

<sup>395</sup> Revised GPA art IV:2.

provision of measures like a price preference programme, offsets, and the phased-in addition of specific entities or sectors or a higher threshold than the permanent one are further important measure that will benefit developing countries.<sup>396</sup> In particular the possibility of the use of price preferences will provide an effective measure for developing countries to achieve their socio-economic goals. One of the main problems for developing countries remains the high threshold values set for coverage by the agreement, which often excludes developing countries from competing in international public procurement.<sup>397</sup>

De Lima e Silva's observation<sup>398</sup> that the Revised GPA is simplified, the text modernised, the quality of the drafting improved, and that it is more user-friendly, must be agreed with. The Revised GPA is in many ways an improvement on the GPA but it is doubtful that it goes far enough to entice most developing countries to accede thereto. The economic benefits for developing countries are still not apparent, they still have to negotiate conditions of accession, and high threshold values remain a bar to their participation in international public procurement. Suppliers often lack the confidence that they will receive fair treatment in a foreign country, and although proper challenge procedures serve to alleviate such fears, this fear ought to be addressed more pertinently.<sup>399</sup>

The GPA and Revised GPA contain many principles which are intended to promote its objectives, which are also applicable to public procurement in general. They are in particular the principles of competition, efficiency, transparency, the combating of abuse, fairness and accountability, all of which aim to ensure the integrity of the system.

#### **4.4 Working Group on Transparency**

##### *4.4.1 Background*

Article XXIV:7(b) and (c) of the GPA called on the parties to undertake further negotiations in order to improve and simplify the agreement, to achieve the

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<sup>396</sup> However, the limited time frames for their implementation diminish the value thereof.

<sup>397</sup> The reason is that developing countries often do not have the knowledge, technology, infrastructure or financial means to compete for larger contracts.

<sup>398</sup> De Lima e Silva 2008 *PPLR* 78.

<sup>399</sup> For a general discussion see Gordon, Rimmer and Arrowsmith "Economic Impact" 27.

greatest possible extension of the agreement's coverage and to eliminate discriminatory measures and practices. The review of the GPA started in 1997 with the aim of expanding the membership of the Agreement by making it more accessible for non-parties, in particular developing countries.<sup>400</sup> Work also began on developing a "Transparency Agreement" which would offer developing countries a less rigorous discipline than the GPA, and work continued on the government procurement of services.<sup>401</sup> The Working Group on Transparency in Government Procurement Practices<sup>402</sup> was set up by the First WTO Ministerial Conference in Singapore, December 1996.<sup>403</sup> The purpose was to develop studies on transparency and to reach common ground for the future multilateral agreement on this topic.<sup>404</sup> To date no draft has been agreed upon and the work of this working group has stopped following the General Council's decision on the Doha Agenda work programme of 1 August 2004.<sup>405</sup> The main reason why the work was stopped was in reaction to the view of the developing countries that there was insufficient basis for a multilateral agreement on transparency.<sup>406</sup> As pointed out by Arrowsmith, the failure to clarify the exact objectives of the Working Group on Transparency led some states to believe it would lead to an

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<sup>400</sup> See the 1996 Report by the General Council WTO document GPA/8. See also Trepte *Regulating Procurement* 380.

<sup>401</sup> Trepte *Regulating Procurement* 380; Arrowsmith 1996 *PPLR* 154.

<sup>402</sup> Evenett and Hoekman *International Cooperation* define a procurement regime to be transparent if the terms upon which the procurement process is conducted and the criteria on which decisions will be based are properly documented and made widely available; the award decision is made publicly available and motivated; and it is possible to verify that the documented procedures and criteria were applied.

<sup>403</sup> Document WT/MIN(96)/DEC, 18 December 1996, issued at the first WTO Ministerial Conference, Singapore, 9-13 December 1996. The decision reads as follows: "We, the Ministers, have met in Singapore from 9 to 13 December 1996 for the first regular biennial meeting of the WTO at Ministerial level, as called for in Article IV of the Agreement Establishing the World Trade Organisation, to further strengthen the WTO as a forum for negotiation, the continuing liberalisation of trade within a rule-based system, and the multilateral review and assessment of trade policies, and in particular to: assess the implementation of our commitments under the WTO Agreements and decisions; review the ongoing negotiations and Work Programme; examine developments in world trade; and address the challenges of an evolving world economy. We further agree to: establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement".

<sup>404</sup> De Lima e Silva 2008 *PPLR* 89.

<sup>405</sup> Trepte *Regulating Procurement* 382, De Lima e Silva 2008 *PPLR* 89.

<sup>406</sup> See par 20-22 of the Report on the Meeting of June 18, 2003 (WT/WGTGP/M18) available at WTO 2009 *Transparency* [www.wto.org/](http://www.wto.org/).

unduly intrusive regulation and might have implications for their states' sovereignty. They feared that the developed states had a hidden agenda.<sup>407</sup>

However, important inputs were made by the delegates to the working group on transparency.<sup>408</sup> For instance, inputs were received from the Asia-Pacific Economic Cooperation's<sup>409</sup> Government Procurement Experts Group.<sup>410</sup> The USA, on its own behalf and that of the delegations of Hungary, Korea and Singapore, submitted a draft consolidated text for an agreement on transparency in government procurement.<sup>411</sup> Information was also received from UNCITRAL, OECD, the Asian Development Bank, the African Development Bank, the IMF, the European Bank for Reconstruction and Development, the International Trade Centre and the UNDP on their respective technical cooperation activities in the area of government procurement.<sup>412</sup>

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<sup>407</sup> Arrowsmith 2003 *Journal of World Trade* 284.

<sup>408</sup> These can be accessed at WTO 2009 *Transparency* [www.wto.org/](http://www.wto.org/).

<sup>409</sup> Hereinafter the "APEC". It is a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. APEC operates on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants. Unlike the WTO or other multilateral trade bodies, APEC has no treaty obligations required of its participants. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis. APEC has 21 members – referred to as "Member Economies" – which account for more than a third of the world's population (2.6 billion people), approximately 60% of world GDP (US\$19, 254 billion) and about 47% of world trade. APEC's 21 Member Economies are Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; Viet Nam. See APEC 2009 *About* [www.apec.org/](http://www.apec.org/).

<sup>410</sup> Hereinafter the GPEG. In August 1999, the GPEG completed the development of the non-binding principles, including elements of and illustrative practices. The six principles are transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. Each non-binding principle addresses the elements of general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria, and the award of contracts. See APEC 2003 *Experts' Group* [www.apec.org/](http://www.apec.org/).

<sup>411</sup> Document WT/GC/W/385 WT/WGTGP/W/27 dated 9 November 1999. It proposed that members use the text as the basis to conclude an agreement on transparency in government procurement at the third ministerial conference. This of course never materialised. This draft agreement addressed the following aspects: general objective; non-discrimination in transparency; scope and application; exceptions; transparency of procurement rules; transparency of information on procurement opportunities; transparency in qualification and bid documentation; transparency of decisions on qualification and contract awards; other provisions on information relating to procurements; domestic review procedures; review and institutional provisions; dispute settlement; technical cooperation; and final provisions.

<sup>412</sup> See documents WT/WGTGP/W/20 and addenda 1-7.

The working group concentrated their inputs on the informal note by the Chair, entitled “List of Issues Raised and Points Made”, discussing each of the items as follows:

- (i) the definition and scope of government procurement;
- (ii) procurement methods;
- (iii) the publication of information on national legislation and procedures;
- (iv) information on procurement opportunities, tendering and qualification procedures;
- (v) time-periods;
- (vi) the transparency of decisions on qualification;
- (vii) the transparency of decisions on contract awards;
- (viii) domestic review procedures;
- (ix) other matters related to transparency;
- (x) the information to be provided to other governments (notification);
- (xi) WTO dispute settlement procedures; and
- (xii) technical cooperation and special and differential treatment for developing countries.<sup>413</sup>

There was a lack of progress because of a lack of clarity regarding the concept of transparency as such,<sup>414</sup> and what the objectives of transparency in procurement should be.<sup>415</sup> It was also perceived that some of the above items might have significant implications for domestic sovereignty.<sup>416</sup> The Working Group on Transparency did nevertheless conduct a study of transparency and devoted a lot of time to determining the contents of such a possible agreement. Because the delegations could not agree on many crucial issues, very little progress was made towards obtaining consensus.<sup>417</sup> In particular, certain states<sup>418</sup> in principle opposed the concept of an agreement on transparency.

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<sup>413</sup> See document WT/WGTGP/3.

<sup>414</sup> Linarelli “WTO Transparency Agenda”.

<sup>415</sup> Arrowsmith 2003 *Journal of World Trade* 283.

<sup>416</sup> *Id* at 284.

<sup>417</sup> Working group on Transparency in Government Procurement, Report on the Meeting of 7 June 2000 (WT/WGTGP/M/10) and Report on the Meeting of 25 September 2000 (WT/WGTGP/M/1) and Report on the Meeting of 4 May 2001 (WT/WGTGP/M/12).

<sup>418</sup> In particular India, Pakistan, Malaysia and Egypt.

Other states were concerned that such an agreement might impose significant and costly obligations. At Doha, concern was expressed that transparency in public procurement might be a step towards market access negotiations. This was unacceptable to many states, as they wanted to continue using public procurement to advance their socio-economic policies.<sup>419</sup> Other fears were that the discretion in obtaining value for money would be limited and that the implementation costs would be exorbitant.<sup>420</sup>

What is of importance, however, is the inputs made by the different states and organisations. These inputs were used to revise the document that became known as "The Informal Note by the Chair, List of Issues Raised and Points Made".<sup>421</sup> The essence of this document with regard to transparency, which is pertinent to this research, is discussed below.<sup>422</sup> The principles of transparency as they appear from the submissions will be concentrated, on rather than the detail of the inputs.<sup>423</sup> These principles provide an indication of what is required to provide an acceptable procurement system.

The principles will be discussed under the following headings: procurement methods; the publication of information on national legislation and procedures; information on procurement opportunities, tendering and qualification procedures; time-periods; the transparency of decisions on qualification; the transparency of decisions on contract awards; domestic review procedures; and other matters related to transparency.

#### *4.4.2 Methods of procurement*

The method of procurement employed is less important than ensuring that it conforms to the basic principles on transparency and maximises the level of competition. Three categories of methods of procurement can be identified: a)

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<sup>419</sup> See the Doha statements WT/MIN(01)/ST.

<sup>420</sup> *Ibid.* The SADC (South African Development Community) did not see this as a priority.

<sup>421</sup> See document WT/WGTGP/3.

<sup>422</sup> Aspects like the definition and scope of government procurement and what type of transactions are covered, which do not really relate to transparency, were also discussed in this list but will not be discussed here.

<sup>423</sup> The following WTO documents contain the submissions and discussions from which the principles are extracted: WT/WGTGP 1-7; WT/WGTGPM 12-18; WT/WGTGPW 20A8; and WT/WGTGPW 22-26.

open tendering, where information on the procurement opportunity and selection criteria are made publicly available to all interested suppliers; b) selective tendering, where a pre-selection of qualified suppliers is made and information is transmitted only to those suppliers; and c) limited tendering, where no information is made publicly available, but the procuring entity negotiates with an individual supplier. The method to be used in a procurement process should be specified in advance.<sup>424</sup>

Open bidding in which there is no limit to the number of potential bidders is the most transparent method. Although this may be the most transparent method, it may not be the most cost-effective, in particular in the case of complex procurements. Selective procedures are justifiable where it is not feasible or efficient to consider and evaluate a large number of potential tenders, as long as all potential interested suppliers are given the same opportunity to have access to information on the procurement and are invited to tender.<sup>425</sup> International instruments and national practice commonly accept a range of circumstances and conditions under which the use of limited tendering is warranted. Such limited tendering<sup>426</sup> should be used in justified and exceptional circumstances only,<sup>427</sup> as information as to the procurement and the selection criteria are not made publicly available. When less transparent methods are used, circumstances justifying their use should be made known to all interested parties. To maximise transparency a procuring entity should generally seek more than

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<sup>424</sup> WT/WGTGP/3 par 18 and 19.

<sup>425</sup> WT/WGTGP/3 par 20.

<sup>426</sup> For instance individual, sole-source, single-source or direct tendering.

<sup>427</sup> WT/WGTGP/3 par 24. These circumstances were identified as extreme urgency brought about by circumstances unforeseeable by the procurement authority (eg natural disasters); such circumstances should not be caused by the procuring entity itself, for instance as a result of its negligence; in the absence of responsive tenders, under tendering procedures which do not restrict competition; when tenders already submitted have been collusive; when it is clear at the outset of a procurement that only one supplier or a limited group of suppliers has the proprietary rights to goods or services being procured, for example procurements involving the protection of patents, copyrights or other exclusive rights, or for other technical or artistic considerations; in commodity markets where there may be no individual suppliers since the market is the supplier; in so-called "fire sales" where the procurement authority can realise exceptional savings at a one-time event (eg liquidation sales); when a product or a service is supplied by a supplier with a monopolistic position in the market; when a product or a service can be procured in a specific geographical location or place of production only; when a procurement is for research or experimental purposes and not for commercial use; for national security reasons; or for other reasons which should be published in law or regulations.

one bid if circumstances permit, a procuring entity should be required to document the specific circumstances giving rise to the need for such limited tendering, and public notices of contract awards should disclose the specific circumstances and reasons for contacting a particular supplier.<sup>428</sup>

#### *4.4.3 Publication of information on legislation and procedures*

Transparency implies that it must be ensured that information on procurement rules, practices and opportunities is made widely available in an easily usable form to all interested parties with the right of access to that information. What is important is the scope of the information and in what way the information should be made available. Either all of the information may be made available, or only the key items.<sup>429</sup>

All laws, regulations, judicial decisions, policy guidelines and administrative and other procedures on government procurement should be published promptly or be readily and easily accessible in a usable form to all interested parties. Any amendments to such laws and regulations should also be published promptly or generally made available through an accessible source. The important thing is that it should be publicly available. A distinction must be made between publication and accessibility. Whether it is printed or electronically published does not matter as long as it is accessible.<sup>430</sup> It should be provided at cost or at least the fees should be charged on a non discriminatory basis.<sup>431</sup> The official language of the country ought to suffice.<sup>432</sup> Contact or enquiry points for information must be established. This can be achieved through establishing an internet website.<sup>433</sup>

#### *4.4.4 Information on procurement opportunities, tendering and qualification procedures*

Publication, the contents of information, evaluation criteria, clarifications and modifications, and language will be discussed under this heading. Advance

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<sup>428</sup> WT/WGTGP/3 par 21-24.

<sup>429</sup> WT/WGTGP/3 par 27 and 29.

<sup>430</sup> WT/WGTGP/3 par 30.

<sup>431</sup> WT/WGTGP/3 par 33.

<sup>432</sup> WT/WGTGP/3 par 34.

<sup>433</sup> WT/WGTGP/3 par 35.

information on government procurement opportunities enhances the participation of business in a procurement procedure that contributes to improved efficiency in government procurement.<sup>434</sup> Information about procurement opportunities must be available in notices of invitation to tender, and in tender documents.<sup>435</sup> Such information must be sufficient to allow potential suppliers to assess their interest in participating in the proposed procurement procedure, to seek tender documents and to enable them to prepare responsive bids. The level of detail can differ depending on whether open, selective or limited tendering is applicable.<sup>436</sup>

The contents of tender documentation should provide all of the information that was not provided in the tender notices, to enable suppliers to submit responsive tenders. It should set forth the parameters for evaluating tenders and awarding the contract. This includes the requirements in respect of technical specifications, any preferences granted, and any other assessment criteria based on socio-economic considerations. The information in tender documents should be comprehensive enough to ensure the submission of bids that will enable procuring entities to compare them and to allocate their own resources efficiently.<sup>437</sup>

#### 4.4.4.1 Publication

With regard to publication the two key issues are where the information can be found and the content thereof. Satisfactory publication entails that the information should be made known and be generally available through an easily accessible source. The level of availability should be proportionate to the likely level of interest.<sup>438</sup> The requirements for publication may be less strict for low-value procurements.<sup>439</sup>

#### 4.4.4.2 Contents

The contents should be sufficient to allow potential suppliers to assess their interest in participating in the proposed procurement or in the qualification

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<sup>434</sup> WT/WGTGP/3 par 40.

<sup>435</sup> WT/WGTGP/3 par 41.

<sup>436</sup> WT/WGTGP/3 par 43.

<sup>437</sup> WT/WGTGP/3 par 44.

<sup>438</sup> WT/WGTGP/3 par 48. This entails that should foreign suppliers be interested it should be published in a source accessible to such suppliers.

<sup>439</sup> This will avoid unnecessary costs.

system. It must also enable them to prepare responsive bids or proposals for qualification.<sup>440</sup>

#### 4.4.4.3 Evaluation criteria

With regard to the evaluation criteria, all relevant evaluation criteria should be accessible to interested suppliers, whether through publication of procurement opportunities, specifications laid down in tender documentation, or by giving references to applicable laws and regulations. It is important that information on preferences and other measures in favour of domestic supplies or suppliers, for instance offsets, be made known in advance in the tender

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<sup>440</sup> WT/MGTGP/3 par 50. The type of information that can be included is set out in par 51:

- “● regarding the procuring entity:
  - full contact details (the name and the address) of the procuring entity (the buying department or agency, the location of the responsible office and the division or branch of the department or agency);
  - coordinates of a contact point or document centre from which additional information including on technical and commercial requirements and any other relevant information or documents may be requested and obtained, the final date for making such requests and, if applicable, the cost of such information; unique reference number identifying the request in the department or agency’s records;
- regarding suppliers:
  - any requirements relating to the supplier or service provider, for example economic or qualification requirements;
- regarding the intended procurement:
  - an identifiable description (nature) of the goods and/or services to be provided, together with their quantity or an indication of their extent;
  - the place of delivery, site or place of performance of the service and, if applicable, the time-limit for delivery, completion or duration of the contract;
- regarding evaluation of tenders:
  - the procurement procedure envisaged to be used (open, selective, whether negotiations are involved, etc);
  - the criteria for the award of the contract including factors other than the price that are to be considered in the evaluation of tenders (economically most advantageous bid) in the evaluation of tenders;
  - information on the existence of any conditions in favour of national suppliers in awarding contracts, such as price preferences, local content requirements or any other policies of discriminatory nature. In this connection, it has also been said that provision of such information would not be necessary if a description of national preferences or discriminatory policies was already published in the Official Gazette;
  - any technical specifications required;
  - where applicable, the location, date and time of any public briefing on the requirements;
- regarding submission, receipt and opening of tenders:
  - the final date for the submission/receipt of tenders or requests to be invited to participate in a qualification system;-the address to which submission of tenders or requests to be invited to participate in a qualification system must be sent
  - details of any language requirements in respect of submission of tenders;
  - date and place of opening of tenders”.

documents and/or tender notices.<sup>441</sup> Offsets, domestic content, technology transfer, export earnings or similar requirements have the effect of distorting procurement decisions.

Such requirements must be applied in a transparent manner and should form part of the qualification criteria rather than the criteria for evaluating tenders.<sup>442</sup> As technical specifications are an important element of the evaluation criteria, specifying one technology over others should be avoided, and tender documentation should not be developed in such a way as to require the use of technology available to only a limited number of suppliers. Performance-based specifications are preferable to those that are design-based, and should rely, if possible, on existing internationally agreed or other relevant standards.<sup>443</sup>

#### *4.4.5 Time periods*

The principle applicable in determining the minimum time periods that must be available to potential suppliers to fulfil the requirements of the different stages of the procurement process is that it must be adequate to allow suppliers to prepare and submit tenders before the closing of the tendering procedures, taking into account the procuring entity's own reasonable<sup>444</sup> needs, the complexity of the intended procurement, the extent of subcontracting anticipated, and the normal time for corresponding by mail.<sup>445</sup>

#### *4.4.6 Decisions on qualification*

The objective of an open, transparent, efficient and equitable selection process should be pursued by ensuring that decisions on registration and the qualification of suppliers are taken only on the basis of criteria that had been identified early in the process and timeously disclosed to suppliers. Any changes in qualification requirements should be made known.<sup>446</sup> The criteria for qualification could include such factors as technical capability, client satisfaction, financial capacity,

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<sup>441</sup> WT/WGTGP/3 par 54.

<sup>442</sup> WT/WGTGP/3 par 56.

<sup>443</sup> WT/WGTGP/3 par 58.

<sup>444</sup> This refers for instance to emergency considerations.

<sup>445</sup> WT/WGTGP/3 par 66. This is in accordance with the UNCITRAL Model Law's general principle and as set out in art XI:1 of the GPA.

<sup>446</sup> WT/WGTGP/3 par 69.

contracting and partnering issues, quality control, performance requirements relating to occupational health and safety, compliance with an associated code of practice for potential suppliers, human resource management, compliance with domestic legislative requirements, and commitment to continuous improvement. Sufficient flexibility is necessary, and no exhaustive list of criteria can be compiled.<sup>447</sup> All applicants must be informed of the qualification decision in advance of the call for tenders.<sup>448</sup> Due process should be followed.<sup>449</sup>

#### 4.4.7 Decisions on contract awards

Decisions must be taken strictly on the basis of the evaluation criteria, including with regard to the technical specifications which had been set out in the tender documents and in accordance with the information provided on how those criteria would be applied. Criteria should be set out in such a way as to ensure as objective an application as possible.<sup>450</sup> Procuring entities should have procedures in place, like the public opening of tenders, to ensure the regularity and impartiality of the procurement process, and that there is no opportunity to manipulate the specific elements of tenders or to provide a particular tenderer with information on other tenders.<sup>451</sup>

The right to information after the contract is awarded is essential to transparency.<sup>452</sup> It provides unsuccessful tenderers with the opportunity to ensure that they have been treated fairly and equitably according to the specific requirements. It provides the assurance that the criteria set out in the tender documentation and the applicable national rules and procedures were properly followed in the procurement proceedings. This information may also assist unsuccessful bidders to improve their future bids.<sup>453</sup>

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<sup>447</sup> WT/WGTGP/3 par 72.

<sup>448</sup> WT/WGTGP/3 par 73. It could be possible to require that qualification decisions be made by expert bodies.

<sup>449</sup> WT/WGTGP/3 par 75.

<sup>450</sup> WT/WGTGP/3 par 77. Allowance needs to be made for cases where, for reasons of *force majeure*, the criteria set out in tender documents can not be strictly adhered to.

<sup>451</sup> WT/WGTGP/3 par 78.

<sup>452</sup> The nature and scope of the information to be provided may differ depending on the circumstances and the method utilised.

<sup>453</sup> WT/WGTGP/3 par 80.

A balance will have to be struck between the need for transparency and the administrative burden created thereby.<sup>454</sup> The demand for confidentiality in some aspects of the matter will have to be taken into account. The obligation to provide information could vary from a full debriefing, on request, for unsuccessful tenderers, to the mere publication of a minimum of information within a certain time-frame, and could include a statement of the reasons why a specific procurement method was used.

#### *4.4.8 Domestic review procedures*

A domestic review mechanism is essential to ensure accountability and that the rules are respected by everyone involved in the procurement process. The establishment of a mechanism for the review of complaints by suppliers, or a tender challenge system, guarantees due process and public accountability throughout the procurement process, and causes the process to be seen as transparent. It will make public procurement authorities more aware of the need to ensure that the procedures used in a particular procurement are in accordance with the applicable laws and regulations. It increases confidence in the effective functioning of the overall procurement system.

The review mechanisms need to be independent, appropriate to their circumstances, scope, topic and objectives. They should include “internal” scrutiny of the actions or decisions of a procurement official or area within a government organisation by another official or area of that organisation, as well as scrutiny by other “external” government organisations, such as an

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<sup>454</sup> Typical aspects that may have to be addressed, as set out in par 81, are the procuring entity, the location of the responsible office, division or branch of the department or agency and its address; description of the supplies including the department or agency for which they are required, if different from the above, and in enough detail to identify their nature, quantity and any period that may be applicable; a unique reference number identifying the contract, purchase or agreement in the department or agency’s records and the date of the purchase or agreement; the value of the winning bid or the total liability of the contract at the date of entering into the contract; or where it is not possible to predict accurately the total liability with precision because of the basis of the contract, for example cost escalation, labour and materials, or schedule of rates, the total estimated value or liability; the value of the lowest and the highest bid, the type of procurement method used, the name of the winning supplier(s), their postal address and the date of the award; where a panel contract has been made, details of all suppliers should be notified. However, if this is impractical, a contact address within the agency should be published for persons seeking further information; and relevant product and service code.

ombudsman, a government audit organisation, or representatives of an elected assembly, including scrutiny by the judiciary, non-governmental bodies, or bodies independent of government influence.<sup>455</sup> Review procedures should provide for adequate remedies that will protect the interests of suppliers and will deter procurement entities from engaging in future actions that would be inconsistent with the provisions of an eventual agreement on transparency. Such remedies should include the possibility of correction, including altering the inconsistent procurement process, re-tendering for the procurement, or awarding damages to cover legitimate claims.<sup>456</sup> Written records of the procurement process need to be kept in order to ensure that review bodies have an adequate factual basis for review.<sup>457</sup>

#### *4.4.9 Other aspects*

Appropriate public access to information for external scrutiny is an essential element of transparency and accountability. Government procurement records and information and mechanisms for collecting, assessing and scrutinising those records and that information should enable effective external scrutiny. Information recorded on authorisations, procurement systems, actions and decisions should be sufficient to justify decisions taken in the procurement process and to demonstrate that the procurement activity was consistent with government requirements.<sup>458</sup> A proper record of decisions and actions taken during the procurement process, and the reasons therefore, the maintenance of a record of procurement proceedings, and the availability to interested parties of non-confidential information contained in the record are necessary to ensuring

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<sup>455</sup> WT/WGTGP/3. In par 95 the following features were identified: to encourage suppliers, in the first instance, to take up the matter directly with the procuring entity for an early resolution; in some cases, the mediation by an independent authority might be sought; if the matter was not resolved mutually, provisions enabling suppliers to bring an action against the procuring entity before a judicial or administrative authority or other independent body; review provisions should require that review bodies be impartial and independent of the procurement process itself; account should be taken of such principles as objective legality, ex officio action and material delegation in the review procedures; in addition to procedures based on formal complaints, initiation of review procedures by competent public authorities on an ex officio basis or national mechanisms for monitoring procurement proceedings; the review procedure should result in a published and reasoned conclusion that should be notified to interested suppliers in writing; review procedures should be published in a medium that is publicly available.

<sup>456</sup> WT/WGTGP/3 par 98.

<sup>457</sup> WT/WGTGP/3 par 100.

<sup>458</sup> WT/WGTGP/3 par 103.

adherence to agreed rules and are of particular importance in the functioning of an administrative or judicial review process.<sup>459</sup> Such records will provide the basis for an audit trail and will support an evaluation of the procurement.<sup>460</sup> Adherence to these rules introduces an element of accountability into the process. The preservation of records for a pre-established minimum length of time is also essential. The length of time should be linked to the time provided to suppliers in legislation to challenge a procurement decision and to seek the review of a procurement process.<sup>461</sup>

Electronic information technology has been adopted by many procurement communities and offers tremendous opportunities to level the playing field by increasing access to information for all suppliers at low cost.<sup>462</sup> The requirement of transparency should not constitute an unnecessary barrier to progress, given the availability of modern information technology, the use of which should not result in discrimination against those who do not have a competitive edge in this area.<sup>463</sup>

Bribery in government procurement processes is a source of serious concern. It involves not only political considerations such as legal insecurity, unsatisfactory governance and unethical behaviour, but also considerations of an economic nature such as inefficient resource management. Corruption may have a negative impact on investment and may distort the possibility of fair competition in business.<sup>464</sup> Transparency, by itself, is not enough to curb bribery, and needs

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<sup>459</sup> WT/WGTGP/3. In par 104 footnote 4, the following detail to be recorded were suggested: approval to make the procurement; the selection criteria upon which evaluation and selection decisions will be based; discussions with potential bidders before bids close; details of clarification of bids during evaluations; reasons for variations to a tender; steps to provide all bidders with an equal opportunity to revise their bids; agreements reached during negotiations; authorisation and signing of a contract; details of debriefings; reasons for varying a contract; and records of contractor performance.

<sup>460</sup> The following details of the matters that should be documented have been suggested: approval to make the procurement; the selection criteria upon which evaluation and selection decisions will be based; discussions with potential bidders before bids close; details of clarification of bids during evaluations; reasons for variations to a tender; steps to provide all bidders with an equal opportunity to revise their bids; agreements reached during negotiations; authorisation and signing of a contract; details of debriefings; reasons for varying a contract; and records of contractor performance.

<sup>461</sup> WT/WGTGP/3 par 104.

<sup>462</sup> WT/WGTGP/3 par 107.

<sup>463</sup> WT/WGTGP/3 par 108.

<sup>464</sup> WT/WGTGP/3 par 111.

to be supplemented by specific appropriate action and measures relating, among others concerns, to the bribery of public officials, trans-national bribery, the tax deductibility of bribes paid to foreign officials, the retention of records of procurement proceedings, the establishment of bid challenge systems, the lifting of banking secrecy, mutual legal assistance, and technical and financial cooperation.<sup>465</sup>

Although the above aspects relate closely to the discussion of transparency, they should also be seen as salient in any procurement system, where they would enhance not only transparency but also other aspects like fairness, value for money, efficiency, competition, the combating of abuse, and accountability, and would ensure the integrity of the process.

#### **4.5 Conclusion**

The original Government Procurement Agreement entered into during 1979 came into effect in 1981. It was narrow in scope and covered only supplies contracts. It excluded procurement of works and services by government agencies. The present GPA entered into as part of the Uruguay Round of talks, which culminated in the WTO, is more extensive and took effect on 1 January 1996. The scope is much broader in that it covers works and other services as well as supplies.<sup>466</sup> It applies to certain activities in the utilities sector and applies to regional and local procuring entities over and above central or federal government. However, the scope is not uniform for the different procuring entities and its application with regard to each state is set out in the annexures to the agreement.<sup>467</sup> The GPA contains aggregation rules ensuring that contracts are not divided into smaller contracts in order to fall below the threshold values.<sup>468</sup>

The GPA addresses the important stages of the procurement process. In particular it deals with issues like technical specifications;<sup>469</sup> tendering

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<sup>465</sup> WT/WGTGP/3 par 112.

<sup>466</sup> Appendix 1 to the GPA.

<sup>467</sup> Art II:3.

<sup>468</sup> Art II:4.

<sup>469</sup> Art VI.

procedures;<sup>470</sup> the qualification of suppliers;<sup>471</sup> the invitation to participate;<sup>472</sup> selection procedures;<sup>473</sup> time limits;<sup>474</sup> tender documentation;<sup>475</sup> the submission, receipt and opening of tenders and the award of contracts;<sup>476</sup> negotiation procedures;<sup>477</sup> offsets;<sup>478</sup> transparency;<sup>479</sup> the publication of information regarding tenders;<sup>480</sup> the publication of laws, regulations, decision, administrative rulings and court decisions;<sup>481</sup> and challenge procedures.<sup>482</sup> As expected, these issues are dealt with in a way that lays down certain minimum requirements that have to be adhered to.

Although the purpose of the GPA is to enhance world trade it still has to be based on sound public procurement policies applicable to any law, regulation, procedure or practice regarding procurement by the entities covered by the agreement.<sup>483</sup> The principles of competition, integrity, transparency, efficiency, the combating of abuse, accountability, fairness, and value for money<sup>484</sup> are addressed in the agreement. The principles laid down by the Working Group on Transparency also support these objectives. One of the important principles necessary to any sophisticated procurement system is that a tender must be awarded either to the qualified tenderer whose tender is the lowest tender or the tender, which in terms of the specific evaluation criteria, is the most advantageous, unless it is decided in the public interest not to issue the contract.<sup>485</sup> The concept of the most advantageous tender enables the decision maker to take all factors into account and not to be bound by consideration of price only. Of further importance are the facts that individuals, and not only state

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<sup>470</sup> Art VII.

<sup>471</sup> Art VIII.

<sup>472</sup> Art IX.

<sup>473</sup> Art X.

<sup>474</sup> Art XI.

<sup>475</sup> Art XII.

<sup>476</sup> Art XIII.

<sup>477</sup> Art XIV.

<sup>478</sup> Art XVI.

<sup>479</sup> Art XVII.

<sup>480</sup> Art XVIII.

<sup>481</sup> Art XIX.

<sup>482</sup> Art XX.

<sup>483</sup> Art VII:I and XXIV:5.

<sup>484</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>485</sup> Art XIII:4(b).

parties, are given the right to enforce the agreement, and that minimum standards are provided for challenge procedures.<sup>486</sup>

The Revised GPA elevates the principle of transparency to a substantive objective. It also puts more emphasis on the integrity and predictability of the process, the efficient and effective management of public resources, flexibility, impartiality, and the avoidance of conflicts of interest and of corrupt practices.<sup>487</sup> Its further major contribution is the fact that it makes extensive provision for special consideration to be given to the development, financial, and trade needs and the particular circumstances of developing countries and least-developed countries. Transitional measures are provided for to assist developing countries to phase in the full impact of the Revised GPA over time. The measures are price preference programmes,<sup>488</sup> offsets,<sup>489</sup> and the phased-in addition of specific entities or sectors,<sup>490</sup> and the establishment of a temporary threshold that is higher than the entity's permanent threshold.<sup>491</sup>

The GPA and Revised GPA have as their primary objective to liberalise and expand world trade. This entails that domestic products and services must not be protected and foreign suppliers not be discriminated against. The primary objective of national public procurement regimes is to obtain value for money and the secondary objective is the furtherance of socio-economic objectives. Despite the differences in these two objectives, similar principles (of which transparency is probably the most important) are used to ensure that these

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<sup>486</sup> Art XX.

<sup>487</sup> See Schnitzer 2005 *PPLR* 63-90. He states that most bi-lateral agreements, in order to open up public procurement markets, are based on the key principles of national treatment and non-discrimination. He sees transparency as the common characteristic and as the cornerstone of the agreements as a lack of transparency is in itself a barrier to trade. This translates into fair, objective and predictable award and challenge procedures. Publication, time limits, the provision of reasons and the keeping of records are, according to him, all principles of such agreements.

<sup>488</sup> Art IV:3(a) Revised GPA. This is on condition that the programme:

- (i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement; and
- (ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement".

<sup>489</sup> Art IV:3(b).

<sup>490</sup> Art IV:3(c).

<sup>491</sup> Art IV:3(d).

objectives are reached. Principles that emerge from the GPA and Revised GPA are:

- the transparency of all aspects of the procurement process, including the accessibility of information;
- the integrity of the system, which includes predictability and impartiality;
- efficiency, including flexibility, promptness and cost effectiveness;
- the avoidance of conflicts of interest and of corrupt practices, and the combating of abuse;
- accountability, including independent and impartial challenge procedures;
- competition;
- fairness, and
- value for money.

Content is given to the above principles by ensuring that

- the available methods of procurement conform to principles of transparency and maximise the level of competition;
- information on procurement legislation, rules and practices is made widely available in an easily usable form to all interested parties, with the right of access to that information;
- information on procurement opportunities, tendering and qualification procedures, and all relevant evaluation criteria is published in an easily accessible and available format, the contents being sufficient to allow potential tenderers to assess their interests in participating in the proposed procurement or in the qualification procedure;
- the minimum time periods available to potential suppliers are adequate to allow tenderers to prepare and submit tenders before the closing of the tendering procedures, taking into account all relevant circumstances.
- decisions on qualification are taken only on the basis of criteria that have been identified early in the process and timeously disclosed to

potential tenderers. Criteria must be set out in such a way as to ensure as objective an application as possible.

- special treatment for developing countries is provided for in a transparent way; and
- domestic review mechanisms are independent, appropriate to their circumstances, scope, topic and objectives and provide for adequate remedies that will protect the interests of tenderers.

The GPA provides a very good matrix for evaluating the current South African public procurement regime.

## CHAPTER 5 THE SOUTH AFRICAN LAW ON PUBLIC PROCUREMENT

### **5.1 Introduction**

The history of South African public procurement is inextricably bound to its legal history. South Africa's modern legal history was shaped by the development of the State of South Africa. The most important moments were the Dutch settlement in the Cape from 1652, the British occupations,<sup>1</sup> the formation of the Union of South Africa in 1910, the creation of an independent Republic in 1961, and the new constitutional dispensation introduced in 1994.

Although the phenomenon of public procurement is probably as old as the history of national states, modern international public procurement came to the fore only with the increase in international trade during the past few decades. Most developments in public procurement law have taken place in this period. Public procurement has also only recently become a separate field of study in the law, especially in South Africa. To understand and evaluate the present procurement regime in South Africa and why it is used as an instrument by government to achieve its socio-economic policies, a brief historical perspective is necessary. Although a distinction will be made between the pre-constitutional and the constitutional eras of South Africa's procurement law, the emphasis will be on the constitutional era.

With regard to the pre-constitutional era the following will cursorily be dealt with: the period before Europeans settled in the Cape; the introduction of Roman Dutch Law in the Cape of Good Hope by the early European settlers; the influence of British Law in particular from 1910 to 1961; and the period of the South African Republic from 1961 until 1994, when South Africa became a constitutional state.

The constitutional era will be dealt with in more detail. This will be done by discussing the most important legislation directly affecting public procurement.

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<sup>1</sup> The occupations were from 1795 to 1803 and from 1806 to 1910 respectively.

In particular the PFMA and MFMA and the regulations issued in terms thereof will be dealt with. Other legislation which might have an influence on public procurement will be mentioned without going into detail. It is not practical to discuss the supply chain management policies of any of the procuring entities in South Africa. How collateral objectives in public procurement are sought to be achieved will be addressed separately with particular reference to the PPPFA and the National Industrial Participation Programme. It is not the purpose to discuss the legislation and regulations in minute detail but rather to determine the broad principles on which the public procurement regime is based. The provisions of the Constitution have already been discussed in Chapter 2 and will not be repeated. The chapter will be concluded with an evaluation of the above.

## **5.2 The Pre-Constitutional era**

### *5.2.1 The time before European settlement*

Before the Dutch started a colony in the Cape in 1652<sup>2</sup> the area today known as South Africa was for many millennia inhabited by groups of hunter-gatherers. Some became sheep and cattle herders, notably the Khoikhoi,<sup>3</sup> whom the Dutch settlers encountered in the Cape. As early as AD 200, Iron Age communities settled in the more northern parts of the present-day South Africa. They gradually moved southwards and in due course met with the white settlers in the Cape.<sup>4</sup> They were cultivators and pastoralists. Their societies were based on the possession of land, albeit vested in the chief. The form of government at that time was confined to traditional leadership.<sup>5</sup> Forms of procurement, amongst the different tribes, undoubtedly took place in those times, but they had little if any influence on present-day public procurement law in South Africa.

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<sup>2</sup> Jan van Riebeeck, in the employ of the Vereenigde Oost-Indische Compagnie (VOC), landed in the Cape on 6 April 1652 with the purpose of establishing a refreshment post for sea travel between Europe and India.

<sup>3</sup> This term is generally used for the indigenous people at the Cape at the time of Jan van Riebeeck. They were also referred to as Hottentots by the white settlers.

<sup>4</sup> This led to the many border disputes, raids and wars between the white settlers and the black tribes at the borders of the Cape Colony. See Visser and Zimmerman *Southern Cross* 46.

<sup>5</sup> For a more detailed exposition of the history of pre-colonial South Africa see Visser and Zimmerman *Southern Cross* 33-64.

## 5.2.2 *The European Settlement in South Africa 1652-1910*

### (a) *The early Dutch settlement*

European explorers had been landing on the shores of Southern Africa since the late fifteen-century. However, the first permanent European settlement was established only in the mid seventeenth century, namely a Dutch refreshment station at Table Bay. This was to serve the lucrative trade route between the Netherlands and the East Indies. During 1652, Jan van Riebeeck, in the employ of the Vereenigde Oost-Indische Compagnie (hereinafter referred to as the "VOC"), started a commercial trading post at Table Bay. The VOC was under the sovereignty of the Netherlands Estates General.<sup>6</sup> In practice the VOC administered the Cape until 1796<sup>7</sup> with little interference from the Government of the Netherlands. The VOC was governed by its directors, the Heeren Zeventien,<sup>8</sup> who even had legislative powers under the charter of the Estates General.<sup>9</sup>

The government at the Cape was vested in a Commander and, after 1691, a Governor assisted by a council consisting of the Secunde<sup>10</sup> and other senior officials.<sup>11</sup> It administered administrative as well as judicial functions. In 1685 it was divided into a Council of Policy and a Court of Justice.<sup>12</sup> The Council of Policy was at the same time legislature and executive.<sup>13</sup>

The law of the Netherlands was in this way introduced in the Cape.<sup>14</sup> No special enactment to this effect was made.<sup>15</sup> Because of the dominance of the

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<sup>6</sup> The Estates General formed the government of the Republiek der Vereenigde Nederlanden, which consisted of seven provinces. Each of the seven provinces was a republic in itself.

<sup>7</sup> The VOC operated under the charter (octrooi) of the Estates General of 20 March 1602. It granted the VOC the monopoly to trade to the east of the Cape and through the straits of Magellan. It empowered the VOC *inter alia* to administer its trading stations. For a detailed exposition of the relationship between the Estates General and the VOC see Hahlo and Kahn *Union of South Africa* 10-16.

<sup>8</sup> Hahlo and Kahn *Union of South Africa* 11. The capital of the VOC was in the form of shares. Blocks of shares were held by six chambers. The directors were appointed by the Estates-General out of nominations submitted by the chambers.

<sup>9</sup> Hahlo and Kahn *Union of South Africa* 10-11.

<sup>10</sup> Second in command.

<sup>11</sup> Hahlo and Kahn *Union of South Africa* 12; Hahlo and Kahn *South African Legal System* 534-541.

<sup>12</sup> Hahlo and Kahn *Union of South Africa* 12; Hahlo and Kahn *South African Legal System* 534-541.

<sup>13</sup> Hahlo and Kahn *Union of South Africa* 12; Hahlo and Kahn *South African Legal System* 534-541.

<sup>14</sup> For a summary of how the Roman Dutch Law was introduced in the Cape see Visser and

province of Holland in the affairs of the VOC, the common law of Holland, namely the Roman Dutch Law, was adopted.<sup>16</sup>

Over the approximately 150 years of rule by the VOC a large number of Placaaten<sup>17</sup> were issued in terms of which the Cape was governed.<sup>18</sup> As the *de facto* rulers of the Cape Colony the VOC, being a commercial enterprise, issued many Placaaten which related to commercial activities in the Cape Colony. These included the compulsory selling of agricultural products such as grain to the VOC.<sup>19</sup> Many public auctions were advertised at which concessions for the supply of goods were auctioned by the VOC to the highest bidder.<sup>20</sup> It was common to obtain tenders for the provision of supplies to the company.<sup>21</sup> It will be difficult to classify the procurement done by the VOC as public procurement in the true sense of the word, as the VOC administered the colony along commercial lines and not with the purpose of creating a national state.

With the growth of the colony, local authorities similar to those in the Netherlands were established.<sup>22</sup> These were established in the form of landdrosten, heemraden, and later veldcornette.<sup>23</sup> In due course they accrued

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Zimmerman *Southern Cross* 37-45. Although the common law of the republics of the Netherlands were similar, there were some differences between the republics. See Visser and Zimmerman *Southern Cross* 41-45 for an interesting discussion on the meaning of Roman Dutch Law. See also Hahlo and Kahn *South African Legal System* 524-596.

<sup>15</sup> Hahlo and Kahn *Union of South Africa* 13.

<sup>16</sup> Hahlo and Kahn *Union of South Africa* 13; Visser and Zimmerman *Southern Cross* 40.

<sup>17</sup> They can also be referred to as statutes or regulations. They dealt mainly with local matters.

<sup>18</sup> Hahlo and Kahn *Union of South Africa* 16.

<sup>19</sup> See for instance the *placaat* by Zacharias Wagenaer dated 9 September 1666 warning the farmers to deliver all of their grain to the VOC, or else their houses would be searched for grain. See Part 1 of Jeffreys and Naude *Kaapse Plakaatboek*.

<sup>20</sup> Many *placaaten* were issued for the provision of meat, beer, wine and similar products to the VOC and hospitals, the garrison and prisoners. See the *placaaten* dated December 1681, 2 and 3 May 1707, 11 January 1708, 6 and 10 April 1723. Jeffreys and Naude *Kaapse Plakaatboek*. See also Hahlo and Kahn *South African Legal System* 540.

<sup>21</sup> Examples are: Resolution dated 27 April 1679 by Hendrik Crudop. *Placaat* dated 4 March 1681 signed by Simon van der Stel advertising the selling of tobacco to the highest bidder and to buy grain from the lowest bidder. A *placaat* dated 11 October 1779 advertised for tenders to deliver limestone to the VOC for the building of a hospital. Jeffreys and Naude *Kaapse Plakaatboek*.

<sup>22</sup> It must be kept in mind that in the Netherlands, during the Middle Ages, towns had many freedoms and privileges and were quite independent from central government. This remained the case after the Netherlands became a Verenigde Republiek. This system was also followed in the Cape when towns developed. Hahlo and Kahn *South African Legal System* 533-541; Hahlo and Kahn *Union of South Africa* 51. Municipal boards were established in terms of Ordinance 836 of 1836.

<sup>23</sup> Hahlo and Kahn *Union of South Africa* 13.

the authority to enter into agreements including those relating to procurement.<sup>24</sup>

Already under Dutch rule there was a tendency by the European community to discriminate against the indigenous peoples of the Cape.<sup>25</sup> At this early stage the seeds were already sown for the system of apartheid which flourished after South Africa became a Republic in 1961.

After ruling the Cape for 144 years, in 1796 the VOC declared that it could not meet its obligations and its charter was cancelled.<sup>26</sup> At this time France had declared war against Holland and England.<sup>27</sup> To protect its interests against the French, the British occupied the Cape on 11 June 1795, which occupation lasted until February 1803. Britain held the Cape in the name of the Prince of Orange, the lawful ruler of the Netherlands, who was in exile.<sup>28</sup>

The use of tenders for procurement was prevalent already during this period.<sup>29</sup> Publicity was ensured by publishing invitations to tender in the *Placaaten*.<sup>30</sup> Decentralisation of public procurement to local government level occurred.<sup>31</sup>

*(b) The English occupations*

In February 1803, after England had made peace with France,<sup>32</sup> the Cape was restored to the Netherlands. The peace did not last and Britain

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<sup>24</sup> Hahlo and Kahn *South African Legal System* 569.

<sup>25</sup> Hahlo and Kahn *Union of South Africa* 53-56 and 70-72.

<sup>26</sup> Hahlo and Kahn *Union of South Africa* 4.

<sup>27</sup> Hahlo and Kahn *Union of South Africa* 4.

<sup>28</sup> Hahlo and Kahn *Union of South Africa* 4; Visser and Zimmerman *Southern Cross* 46.

<sup>29</sup> See for instance the *placaat* by Zacharias Wagenaer dated 9 September 1666 warning the farmers to deliver all of their grain to the VOC, or else their houses would be searched for grain. See Part 1 of Jeffreys and Naude *Kaapse Plakaatboek*. See the *placaaten* dated December 1681, 2 and 3 May 1707, 11 January 1708, 6 and 10 April 1723. See also Hahlo and Kahn *South African Legal System* 540.

<sup>30</sup> Examples are: Resolution dated 27 April 1679 by Hendrik Crudop. *Placaat* dated 4 March 1681 signed by Simon van der Stel advertising the selling of tobacco to the highest bidder and to buy grain from the lowest bidder. A *placaat* dated 11 Oktober 1779 advertised for tenders to deliver limestone to the VOC for the building of a hospital.

<sup>31</sup> Hahlo and Kahn *South African Legal System* 533-541; Hahlo and Kahn *Union of South Africa* 51. Municipal boards were established in terms of Ordinance 836 of 1836.

<sup>32</sup> By the Treaty of Amiens 27 March 1802.

reoccupied the Cape in January 1806. The Cape remained a British Colony from 1806 until South Africa became a Union in 1910.<sup>33</sup>

During the periods of the first and second British occupations (1795 to 1803 and 1806 to 1910, respectively) government in the Cape was progressively centralised. The administration in the Cape was restructured along similar lines to the administration in Britain.<sup>34</sup> During the British rule *placaaten* were still issued and the selling and buying of supplies by the government were advertised therein.<sup>35</sup>

In 1820 the British settlers came to the Cape and settled in the area between the Kei and Keiskamma rivers. This area was incorporated into the Cape Colony in 1865.<sup>36</sup> By the end of the 19<sup>th</sup> century certain public works were already being performed by private companies in terms of a system analogous to the Build Operate Transfer agreements (hereafter referred to as “BOT agreements”)<sup>37</sup> of today.<sup>38</sup>

The local government of the Cape Colony, consisting mainly of municipalities, also had powers to enter into contracts and to ask for tenders.<sup>39</sup> The provision

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<sup>33</sup> Hahlo and Kahn *Union of South Africa* 5. When the Convention of London was concluded on 13 August 1814, the Cape was not restored to the Netherlands.

<sup>34</sup> Visser and Zimmerman *Southern Cross* 49-51; Hahlo and Kahn *Union of South Africa* 17-21; Hahlo and Kahn *South African Legal System* 569-571.

<sup>35</sup> See the *placaat* dated 9 December 1801 in which the sale of government-owned windmills by public auction was advertised. In terms of s 43 of Ordinance number 9 dated 15 August 1836, signed by B D’Urban, eight days notice was given to contractors to tender to do certain work cheaper than the existing offer.

<sup>36</sup> It was known as British Kaffraria and incorporated in terms of the *Cape Colony Act* 3 of 1865(C).

<sup>37</sup> These are agreements between the state and the private sector in terms of which public works like bridges or roads are built by private enterprise and operated for the builder’s own account for a specified time, whereafter they are transferred to the government.

<sup>38</sup> The *Vaal River Bridge Act* 11 of 1881 was enacted to provide for the construction and maintenance of a bridge across the Vaal River at or near the township of Barkley/Griqualand West. This Act provided that a private individual, Moritz Unger, could construct, maintain and operate a bridge over the Vaal River at his own cost. He could ask toll for his own account. The Cape Colony had the right to buy the bridge after 21 years. The *Imvani and Indwe Railway Act* 3 of 1882 also provided for a build operate transfer agreement. A private company had to build a railway for the right to mine coal at Indwe.

<sup>39</sup> This was provided for in the *To Consolidate and Amend the Law Relating to the Municipalities Act* 45 of 1882. S 104 and 105 thereof specifically provided for contracts and tenders. Contracts which were in view of all circumstances the most advantageous had to be entered into. S 156 thereof provided for the powers and duties of such municipalities. These municipalities were regulated initially by Act 15 of 1860, thereafter Act 13 of 1864 and various

that “contracts which were in view of all circumstances the most advantageous had to be entered into”<sup>40</sup> was important.

Towards the end of the nineteenth century and at the beginning of the twentieth century the Cape Colony, now under British rule, had separate acts dealing with financial matters.<sup>41</sup> In effect the treasury had control over and administered the financial aspects of the government. This included state spending which related to public procurement. The responsible officer was called the Controller and Auditor General. The Treasurer could issue regulations pertaining to the expenditure of state money.<sup>42</sup>

(c) *The Boer Republics*

During 1836 the white settlers from the Cape Colony founded new states in the interior, namely Natal, Transvaal (ZAR)<sup>43</sup> and Orange Free State. The Transvaal, Orange Free State and Natal Republics had their origins in the first constitution of December 1836 adopted at Thaba Nchu.<sup>44</sup>

(i) Natal:

The Natal Republic was short-lived. The British occupied it in 1842 and formally annexed it in 1843. It became a separate crown colony in 1856.<sup>45</sup> In terms of the Natal Ordinance number 12 of 1845 the system, code or body of law commonly called the Roman Dutch Law, accepted and administered by the Cape Colony,

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ordinances namely Ordinance 9 of 1836, Ordinance 2 of 1844, Ordinance 8 of 1848 and Ordinance 5 of 1852. On local government level, village management boards were introduced in terms of Act 29 of 1881. These boards could enter into contracts in terms of s 23 thereof.

<sup>40</sup> *To Consolidate and Amend the Law Relating to the Municipalities Act* 45 of 1882. S 104 and 105.

<sup>41</sup> The *Contingency's Account Act* 14 of 1892, *Audit of Public Accounts Act* 30 of 1875 and the *Exchequer and Audit Act* 14 of 1907 regulated actions by the treasury.

<sup>42</sup> S 35 of the *Exchequer and Audit Act* 14 of 1907.

<sup>43</sup> De Zuid Afrikaansche Republiek.

<sup>44</sup> Hahlo and Kahn *Union of South Africa* 6; Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 460; Visser and Zimmerman *Southern Cross* 54.

<sup>45</sup> Hahlo and Kahn *Union of South Africa* 6. In 1897 Zululand and Tongaland were annexed by Britain and incorporated into the then Natal. Visser and Zimmerman *Southern Cross* 53.

was established as the law.<sup>46</sup> The law as applied in the Cape was also applied in Natal.<sup>47</sup>

(ii) Orange Free State:

After the occupation of Natal by the British, on 9 April 1844, the Transvaal Republic with its capital at Potchefstroom and the Orange Free State with its capital at Winburg declared themselves Republics. They adopted Constitutions consisting of 33 articles. It provided that the *Hollandsche Wet* should be applied.<sup>48</sup> No specific provision was made with regard to public procurement.

In 1848 Sir Harry Smith, the governor of the Cape Colony, tried to incorporate the Orange Free State into the British Empire. In terms of the Bloemfontein Convention<sup>49</sup> British sovereignty was, however, again withdrawn and the Orange Free State became an independent Republic.<sup>50</sup> In terms of section 57 of the Constitution of the Orange Free State of 1854, Roman Dutch law was the law of the Orange Free State.<sup>51</sup>

The *Orange Free State Constitution Act*<sup>52</sup> provided<sup>53</sup> for procurement by way of tenders which had to be advertised. Municipalities had to source contracts in excess of £30 by way of tenders.<sup>54</sup> After the Anglo Boer War the *Audit and Exchequer Act*,<sup>55</sup> which regulated state spending, was promulgated.<sup>56</sup>

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<sup>46</sup> Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 472.

<sup>47</sup> Towards the end of the 19<sup>th</sup> century separate acts relating to the treasury existed: In Natal the *Audit Act* 18 of 1904; the *Contingency's Fund Act* 21 of 1904 where applicable.

<sup>48</sup> Art 31 of the *Thirty Three Article Constitution*. Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 460-461; Hahlo and Kahn *Union of South Africa* 7; Visser and Zimmerman *Southern Cross* 55.

<sup>49</sup> Bloemfontein Convention 23 February 1854. Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 467.

<sup>50</sup> Hahlo and Kahn *Union of South Africa* 7; Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 460-461; Visser and Zimmerman *Southern Cross* 55.

<sup>51</sup> Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 468.

<sup>52</sup> *Constitution Act* of 1845.

<sup>53</sup> Ch LXXII, s 26.

<sup>54</sup> Ch LXXXVI, s 45.

<sup>55</sup> Act 17 of 1908.

<sup>56</sup> Ordinance 8 of 1856 allowed for municipal Government along the lines followed in the Cape. Hahlo and Kahn *Union of South Africa* 83.

(iii) Transvaal (ZAR):

In 1852 the Transvaal Republic's independence was recognised by the British Government.<sup>57</sup> In 1853 they adopted the name de Zuid Afrikaansche Republiek and in 1858 they adopted the Rustenburg Constitution.<sup>58</sup> In terms of the bijlages<sup>59</sup> promulgated<sup>60</sup> in terms of the new Constitution, the Hollandsche reg still applied. Public procurement was soon dealt with by Volksraadbesluiten.<sup>61</sup> Important principles emerged from these Volksraadbesluiten. Tenders remained the principle method of public procurement. The exception was procurement below a certain threshold, where tenders were not required. It was required that the subject of the procurement must “duidelik verstaanbaar moeten uitgeschreven worden om misverstand te voorkomen”. Timely publication in the government gazette had to ensure competition, and submission of the tenders had to be made by the due time and date in a closed envelope. A record of the proceedings of the opening of the tenders and the evaluation and recommendations made had to be kept.

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<sup>57</sup> The Sandriver Convention January 1852.

<sup>58</sup> Hahlo and Kahn *Union of South Africa* 7.

<sup>59</sup> Addendums or schedules.

<sup>60</sup> Dated 19 September 1859.

<sup>61</sup> The *Volksraadsbesluiten* 12 Februarj 1868 provided in art 253: “Dat gene publieke werken of leveranciën of voor den Staat mogen geskieden, tenzij zij vooraf door den Hed. Uitv. Raad goedgekeurd en onder behoorlijke publieke tenders uitgevaardigd”. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens Besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144: “wordt onderstaande Concept-Ordonnantie hiermede gepubliceerd. Gouvernementskantoor, Pretoria, 16 Augustus 1875. Concept-Ordonnantie, Regelende de wijze waarop, of hoedanig, tenders gevraagd worden voor het doen van publieke werken en het leveren van benodigdheden voor of aan het Gouvernement der Zuid Afrikaansche Republiek. Art. 1. Voor elk publiek werk, dat de som van omtrent L10 te boven gaat, zullen vooraf tenders moeten gevraagd worden door hem aan wien het toezigt der werken is toevertrouwd.

Voor alle benodigdheden tot Gouvernements einde of gebruik, die waart van L5 te boven gaande, zullen evenals voor publieke werken tenders moeten worden gevraagd, tenzij door den Uitv. Raad tot aankoop besloten wordt. Ieder tender tot het doen van een publiek werk, of het leveren van iets benodigd, zal duidelijk verstaanbaar moeten uitgeschreven worden om misverstand te voorkomen, en zal door publicatie in de Staatscourant tijdig genoeg voor publieke mededinging bekend gemaakt moeten worden. 1) Alle tenders zullen overeenkomstig de advertentie voor het uur op den bepaalden dag bij den Postmeester (generaal 2) verzegeld en op het couvert gemerkt zijn: “Tender voor ...” moeten ingezonden worden, en door hem ongeopend worden voorgelegd aan de daartoe benoemde commissie. De commissie zal bestaan of zamengesteld zijn uit den Auditeur-, Thesaurier- en Postmeester-Generaal. De commissie is gehouden dadelijk na den dag en het uur dat voor het inkomen van den laatsten tender bepaald is, bijeen te komen, de tenders openen en een behoorlijk procesverbaal er van opmaken en met hunne beoordeeling en recommandatie aan den Uitv. Raad toezenden, die daarover zal beslissen. 1) Deze ordonnantie zal voorloopig in werking gesteld worden”.

On 12 April 1877 the Transvaal was again annexed by the British. It again obtained independence in 1881.<sup>62</sup>

Interestingly enough, the ZAR already had anti-bribery legislation at that time.<sup>63</sup> The *Audit Act* 30 was promulgated in 1875. This Act provided for a system whereby the treasury was in control of state finances and could issue regulations to regulate state expenditure. The powers of local government, which also related to procurement, were provided for in the Municipal Corporations Law.<sup>64</sup>

The Anglo-Boer War lasted from 1899 until 1902,<sup>65</sup> whereafter the Orange Free State and the Transvaal became British colonies, and South Africa now consisted of four separate colonies. After holding a National Convention, South Africa became a Union on 31 May 1910.<sup>66</sup>

(d) *Administrative law:*

Administrative law was still in the early stages of development during this period of South Africa's history.<sup>67</sup> What is of importance, however, is the influence of the English occupations in this regard. It put the legal system of administrative law on the same path of development as that of England. The constituting of the Supreme Court in the Cape in 1827, and later the supreme courts in the other jurisdictions in the present South Africa, heralded the start, albeit very slowly, of legal scrutiny by the judiciary of state administrative actions.<sup>68</sup>

(e) *Conclusion:*

By the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries, Roman Dutch Law was the law of the Cape and Natal colonies and the Orange Free State

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<sup>62</sup> Convention of Pretoria 3 August 1881.

<sup>63</sup> *The Law Against Bribery of Officials* Act 10 of 1894 amended by *the First Volksraad Resolution* 31 August 1895 art 580.

<sup>64</sup> Law 19 of 1872. S 52 thereof regulated the powers of the councils. See also Law 3 of 1881 (District Councils) Law 6 of 1883 (District Councils), Law 10 of 1886, Law 19 of 1892 and Law 13 of 1896. Hahlo and Kahn *Union of South Africa* 101-102.

<sup>65</sup> The war was between the Republics of the Orange Free State and the ZAR, on the one hand, and the British Empire on the other, and was ended with the Peace Treaty of Vereeniging of 31 May 1902.

<sup>66</sup> In terms of the *South Africa Act*, 1909.

<sup>67</sup> Baxter *Administrative Law* 8. For a general discussion of the development of Administrative law during this period see Baxter *Administrative Law* 27.

<sup>68</sup> Baxter *Administrative Law* 30.

and ZAR (Transvaal) republics. Already the foundations of certain public procurement principles were noticeable in the two colonies and two republics, in particular the ZAR. Although not common to all of the colonies and republics, the most notable principles were:

- A competitive method for procurement, namely tender procedure, was followed;<sup>69</sup>
- A differentiation was made with regard to the method of procurement in that tender procedures were prescribed for procurement only above a certain monetary threshold;<sup>70</sup>
- A proper description of the intended procurement had to be given by means of timeous advertisements;<sup>71</sup>
- Tenders had to be delivered at the specified time and place in unopened envelopes;<sup>72</sup>
- A proper record of the tender proceedings had to be kept;<sup>73</sup>
- An evaluation with a recommendation had to be provided by the procuring entity to the final decision maker;<sup>74</sup>
- The contract that was the most advantageous under the circumstances had to be entered into;<sup>75</sup> and

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<sup>69</sup> See the *placaaten* dated December 1681, 2 and 3 May 1707, 11 January 1708, 6 and 10 April 1723, Jeffreys and Naude *Kaapse Plakaatboek*. See also Hahlo and Kahn *South African Legal System* 540. See the *placaat* dated 9 December 1801 in the Cape Colony in which the sale of government owned windmills by public auction were advertised. In terms of s 43 of Ordinance number 9 dated 15 August 1836, signed by B D'Urban eight days notice was given to contractors to tender to do certain work cheaper than the existing offer; *Orange Free State Constitution Act* of 1845 ch LXXII, s 26; and in the ZAR *Volksraadsbesluiten* 12 Februariej 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>70</sup> *Volksraadsbesluiten* 12 Februariej 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>71</sup> *Volksraadsbesluiten* 12 Februariej 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>72</sup> *Volksraadsbesluiten* 12 Februariej 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>73</sup> *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>74</sup> *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>75</sup> In the Cape Colony: *To Consolidate and Amend the Law Relating to the Municipalities Act* 45 of 1882. S105.

- Anti-corruption legislation had been enacted.<sup>76</sup>

### 5.2.3 South African Union 1910-1961

#### (a) Introduction:

The Union of South Africa was constituted by the *South Africa Act*,<sup>77</sup> as from 1 May 1910.<sup>78</sup> It comprised the Cape Colony, Natal, the Orange River Colony and the ZAR (Transvaal). South Africa was now a unitary state under one government.<sup>79</sup> The Westminster model of parliament was adopted in the Union.<sup>80</sup>

Fundamental to the then *South Africa Act*<sup>81</sup> was the doctrine of legislative supremacy and parliamentary sovereignty.<sup>82</sup> The courts could not question the validity of duly enacted Acts of Parliament.<sup>83</sup> It was believed that the administration of justice ought to fall under the umbrella of the ordinary courts and that all inferior tribunals and public bodies ought to be subject to the supervisory review and jurisdiction of the Supreme Court.<sup>84</sup> This was in contrast to the developments in countries like France where specialised administrative courts were developed.<sup>85</sup> The notion of the rule of law as put forward by Dicey and the doctrine of separation of powers also influenced the *South Africa Act*. The *South Africa Act* was based on the Diceyan doctrine of the “rule of law”, that the administration of justice ought to fall under the umbrella of the ordinary courts and not of special courts.<sup>86</sup> Because of the supremacy of Parliament, government could entrench its policies through legislation. The courts could not decide on the validity thereof because there were no overarching principles or rule of law against which such legislation could be measured.<sup>87</sup>

<sup>76</sup> In the ZAR: *The Law Against Bribery of Officials Act* 10 of 1894 amended by the *First Volksraad Resolution* 31 August 1895 art 580.

<sup>77</sup> *South Africa Act*, 1909.

<sup>78</sup> South Africa was now under British rule.

<sup>79</sup> Hahlo and Kahn *Union of South Africa* 129.

<sup>80</sup> Baxter *Administrative Law* 30.

<sup>81</sup> *South Africa Act*, 1909.

<sup>82</sup> S 19.

<sup>83</sup> *South Africa Act*, 1909 s 98. Baxter *Administrative Law* 30.

<sup>84</sup> Hahlo and Kahn *Union of South Africa* 82-183; Baxter *Administrative Law* 30.

<sup>85</sup> Baxter *Administrative Law* 31.

<sup>85</sup> Hahlo and Kahn *Union of South Africa* 182-183

<sup>86</sup> Hahlo and Kahn *Union of South Africa* 133-135; *Krohn v Minister of Defence* 1915 AD 191 at 207 per De Villiers AJA. Baxter *Administrative Law* 31-32.

<sup>87</sup> Already during the period of the Union the policies tending to discriminate against the

The *South Africa Act* provided for three tiers of government, namely national, provincial and local government.<sup>88</sup> It regulated the financial aspects of the Union and provided<sup>89</sup> that Bills appropriating revenue or moneys or imposing taxation should originate only in the House of Assembly.<sup>90</sup> The above implied that before any state funds could be expended, provision for such expenditure had to be made in an appropriation act. If moneys were so appropriated they could be transferred from the consolidated revenue fund to the relevant state entity.

(b) *The 1911 Exchequer and Audit Act*

The *Exchequer and Audit Act*<sup>91</sup> regulated the receipt, custody and issue of public monies. As in the four former colonies, the South African Union's finances were, at central government level, regulated by the National Treasury. The Act provided<sup>92</sup> that no moneys could be withdrawn from the consolidated revenue fund except in the manner provided for in the Act. If money was appropriated for a specific purpose this money could be issued to the accounting officer and credited out of the Exchequer Account.<sup>93</sup> In terms of the Act the Governor General could make regulations prescribing the system, which had to be observed for the expenditure of public moneys.<sup>94</sup>

A distinction between procurement on national, provincial and local government level was made. Different pieces of legislation and regulations were applicable to the three tiers of government. The regime on national level was in principle reflected on provincial level. Only the position on national level will be briefly discussed.

On national level public procurement was in principle done by means of tender procedures administered by the tender board. The first regulations<sup>95</sup> specifically

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<sup>88</sup> black majority were being reflected in legislation.

<sup>89</sup> Each embarking *inter alia* on public procurement.

<sup>90</sup> S 60(1).

<sup>91</sup> Part 7 of this Act provided for the financial matters of the Union. In particular s 117 provided for a consolidated revenue fund.

<sup>92</sup> Act 21 of 1911.

<sup>93</sup> S 24 thereof.

<sup>94</sup> S 35.

<sup>95</sup> S 61.

<sup>95</sup> In terms of GN number 735 of 6 May 1913. The tender board regulations issued in terms of s 61 of Act 21 of 1911 were published in GN 735 of 6 May 1913, Government Notice 385 of 3 March 1922 Government Notice 1061 of 1922, Government Notice 1470 of 20 August 1926

constituting the tender board were promulgated on 6 May 1913.<sup>96</sup> The tender board was constituted to obtain supplies and services required by central government, excluding the Department of Railways and Harbours,<sup>97</sup> and to dispose of public stores.<sup>98</sup> It was a separate body appointed by the government.<sup>99</sup> Despite later amendments<sup>100</sup> the regulations pertaining to the tender board during the period of the South African Union in essence remained the same.

In the regulations a distinction was made between formal tenders and informal tenders. Formal tenders were those required to be submitted to the tender board. All procurement estimated to exceed £100 had to be submitted for formal tenders. Informal tenders were submitted to and dealt with by the head of the relevant state department<sup>101</sup> without reference to the tender board. Informal tenders also referred to the informality in the method of inviting tenders.

Every supply or service required by any state department, which in the course of any financial year was estimated to cost more than £100, had to be referred by the department concerned to the tender board for submission to public competition.<sup>102</sup> The head of the department had to state if the tender had to be called for by advertisement, in addition to publication in the government gazette. Advertising had to be done in the public press or by circulating and posting hand bills.<sup>103</sup>

In the advertisement, the place at which tenders would be received and the latest day and hour up to which they would be received and such further particulars as

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and Government Notice 1511 of 27 August 1926.

<sup>96</sup> Under s 61 of the *Exchequer and Audit Act* 21 of 1911.

<sup>97</sup> The Department of Railways and Harbours was excluded because this department had historically regulated its financial matters independently.

<sup>98</sup> Preamble to the regulations dated 6 May 1913.

<sup>99</sup> Reg 4.

<sup>100</sup> New regulations were issued under Government Notice 385 of 3 March 1922 as amended by GN 1061 of 14 July 1922. These regulations were once again amended by GN 1470 of 20 August 1926 as amended by GN 1511 of 27 August 1926. The numbering of the regulations remained the same.

<sup>101</sup> The head of the department was in charge of the department and acted under the control of the Minister of that department.

<sup>102</sup> Reg 5. No definition was given of public competition. From the rest of the regulations it is clear that the drafters had ordinary tender procedures in mind.

<sup>103</sup> Reg 7.

the board thought fit had to be stated clearly.<sup>104</sup> The board did not have to consider any tender unless it complied with the advertisement. No variation in or additions to the particulars supplied by the departments to the tender board could be communicated to individual tenderers without the prior consent of the board. The board could disregard opened or qualified tenders.<sup>105</sup>

Immediately after the expiry of the hour advertised for receipt of the tenders, or as soon thereafter as possible, the tenders had to be opened in public and the name of each tenderer and the amount of each tender read out to the public in attendance.<sup>106</sup> All such tenders had to be forwarded to the head of the department concerned for report and returned by that head of department with such recommendations as it desired to make to the chairman, for the consideration and decision of the board.<sup>107</sup>

The reasons for recommending tenders had to be clearly stated and when only one tender was received and recommended for acceptance it had to be stated whether or not the rates were considered to be fair and reasonable.<sup>108</sup> Where no tenders were received in response to the advertisement inviting tenders, the department concerned could make the best arrangement feasible in the circumstances without further observing the formalities required by the regulations.<sup>109</sup> Every supply or service required by any department that in the course of any financial year was estimated to cost less than £100 could be obtained by means of informal tender.<sup>110</sup>

Whenever it was desirable to dispose of any public stores at any specific point, where the estimated market value of the stores was more than £100, lists of such stores and an explanation of the necessity for the disposal had to be forwarded by the head of the department concerned to the chairman of the tender board.

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<sup>104</sup> Reg 7.

<sup>105</sup> Reg 7.

<sup>106</sup> Reg 8.

<sup>107</sup> Reg 9.

<sup>108</sup> Reg 9.

<sup>109</sup> Reg 12.

<sup>110</sup> Reg 13.

He had, by advertisement or otherwise, to call for tenders.<sup>111</sup> If the estimated market value of the stores was less than £100 such stores could be disposed of by means of informal tender or by public auction.<sup>112</sup> In any case where it was proposed to sell to an officer of the public service who had submitted a form of tender in response to an advertisement, this fact had to be specifically stated when the tender was recommended to the board. No sale to or purchase from an officer of the public service by informal tender or out of hand was permitted unless the specific sanction of the minister of the department concerned had been obtained.<sup>113</sup>

In any specific instance where it was considered that it would be more advantageous to the government not to call for formal tenders for a supply or service estimated to cost not more than £500, or for the disposal of public stores of an estimated value of not more than £500, the Controller and Auditor General could grant authority for the supply or service in question to be obtained by means of informal tender or without calling for tenders of any description, or for the stores to be disposed of by means of informal tenders or by public auction, or sold out of hand.<sup>114</sup>

Preferential treatment, preferring products and services originating from the Union above foreign goods and services, was provided for from the time of the establishment of the Union.<sup>115</sup>

In 1922 Regulation 13 was amended to provide for goods and services costing under £5 to be procured without calling for tenders.<sup>116</sup> Regulation 9 was amended in 1926 to provide that where a tender other than the lowest tender was recommended for acceptance, the head of the department had to

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<sup>111</sup> Reg 14.

<sup>112</sup> Reg 14.

<sup>113</sup> Reg 15.

<sup>114</sup> Reg 16.

<sup>115</sup> Reg 18 provided: "Heads of departments when recommending tenders to the board, and the board when considering tenders, shall in comparing tenders received allow a preference of 10% on supplies produced within the Union of South Africa or manufactured within the Union, from articles grown within the Union, and a preference of 5% on supplies manufactured within the Union from imported ingredients or partly so".

<sup>116</sup> GN 385 of 3 March 1922 as amended by GN 1061 of 14 July 1922.

certify that the recommendation was made in the best interests of the government, and he had to give his reasons for such a recommendation.<sup>117</sup>

The board's decision to accept or refuse a tender was final. The reasons for the rejection of any tender lower than the one eventually accepted had to be communicated to the Controller and Auditor general.<sup>118</sup> Provision was made for the blacklisting of suppliers.<sup>119</sup>

(c) *The 1956 Exchequer and Audit Act*

The 1911 *Exchequer and Audit Act* was replaced by a new *Exchequer and Audit Act* in 1956.<sup>120</sup> This Act once again provided for regulations to be issued by the Minister of Finance pertaining *inter alia* to state procurement.<sup>121</sup> In terms of the new Act<sup>122</sup> the minister could also make regulations providing for the establishment, constitution, functions and powers of a board (to be known as the state tender board). The board was charged with the procurement of supplies and services for and on behalf of the state, and the disposal of state stores. The regulations had to govern the procedures to be observed by the board in the exercise of its duties. The Act provided that supplies and services could not be procured for or on behalf of the state, and state stores could not be disposed of, except through the board or in such other manner as was prescribed in or determined in accordance with the regulations.<sup>123</sup> Public procurement in terms of the new Act remained in essence the same as under the previous Act.

A notable addition in the 1956 Act was that the minister could promulgate regulations for the imposition by the state tender board of a monetary penalty

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<sup>117</sup> GN 1470 of 20 August 1926 as amended by GN 1511 of 27 August 1926.

<sup>118</sup> Reg 9.

<sup>119</sup> In terms of reg 21, if the board was satisfied that the execution of the contract by a person, firm or company had been unsatisfactory, or that a person, firm or company had offered, promised or given a bribe to any officer in the service of the government in relation to the obtaining or the execution of a contract, or if the board was satisfied that a person, firm or company or the reasonable employee or agent of a person, firm or company or on his behalf had acted in a fraudulent manner or in bad faith towards either the government or any public body, company, person or persons, the board could, after consideration of all the circumstances, resolve that no tender from that person, firm or company could be considered during such period as the board may fix.

<sup>120</sup> Act 23 of 1956.

<sup>121</sup> S 61.

<sup>122</sup> S 61.

<sup>123</sup> *Exchequer and Audit Act* 23 of 1956 s 61.

on any person to whom the board had awarded a contract on the strength of information furnished by such person, which, subsequent to the award, was shown to have been incorrect information.<sup>124</sup> He could also prescribe the manner in which any such penalty might be recovered.

Land was not dealt with by the tender board, but disposed of in terms of the *Crown Land Disposal Act*.<sup>125</sup>

(d) *Provincial and local government*

On provincial government level, the *South Africa Act*<sup>126</sup> provided for four provinces, each with its own provincial government, which had legislative and executive powers.<sup>127</sup> Provincial Revenue Funds were provided for<sup>128</sup> and the provinces were responsible for procurements in all matters in which it had jurisdiction.<sup>129</sup>

The four provinces had powers to raise taxes and spend money on provincial matters. This included public procurement, which fell within their jurisdiction. Each province had its own regulations and tender boards pertaining to state procurement. The provincial public procurement system in essence mirrored that of the national government.

On local government level the *South Africa Act*<sup>130</sup> provided that the local authorities in existence prior to the formation of the Union continued to exist thereafter.<sup>131</sup> They retained the powers that they had had before the Union, including powers relating to public procurement, and were consequently not subject to the national or provincial procurement rules and procedures.<sup>132</sup>

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<sup>124</sup> S 61(2).

<sup>125</sup> Act 2 of 1911.

<sup>126</sup> 1909.

<sup>127</sup> *South Africa Act*, 1909. Part V of the *South Africa Act* provided for provincial government for the four provinces.

<sup>128</sup> S 85.

<sup>129</sup> S 2 of the *Exchequer and Audit Act* 21 of 1911 provided that the Act did not apply to provincial revenue funds.

<sup>130</sup> 1909.

<sup>131</sup> Hahlo and Kahn *Union of South Africa* 183.

<sup>132</sup> Ordinance 17 of 1939, s 35(1) thereof provided that it was necessary to obtain tenders for goods and services above a specified amount.

Numerous public and statutory bodies which participated in public administration at all three levels of government emerged in the Union.<sup>133</sup> State utilities were subject to their constituting acts, which specifically regulated procurement issues and were also not subject to the national or provincial procurement rules and procedures.<sup>134</sup>

(e) *Administrative law*

During the period of the Union, English administrative principles were firmly entrenched in South African law. The principle of the sovereignty of Parliament was accepted. This entailed that administrative action had to fall within the four corners of the enabling legislation.<sup>135</sup> It also entailed the separation of powers between the legislature, the executive and the judiciary.<sup>136</sup> The principles of English administrative law were also incorporated into our law by the courts, as the South African administration during the period of the Union was largely based on the English system.<sup>137</sup> This was especially the case with the review of administrative actions.<sup>138</sup> The courts, however, developed the principles of review applicable in South Africa based on existing laws and remedies and the particular situation in South Africa.<sup>139</sup>

(f) *Procurement during this period*

During the period of the Union of South Africa, as was the case immediately prior thereto, the preferred method of public procurement was tender procedures. A distinction was made between procurement on national, provincial and local government levels. Public procurement on national level was centralised by means of the tender board, which dealt with all tenders above the prescribed monetary threshold.

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<sup>133</sup> Examples are the Board of Trade and Industry, Township Boards, and corporations like Escom (the Electricity Commission). The Acts in terms of which these bodies were established determined how procurement should take place, mostly giving them the power to act independently.

<sup>134</sup> This was done either by providing for procurement in the constituting Act itself, or with reference to the Tender Board.

<sup>135</sup> *Wiechers Administratiefreg* 17.

<sup>136</sup> *Wiechers Administratiefreg* 18.

<sup>137</sup> *Wiechers Administratiefreg* 34.

<sup>138</sup> *Baxter Administrative Law* 32.

<sup>139</sup> *Baxter Administrative Law* 43-48.

Regulations were promulgated in terms of which public procurement had to take place. The content of the more important provisions of these regulations can be summarised as follows:

- A centralised tender board, on national and provincial level, had to finally decide on public procurement.<sup>140</sup>
- A distinction was made, based on the value of the intended procurement, between a formal and an informal procedure.<sup>141</sup>
- Advertisement had to be published in the public press and by means of posted or hand bills.<sup>142</sup>
- Tenderers had to comply with the conditions set out in the advertisement to be considered.<sup>143</sup>
- Tenders that had been opened or were qualified could be disregarded.<sup>144</sup>
- Tenders had to be submitted timeously and opened in public and the tender amounts read out to those present.<sup>145</sup>
- The head of the department that requested the procurement had to provide a report to the tender board stating his recommendations and his reasons for making such recommendations.<sup>146</sup>
- If only one tender had been received, it had to be certified by the head of the department that the rates were fair and reasonable.<sup>147</sup>
- If a tender other than the lowest tender were recommended the reasons for doing so had to be stated.<sup>148</sup>
- Provision was made for blacklisting and penalties if wrong information was given.<sup>149</sup>
- If movable state property were to be sold to an official in public service, the fact had to be stated to the tender board.<sup>150</sup>

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<sup>140</sup> Reg 5.  
<sup>141</sup> Reg 5.  
<sup>142</sup> Reg 7.  
<sup>143</sup> Reg 7.  
<sup>144</sup> Reg 7.  
<sup>145</sup> Reg 8.  
<sup>146</sup> Reg 9.  
<sup>147</sup> Reg 9.  
<sup>148</sup> Reg 9.  
<sup>149</sup> Reg 9.

- Local suppliers could be preferred to foreign suppliers.<sup>151</sup>
- Suppliers could be blacklisted in cases of unsatisfactory completion of contracts, fraud or bribery.<sup>152</sup>
- Penalties could be imposed on a supplier to whom a tender was awarded on incorrect information supplied by such a supplier.<sup>153</sup>

From the above it appears that certain principles that are still relevant today were already in operation in public procurement as early as during the period of the Union of South Africa. The provisions which operationalised these principles were more basic than today's regulations, but the goals they sought to achieve are similar. These principles relate to competition, cost effectiveness, transparency, accountability, the combating of abuse, and the integrity of the process.

#### 5.2.4 *The Republic of South Africa 1961-1994*

##### (a) *The 1961 Constitution of South Africa*

The South African Union became a Republic in terms of the *Constitution of South Africa Act 32 of 1961*.<sup>154</sup> The *Constitution Act, 1961* provided<sup>155</sup> that Parliament should be the sovereign legislative authority in and over the Republic and should have full power to make laws for the peace, order and good government of the Republic. It also provided<sup>156</sup> that no court of law would be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of section 108 or section 118 of the Act. This entrenched the supremacy of Parliament in the Republic of South Africa. Government further entrenched its policies of apartheid in legislation. The courts did not have the power in terms of the *Constitution Act, 1961* to pronounce on the validity of the legislation enacted by Parliament.

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<sup>150</sup> Reg 15.

<sup>151</sup> Reg 18.

<sup>152</sup> Reg 21.

<sup>153</sup> *Exchequer and Audit Act 23 of 1956* s 61(2).

<sup>154</sup> South Africa was now a fully independent sovereign state and not subject to Britain in any respect.

<sup>155</sup> S 59.

<sup>156</sup> S 59(2).

All laws which were in force in any part of the Union of South Africa immediately prior to the commencement of the *Constitution Act*, 1961 continued to be in force until repealed or amended.<sup>157</sup> The system of maintaining a central revenue fund under the control of the Minister of Finance remained in place.<sup>158</sup> Appropriation acts still authorised state expenditure and the regulations issued by the Minister of Finance with regard to the procedure for state expenditure, as provided for in the *Exchequer and Audit Act*,<sup>159</sup> remained in force. The regulations<sup>160</sup> pertaining to the tender board and those which regulated public procurement were also retained. The transition from a Union to a Republic did not immediately alter the public procurement regime.

(b) *Section 61(bis) of the Exchequer and Audit Act*

Section 61(bis) of the *Exchequer and Audit Act*<sup>161</sup> was inserted during 1964.<sup>162</sup> This section specifically provided that the minister might make regulations providing for the establishment, constitution, functions and powers of the board to be known as the State Tender Board. Prior to this date the Tender Board had been constituted by the regulations, issued in terms of section 61 of the *Exchequer and Audit Act*,<sup>163</sup> which related to public procurement in general. This elevated the Tender Board from a body constituted by mere regulations to a body constituted by the Act itself. The Tender Board so established by section 61(bis) was charged with the procurement of supplies and services for and on behalf of the state and the disposal of state stores. In terms of this section the regulations had to govern the procedures to be observed by the board in the exercise of its duties. It provided that supplies and services should not be procured for or on behalf of the state and state stores should not be disposed of except through the board or in such other manner as might be prescribed in or

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<sup>157</sup> S 107.

<sup>158</sup> The *Exchequer and Audit Act* 23 of 1956 remained in place after 1961.

<sup>159</sup> Act 23 of 1956. It was replaced only in 1975 by the *Exchequer Act* 66 of 1975. Ch 3 of this Act provided for general financial control. S 31 thereof in particular provided for the powers of the treasury *inter alia* to exercise control over state moneys and other state property. S 38(1)(e) provided that the Minister of State Expenditure might make regulations prescribing a system which should be observed with regard to the collection, receipt, banking, custody, disbursement, disposal and control of, accounting for, and supervision of state moneys and the accounts kept in connection therewith.

<sup>160</sup> Issued in terms of s 61 of the *Exchequer and Audit Act* 23 of 1956.

<sup>161</sup> Act 23 of 1956.

<sup>162</sup> In terms of s 16 of the *Finance Act* 76 of 1964.

<sup>163</sup> Act 23 of 1956.

determined in accordance with such regulations. The regulations previously issued under the *Exchequer and Audit Act*,<sup>164</sup> remained essentially the same.

Section 61(*bis*)(2) also provided that the minister might provide for the imposition by the board of a monetary penalty prescribed therein. This could be imposed on any person to whom the board had awarded a contract on the strength of information furnished by that person, which, subsequent to the award, was shown to have been incorrect information.<sup>165</sup>

(c) *The State Tender Board and State Procurement Board Act, 1968*

(i) The State Tender Board

A separate Act providing for the State Tender Board and a State Procurement Board<sup>166</sup> was introduced on 1 October 1968. The State Tender Board was now constituted in terms of its own act and not in terms of section 61(*bis*) of the *Exchequer and Audit Act*.<sup>167</sup>

The preamble of the Act read as follows:

To provide for the regulation of the procurement of supplies and services for, the disposal of moveable property of, and the hiring and letting of anything or the acquisition or granting of any right for or on behalf of, the state and to the end to establish a state tender board, to provide for the establishment of regional tender boards and to define the function; and to provide for incidental matters.

In terms of the Act the Tender Board had the power<sup>168</sup> to procure supplies and services for the state, to arrange for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the state, and to dispose of movable state property.<sup>169</sup> For that purpose the tender board could, on behalf of the state, conclude an agreement with a person within or outside the Republic for the furnishing of supplies and services to the state, or for the hiring or letting of

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<sup>164</sup> Act 23 of 1956.

<sup>165</sup> The State Tender Board regulations were issued in terms of GN R957 of 2 July 1965.

<sup>166</sup> *State Tender Board and State Procurement Act* 86 of 1968.

<sup>167</sup> Act 23 of 1956.

<sup>168</sup> Subject to the provisions of s 4(1)(a) of the *Armaments Act* 87 of 1964.

<sup>169</sup> S 4 of Act 86 of 1968.

anything or the acquisition or granting of any right for or on behalf of the state, or for the disposal of movable state property.<sup>170</sup>

The State Tender Board could, in order to conclude such an agreement, in any manner it deemed fit invite offers and determine the manner in which and the conditions subject to which such offers had to be made.<sup>171</sup> It also could, without giving reasons, accept or reject any offer for the conclusion of such an agreement.<sup>172</sup> It could furthermore take steps or cause steps to be taken to enforce such an agreement on behalf of the state, resile from any agreement so concluded and, in appropriate cases, claim damages.<sup>173</sup> It could also exempt any person with whom such an agreement had been concluded, from compliance with such an agreement, or condone the failure of that person to comply with the agreement,<sup>174</sup> or negotiate a settlement, or amend the agreement.<sup>175</sup>

The Act further empowered the State Tender Board to exercise any power it was authorised by the Act to exercise, for and on behalf of any body established by law.<sup>176</sup>

The Act empowered the State Tender Board to procure on behalf of the state but did not make it compulsory for all public procurement to be done through the board. The discretion to decide if public procurement should be done through the tender board was left with the Minister of Finance. He could make regulations that the following procurement for or on behalf of the state must be done through the state tender board or in such other manner as provided for in the regulations issued by him:

- supplies and services;
- the hiring or letting of anything or the acquisition or granting of any right;
- and

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<sup>170</sup> S 4(1)(a).  
<sup>171</sup> S 4(1)(b).  
<sup>172</sup> S 4(1)(c).  
<sup>173</sup> S 4(1)(e) and 4(1)(eA).  
<sup>174</sup> S 4(1)(f).  
<sup>175</sup> S 4(1)(g).  
<sup>176</sup> S 4(3).

- the disposal of movable state property.<sup>177</sup>

The minister also had the power to make regulations which provided for the imposition by the board of a monetary penalty on any person with whom the board concluded an agreement on behalf of the state on the strength of information furnished by that person which, subsequent to the conclusion of such agreement, was shown to have been incorrect information.<sup>178</sup>

The regulations issued in terms of section 13 of the Act provided for the functions of the board, the powers of the board, the procedures at meetings, decisions of the board, notifications of decisions of the board, and the appointment of committees by the board, including preference and regional tender boards.<sup>179</sup> It is of interest that the board had the power to resolve that no offer from persons should be considered for the period determined by the board if it was of the opinion that such persons

- amended or withdrew their offers after the closing date for submission;
- failed to sign a contract or to provide security as provided for in the tender documentation;
- failed to comply with the conditions of the agreement entered into or performed unsatisfactorily under such agreement; and
- promised or offered or gave a bribe or acted fraudulently, in bad faith or improperly;<sup>180</sup>

The board also had the power to allow a preference, determined by the Minister of Finance, in respect of goods produced, manufactured or assembled in the Republic, or which were in a category determined by the said minister.<sup>181</sup>

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<sup>177</sup> S 13(1)(b).

<sup>178</sup> S 13(2).

<sup>179</sup> See GN R957 of 2 July 1965, GN R139 of 30 January 1981, GN R947 of 20 May 1988 and GN R1237 of 1 July 1988.

<sup>180</sup> GN R1237 of 1 July 1988 reg 3(5).

<sup>181</sup> GN R1237 of 1 July 1988 reg 8.

(ii) The State Procurement Board

Prior to 1971 the Act also provided<sup>182</sup> for a State Procurement Board with powers similar to those of the State Tender Board. The State Procurement Board dealt exclusively with procurement by the security services.<sup>183</sup> It was a criminal offence, save with the approval of the board, to disclose to any person any information relating to anything done by the State Procurement Board in the exercise of its powers.<sup>184</sup> The State Procurement Board was dissolved by Act 74 of 1971.

(d) *National Supplies Procurement Act, 1970*

During 1970, the *National Supplies Procurement Act*,<sup>185</sup> which came into operation on 1 July 1971, was promulgated.

The purpose<sup>186</sup> of this Act was to give the Minister of Trade and Industry wide powers with regard to the manufacture, production and acquisition of goods and the acquisition, hiring or supply of services, when he deemed it necessary or expedient for the security of the Republic or in the public interest.

The Act specifically provided<sup>187</sup> that whenever the minister deemed it necessary or expedient for the security of the Republic or in the public interest, he or anyone authorised by him could, without having recourse to the State Tender Board or the State Procurement Board, manufacture or produce in the Republic any goods for the state or on behalf of any person. He could further:

- acquire or hire in or outside the Republic any goods or services for the state or on behalf of any person;
- direct any person so to acquire or hire any goods or services;
- supply in or outside the Republic any services to any person or direct any person so to supply any services; and

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<sup>182</sup> S 7 to 14 thereof.

<sup>183</sup> The security services included the Army and Police. The State Procurement Board was dissolved by Act 74 of 1971. The *Armaments Act* and the *National Supplies Procurement Act* 89 of 1970 thereafter provided for procurement for the security services.

<sup>184</sup> S 10.

<sup>185</sup> Act 89 of 1970.

<sup>186</sup> S 2, 2A and 3.

<sup>187</sup> S 2.

- import any goods for the state or on behalf of any person or direct any person so to import any goods.

The Act also provided<sup>188</sup> the minister with further far-reaching powers. Whenever he deemed it necessary or expedient for the security of the Republic he could order any person who

- was capable of supplying any goods or services; or
- was capable of manufacturing, producing, processing or treating any goods; or
- was the owner or had the power to dispose of; or
- had in his possession or under his control any goods; or
- was a supplier of any service,

to supply or deliver or sell such goods, or to supply such service to the minister, or to manufacture, produce, process or treat such goods and to supply or deliver or sell them to the minister.

The Act stipulated<sup>189</sup> how the price to be paid should be determined and the price was subject to confirmation or adjustment by the minister. A national supplies procurement fund was established<sup>190</sup> from which the procurements in terms of this Act were financed.

This Act should be seen against the background of the political position in South Africa at that juncture in its history. South Africa progressively became more isolated during the years of apartheid, and the ruling minority had to take extraordinary measures to ensure the “security of the Republic and the public interest”.

(e) *State Trust Board Act, 1979*

During the early 1970s, in reaction to the mounting international opposition against its apartheid policies, the South African government went so far as to

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<sup>188</sup> S 3.

<sup>189</sup> S 3(3).

<sup>190</sup> In terms of s 12.

establish a secret fund to finance secret projects for state propaganda and similar projects. This fund was administered by the Department of Information and because of its secret nature it did not follow the prescribed procurement procedures.<sup>191</sup> After the exposure of this fund during the so called “info scandal”, the *State Trust Board Act*<sup>192</sup> was promulgated in order to enforce the rights, to liquidate all the assets and to fulfil all of the liabilities of the state created by or arising from the agreements concluded by or on behalf of the former Department of Information or from the application of secret state funds.

The object<sup>193</sup> of the board was to dispose of the rights and assets and to fulfil the obligations of the former Department of Information as soon as possible and in a manner which would be the least prejudicial to the interests of the state. Wherever practical the board had to observe the regulations of the treasury and the State Tender Board in the disposal of the rights and assets of the state.

(f) *Provincial and Local Government*

The system of provincial councils was in principle maintained in the new Republic. This was specifically provided for in the *Constitution Act, 1961*.<sup>194</sup> The powers of the provincial councils were, however, subject to the new Constitution. The State President could make regulations for the provinces prescribing the system which had to be observed for the collection, receipt, banking, custody, issue, expenditure, care and management of provincial moneys.<sup>195</sup>

Local Authorities that existed prior to South Africa’s becoming a Republic remained in place. In principle they were empowered to do their own procurement, as had been the position during the period of the Union.

Many new utility companies, councils and boards were constituted. With regard to procurement they were subject to the provisions of their own constituting Acts. Examples of such utilities are the Electricity Supply

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<sup>191</sup> For further information on the working of this department and the so called “info scandal” see SAHO 2009 *Information Scandal* [www.sahistory.org.za/](http://www.sahistory.org.za/); Rees and Day *Muldergate*.

<sup>192</sup> Act 88 of 1979.

<sup>193</sup> S 3.

<sup>194</sup> S 84 thereof.

<sup>195</sup> In terms of s 88 of the *Constitution Act* and in particular s 88(2) thereof.

Commission (Escom),<sup>196</sup> the South African Iron and Steel Industrial Corporation (Iskor),<sup>197</sup> the South African Tourism Board<sup>198</sup> and the Scientific Research Council,<sup>199</sup> to name but a few.

(g) *The Constitution Act, 1983*

The constitutional reforms of 1983 provided for in the *Constitution Act, 1983*<sup>200</sup> were mostly related to the political ideology of that government. The reforms further entrenched the division between the different population groups in South Africa and made a distinction between the common interests and segmental interests of the different population groups.<sup>201</sup> The reforms did not in essence influence the public procurement regime.

(h) *Administrative Law*

With the transition from a Union to a Republic, the Westminster system was firmly entrenched in the South African political and legal system. The principles of legislative supremacy and parliamentary sovereignty formed the basis of administrative law.<sup>202</sup> The courts did not question the validity of duly enacted Acts of Parliament but confined themselves to the legality of administrative actions performed in pursuance of such legislation.<sup>203</sup> The courts developed the principles of review based on the remedies available in South African common law.<sup>204</sup> The promulgation of the Uniform Rules of Court in 1965, in particular rule 53, ensured the harmonisation of the procedure of review in the Supreme Court.<sup>205</sup> During the period of the Republic, before the advent of the new constitutional dispensation, the law on review of administrative actions was developed by the courts incrementally on a casuistic basis and was based on the principle of legality in which the doctrine of *ultra vires* formed the inherent

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<sup>196</sup> Eskom Act 40 of 1987.

<sup>197</sup> *South African Iron and Steel Industrial Corporation, Limited*, Act 119 of 1979.

<sup>198</sup> *South African Tourism Board Act* 100 of 1983.

<sup>199</sup> *Scientific Research Council Act* 46 of 1988.

<sup>200</sup> Act 110 of 1983.

<sup>201</sup> *Wiechers Administratiefreg* 19.

<sup>202</sup> *Baxter Administrative Law* 30-31.

<sup>203</sup> *Baxter Administrative Law* 30.

<sup>204</sup> *Baxter Administrative Law* 43.

<sup>205</sup> *Baxter Administrative Law* 43.

rationale for judicial review.<sup>206</sup> In terms of this principle the courts had inherent jurisdiction to review administrative acts as part of their duty to apply the law, including the laws of Parliament.<sup>207</sup> In due course the courts developed defined grounds of review. These grounds were not codified but were developed casuistically.<sup>208</sup>

(i) *Conclusion*

The position with regard to public procurement from the time that South Africa became a Republic in 1961 up to the time when it became a constitutional state in 1994 was similar to the position when it was a Union. However, it is evident that the procurement for matters of state security became more secretive and reflected that government's securocratic style of governance. The protection of its ideology became so important that it created a separate, secretive procurement regime for procurement which they believed was of national importance.

Public procurement became more centralised and the position of the State Tender Board was strengthened in this period. It was now constituted in terms of its own Act and its powers were far-reaching. The Regulations issued in terms of the *Exchequer and Audit Act*<sup>209</sup> with regard to public procurement in essence remained as before the 1961 Constitution. Regulations could now in addition also be promulgated in terms of the *State Tender Board Act*.<sup>210</sup>

The State Tender Board had the power to

- procure supplies and services for the state;
- arrange for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the state; and
- dispose of movable state property;<sup>211</sup>

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<sup>206</sup> Baxter *Administrative Law* 299-300 and 339.

<sup>207</sup> Baxter *Administrative Law* 303-304.

<sup>208</sup> Baxter *Administrative Law* 339-340.

<sup>209</sup> Act 23 of 1956.

<sup>210</sup> Act 86 of 1968

<sup>211</sup> S 4 of Act 86 of 1968.

- on behalf of the state, conclude an agreement with a person within or outside the Republic to achieve the above;<sup>212</sup>
- in any manner it deemed fit, invite offers and determine the manner in which, and the conditions subject to which such offers had to be made;<sup>213</sup>
- without giving reasons, accept or reject any offer for the conclusion of an agreement;<sup>214</sup>
- on behalf of the state, take steps or cause steps to be taken to enforce such an agreement, resile from any agreement so concluded, and in appropriate cases claim damages.<sup>215</sup>
- exempt any person with whom such an agreement had been concluded from compliance with such agreement, or condone the failure of such a person to comply with such an agreement,<sup>216</sup> or negotiate a settlement, or amend the agreement.<sup>217</sup>
- impose a monetary penalty on any person with whom the board concluded an agreement on the strength of information furnished by such a person which, subsequent to the conclusion of the agreement, was shown to have been incorrect information.<sup>218</sup>
- allow a preference, determined by the Minister of Finance, in respect of goods produced, manufactured or assembled in the Republic or which were in a category determined by the said minister;<sup>219</sup>
- resolve that no offer from persons should be considered, for the period determined by the board, if it was of the opinion that such persons
  - amended or withdrew their offers after the closing date for submission;
  - failed to sign a contract or to provide security as provided in the tender documentation;

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<sup>212</sup> S 4(1)(a).

<sup>213</sup> S 4(1)(b).

<sup>214</sup> S 4(1)(c).

<sup>215</sup> S 4(1)(e) and 4(1)(eA).

<sup>216</sup> S 4(1)(f).

<sup>217</sup> S 4(1)(g).

<sup>218</sup> S 13(2).

<sup>219</sup> GN R1237 of 1 July 1988 reg 8.

- failed to comply with the conditions of the agreement entered into or performed unsatisfactorily under such agreement; and
- promised or offered or gave a bribe or acted fraudulently, in bad faith or improperly.<sup>220</sup>

What stands out is that the State Tender Board could in its own discretion invite offers and determine the manner in which and the conditions subject to which such offers had to be made. It could impose monetary penalties, allow a preference as determined by the Minister of Finance, bar suppliers from participating in the procurement process for a specific period of time, and did not need to give reasons for its decision to accept or reject an offer.

Although South Africa already had a well developed administrative law in this period of its history,<sup>221</sup> participants were hampered in many respects. There was no right to information held by the state, no right to be given reasons for decisions, and the grounds for review were limited.<sup>222</sup> The powers of the state tender board, coupled with the limited grounds available to challenge awards, made it very difficult for tenderers to obtain relief from the courts. This strengthened the already centralised power of the government in public procurement. It was a tool that could be used to entrench its policies of the time and effectively excluded participation in public procurement by the majority of the population. With regard to a large portion of public procurement the then government also had a tradition of secrecy and could hide behind the excuse of public interest (as interpreted by itself) and state security to avoid public and legal scrutiny.

Substantive principles of public procurement like transparency, accountability and fairness and equitability were not adhered to in the then public procurement regime. As with the then political dispensation, public procurement was also in dire need of fundamental changes.

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<sup>220</sup> GN R1237 of 1 July 1988 reg 3(5).

<sup>221</sup> Baxter *Administrative Law* 43-44.

<sup>222</sup> See *Pretoria North Town Council v A1 Electric Ice-cream Factory (Pty) Ltd* 1953 3 SA 1 (A) and in general the authoritative work at that time on administrative law, namely Baxter *Administrative Law*.

### 5.3 *The Constitutional era*

#### 5.3.1 *General background*

##### (a) *Introduction*

South Africa became a constitutional state with the introduction of the *Constitution Act, 1993*<sup>223</sup> on 27 April 1994.<sup>224</sup> As a transitional measure, it was provided that, subject to the Interim Constitution and any repeal or amendment by a competent authority, all laws should remain in force.

The system of a central revenue fund under the control of the Minister of Finance remained in place.<sup>225</sup> Appropriation acts still authorised state expenditure<sup>226</sup> and the regulations issued by the Minister of Finance with regard to the procedure for state expenditure, as provided for in the *Exchequer Act*,<sup>227</sup> remained in force. The distinction between national, provincial and local government was retained by the Interim Constitution. It paved the way for the adoption of the final Constitution.<sup>228</sup>

On 8 May 1996 the Constitutional Assembly adopted a new constitutional text, which was referred to the Constitutional Court for certification.<sup>229</sup> The Interim Constitution was replaced by the *Constitution Act, 1996* and became operative on 4 February 1997. Schedule 6 of the Constitution provided for transitional arrangements to enable the smooth transition from the pre- to the post-constitutional era and from the Interim Constitution to the final Constitution. In particular, it provided that all law that was in force when the new Constitution took effect would continue to be in force. This was subject to

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<sup>223</sup> *Constitution of the Republic of South Africa Act* 200 of 1993, hereinafter referred to as the “Interim Constitution”.

<sup>224</sup> The Interim Constitution provided that the new constitutional text, to be passed by the Constitutional Assembly in terms of ch 5 of the Interim Constitution, had to comply with the constitutional principles contained in Sch 4 of the Interim Constitution. It also provided that the constitutional text passed by the Constitutional Assembly would be of no force and effect unless the Constitutional Court certified that the provisions of the new text complied with the constitutional principles.

<sup>225</sup> S 185 of the Interim Constitution.

<sup>226</sup> S 60 of the Interim Constitution.

<sup>227</sup> Act 66 of 1975.

<sup>228</sup> Ch 5 of the Interim Constitution.

<sup>229</sup> The certification of the *Constitution of the Republic of South Africa, 1996* by the Constitutional Court was reported as *Ex Parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC)*.

any amendment or repeal thereof and with it's being consistent with the new Constitution.

The Constitution is now the supreme law of the Republic of South Africa. It provides that any law or conduct inconsistent therewith is invalid<sup>230</sup> and that all of the obligations imposed by it must be fulfilled.<sup>231</sup> Many pieces of legislation have been passed since 1994 to ensure that the constitutional imperatives, especially those relating to the bill of rights,<sup>232</sup> are complied with.<sup>233</sup>

The Constitution provides for national, provincial and local spheres of government, which are distinctive, interdependent and interrelated, and have to operate through co-operative governance.<sup>234</sup> Section 195 of the Constitution also provides for many principles of good governance in public administration.<sup>235</sup>

Provision<sup>236</sup> is made for a national revenue fund into which all moneys received by the national government must be paid. Money may be withdrawn from the national revenue fund only in terms of an appropriation by an Act of Parliament, or as a direct charge against the national revenue fund, which is provided for in the Constitution or an Act of Parliament.<sup>237</sup>

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<sup>230</sup> S 2.

<sup>231</sup> S 2.

<sup>232</sup> Ch 2 of the Constitution (s 7 to 39).

<sup>233</sup> The most important acts which have an influence on public procurement are PAJA, PAIA, PFMA, MFMA and PPPFA.

<sup>234</sup> S 40.

<sup>235</sup> S 195 provides:

“(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be 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 broad representation”.

<sup>236</sup> S 213.

<sup>237</sup> S 216 of the *Constitution of the Republic of South Africa*, 1996 provides for the

Procurement is specifically provided for in Section 217. It provides as follows:

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

The Constitution prescribes principles for procurement by national, provincial and local government as well as all institutions<sup>238</sup> identified in national legislation. It is now a constitutional prerequisite that procurement must take place in terms of a system which is fair, equitable, transparent, competitive and cost effective.<sup>239</sup> Partly because of South Africa's history of discrimination, the Constitution itself makes provision for procurement policy framework legislation which 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.<sup>240</sup>

(b) *Interim Constitution*

The interim constitution afforded constitutional status to public procurement for the first time in South Africa's history.<sup>241</sup> Section 187 provided as follows:

- (1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

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<sup>238</sup> establishment of a treasury and treasury control.  
<sup>238</sup> These institutions are mostly public utility companies. In the *Public Finance Management Act 1 of 1999*, sch 2 and 3 contain lists of such entities.

<sup>239</sup> S 217(1) of the Constitution.

<sup>240</sup> The *Preferential Procurement Policy Framework Act 5 of 2000*. Hereafter referred to as the "PPPFA".

<sup>241</sup> S 187.

- (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
- (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
- (4) All decisions of any tender board shall be recorded.

In terms of section 187, public procurement still had to be done by means of a tender process through tender boards, as had been the case prior to 1994. However, it was specifically required that they had to be independent and impartial. The principles of fairness, competitiveness and openness were provided for. The right to being given reasons was also entrenched. Section 187 contains an express prohibition against improper interference with the decisions and operations of the tender boards and an obligation to record all decisions.

If section 187 is compared with section 217 it is apparent that procurement does not need to be performed solely through a tender process, as had been prescribed in the interim constitution. The use of tender boards was not obligatory in terms of the Constitution, which opens the door to other methods of procurement.<sup>242</sup> The principles of equity and cost effectiveness contained in the Constitution had not been included in the interim constitution, which had also not provided for the preferential treatment of tenderers.

The interim constitution had set the scene for public procurement reform by affording important public procurement principles constitutional status. However, it had been restrictive in the sense that the method of procurement had been limited to tendering processes. The requirement of tender boards had also centralised public procurement. Section 217 of the Constitution affords more flexibility with regard to the methods of procurement than the interim constitution, by not requiring the use of the tender process as the only method of procurement. This flexibility is necessary for cost effectiveness, especially in cases of low-cost procurement. By not prescribing the use of tender boards the Constitution provides that public procurement need not be centralised. The principle of equity in section 217, which was not incorporated in the interim

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<sup>242</sup> See Bolton *Law of Government Procurement* 37.

constitution, is also supported by allowing preferential procurement in public procurement.

(c) *Legislation*

In terms of section 217 of the Constitution, public procurement by organs of state in all spheres of government must take place in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. To give effect to these constitutional requirements, framework legislation was enacted regulating public procurement.

The first Act is the PFMA,<sup>243</sup> which prescribes the general system for public procurement that must be followed by national and provincial governments, the public entities listed in Schedules 2 and 3 of the Act, constitutional institutions, Parliament and provincial legislatures. The second Act is the MFMA,<sup>244</sup> which regulates public procurement on local government level.<sup>245</sup>

The third Act, namely the PPPFA,<sup>246</sup> which is applicable to public procurement by organs of state in all spheres of government, as defined in the Act, prescribes a framework for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination in public procurement.

There are numerous other acts that either directly or indirectly deal with or have an influence on public procurement. They were not promulgated to exclusively regulate public procurement but rather to regulate other aspects of government administration. The following schematic exposition is given to enable an overview of the public procurement regime.

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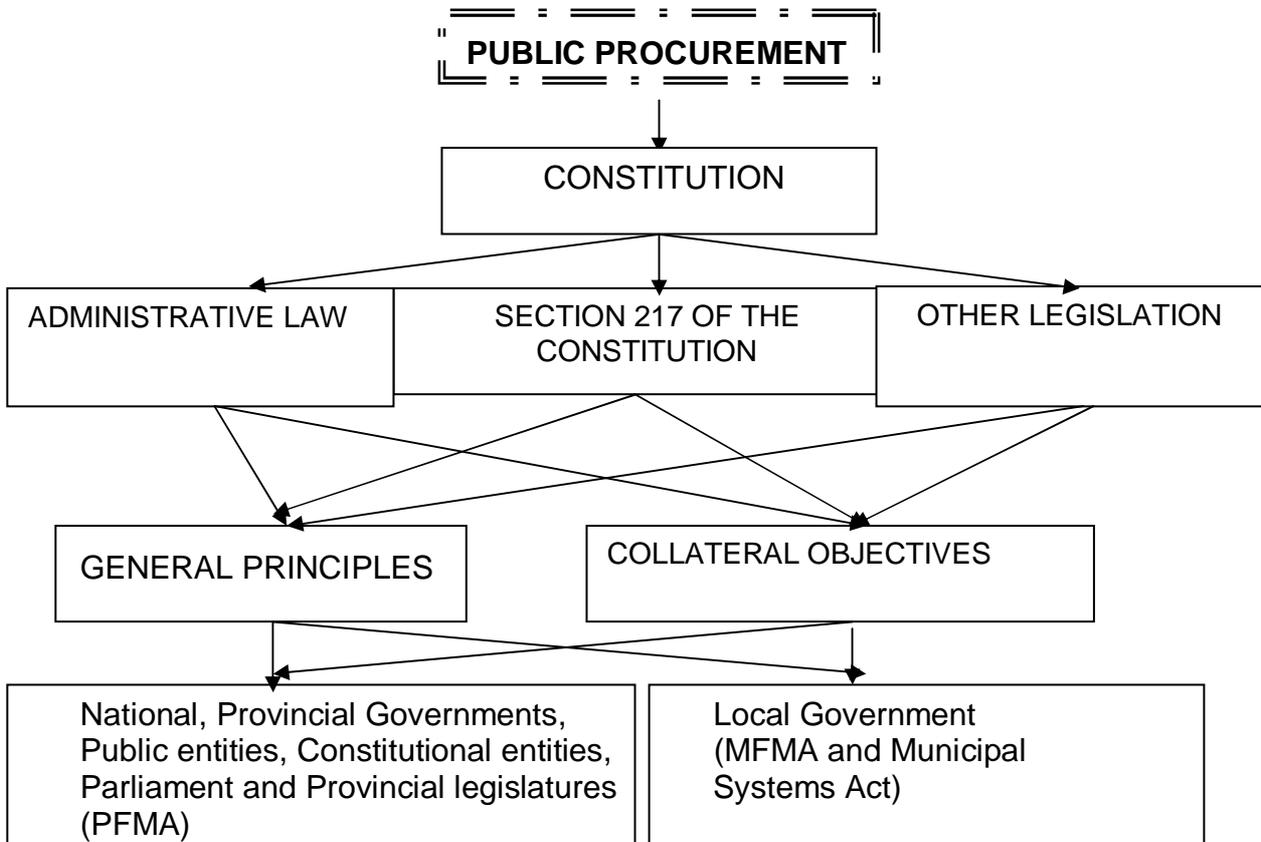
<sup>243</sup> Act 1 of 1999.

<sup>244</sup> Act 56 of 2003.

<sup>245</sup> The *Local Government: Municipal Systems Act* 32 of 2000 provides for public/private partnership for the provision of services and service delivery agreements on local government level. As public/private partnerships are not the subject matter of this study, this act will not be dealt with in any detail.

<sup>246</sup> Act 5 of 2000 promulgated to give effect to s 217(3) of the Constitution.

(a) Schematic exposition:



The provisions of section 217 of the Constitution will be dealt with first. The focus will then be on the principal legislation that deals directly with public procurement, namely the PFMA, the MFMA, and the *Municipal Systems Act*.<sup>247</sup> During the course of this discussion the constitutional requirements will be taken into account. It will also be determined how content is given to these constitutional principles. The legislation that deals with procurement only indirectly will thereafter be discussed to enable an overall view of the public procurement regime. The collateral objectives of public procurement, with an emphasis on the PPPFA, will be dealt with separately. Administrative law will be cursorily dealt with as it has already been addressed in Chapter Two. And some remarks will be made in conclusion.

<sup>247</sup> The differences between the procurement regimes as provided for in the PFMA and the MFMA respectively, and the regulations issued in terms thereof, will be referred to only when such differences warrant further discussion.

### 5.3.2 *The South African Constitution, 1996*

#### (a) *Introduction*

Section 217(1) of the Constitution requires a public procurement system which is fair, equitable, transparent, competitive and cost-effective. These requirements can be broadly distinguished to relate to the economic aspects of public procurement,<sup>248</sup> the right of the public to be assured that public money is spent in an accountable and responsible way,<sup>249</sup> and fairness towards entities contracting with the state.<sup>250</sup> As part of a system, these objectives in many instances overlap and are interconnected, interrelated, interacting and interdependent.<sup>251</sup> They should be viewed as a whole and not as distinct, stand-alone requirements. When evaluating any action within the public procurement regime, the weight attached to each objective will depend on the particular circumstances. The different objectives need to be balanced when determining if they have been complied with. The principles set out in section 217 will be dealt with separately below.

#### (b) *Fairness*

The dictionary meaning of “fair” and “fairness” varies, but in general the term is taken to mean free from discrimination; to treat every one equally; impartial; just; appropriate.<sup>252</sup>

Watermeyer states that “fairness” entails that the process of offer and acceptance is conducted impartially without bias, providing timeous access to the same information to all interested parties. The system must provide for challenge procedures. The terms and conditions for performing the work must also not unfairly prejudice the interests of the parties.<sup>253</sup>

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<sup>248</sup> In particular the requirements of competitiveness and cost effectiveness.

<sup>249</sup> In particular the requirements of a system that is transparent, fair and equitable.

<sup>250</sup> In particular the requirements of a system which is transparent, fair and equitable.

<sup>251</sup> A “system” is defined in the *Concise Oxford English Dictionary* 2001 as a “complex whole, set of connected things or parts, organised body of material or immaterial things”.

<sup>252</sup> *Concise Oxford English Dictionary* 2001.

<sup>253</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/). Watermeyer was one of the consultants who assisted with the World Bank’s Country Procurement Assessment Report *Refining the Public Procurement System in South Africa*, World Bank Report No 25751-SA Feb 2003.

Bolton limits fairness in the public procurement regime to procedural fairness. She describes it as the right to a fair hearing and the right to actions and decisions that are not tainted by bias.<sup>254</sup> She states that procedural fairness means that potential contractors should be afforded access to the procurement process, contracts should be widely advertised, everyone should be familiar with the rules of the competition, and enough time should be afforded to participants.<sup>255</sup> Further, all participants must be treated equally.<sup>256</sup>

The Supreme Court of Appeal has held that fairness must be decided on the circumstances of each case.<sup>257</sup> Whatever is done may not cause the process to lose the attribute of fairness.<sup>258</sup> Fairness implies procedural fairness, a public duty to act fairly. It has also been described as the ever-flexible duty to act fairly.<sup>259</sup> It can also imply substantive fairness, namely that an action must be in conformance with the notion of basic fairness and justice.<sup>260</sup> Public procurement is of an administrative nature and section 217(1) will generally refer to procedural fairness but need not be limited to procedural fairness only.<sup>261</sup>

Administrative fairness does not mean that a person is entitled to a perfect process, free of innocent errors. One can also not expect to be immunised from all prejudicial consequences flowing from such errors.<sup>262</sup>

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<sup>254</sup> Bolton *Law of Government Procurement* 47.

<sup>255</sup> Bolton *Law of Government Procurement* 48.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) at par 3, Conradie AJA held that it may in given circumstances be fair to ask a tenderer to explain an ambiguity in his tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation.

<sup>258</sup> *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) par 9 at 467.

<sup>259</sup> *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) par 8 and 9 at 466H-467C.

<sup>260</sup> In the Constitutional Court, in *S v Ntuli* 1996 1 SA 1207 (CC) the meaning of "fair trial" in s 25(3) of the Interim Constitution was held to embrace a concept of substantive fairness. This meant that the trial must be in compliance with procedural fairness and with the notions of basic fairness and justice. See also *S v Zuma* 1995 2 SA 642 (CC). See also the decision by the Constitutional Court in *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 9 BCLR 891 (CC).

<sup>261</sup> In particular if it is read with the imperative of equitability.

<sup>262</sup> *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 9 BCLR 891 (CC) par 15-20, where the court stated that when considering a tender the tender board undertakes a typically complex task of balancing all of the public interests its mandate requires it to fulfil. This includes fair reconsideration of the appellant's tender –

A measure of judicial deference is appropriate to the complexity of the task of the tender committees.<sup>263</sup> The equal evaluation of tenders was held to be an essential element of fairness.<sup>264</sup> Fairness connotes fairness to all involved, including the state, the general public and all possible tenderers.

Procedural fairness has been interpreted by the courts to include fairness in the relationship between an organ of state and private parties as well as fairness in the relationship between an organ of state and private parties in relation to each other.<sup>265</sup> The former means that organs of state should treat individual private parties fairly in the procurement process, for instance by being transparent and affording them access to the procurement process. The latter means that the parties in relation to one another should be treated fairly; for instance in that all parties are treated equally and given equal opportunities to participate in the process.<sup>266</sup> The notion of equality has both a formal and substantive element. This means that because of the discriminatory practices of the past and the subsequent inequality in society, which still prevails, parties to the public procurement process may be treated differently to ensure substantive equality.<sup>267</sup> Fairness can also be equated to equitableness or reasonableness.<sup>268</sup>

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but not to the exclusion of considerations involving its broader responsibilities. These included the public benefit to be derived from obtaining a higher price by re-advertising the property.

<sup>263</sup> *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) par 21 quoting Hoexter 2000 SALJ 501-502, citing Cockrell 1993 *Acta Juridica* 227.

<sup>264</sup> *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) par 14. The court also stated in par 5 that there are degrees of compliance with any standard and it is notoriously difficult to assess whether the less than perfect compliance falls on one side or the other of the validity divide.

<sup>265</sup> See *Du Preez v TRC* 1997 3 SA 204 (SCA) 234H-I; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) par 41; *President of the RSA v SARFU* 2000 1 SA 1 (CC) par 214; *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC).

<sup>266</sup> In practice no party should be given preference. All parties should be given the same information and awarded the same time to partake in the procurement opportunities.

<sup>267</sup> See *Harksen v Lane* 1997 11 BCLR 1489 (CC); *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs* 2004 4 SA 490 (CC).

<sup>268</sup> See *Concise Oxford English Dictionary* 2001, which refers to “treating people equally – just or appropriate in the circumstances”. See also Bolton *Law of Government Procurement* 45-49. At 47 she states that as public procurement is of an administrative nature the word “fair” in s 217 can be said to refer to procedural fairness as opposed to substantive fairness. For a different view see Quinot 2007 *PPLR* 466 where he states that the interpretation of the word “fair” should include substantive fairness.

In *Minister of Social Development v Phoenix Cash & Carry*,<sup>269</sup> Phoenix Cash and Carry (PCC) had submitted a tender which was disqualified by the bid evaluation committee as a non-responsive tender. The reason for so doing was, according to the committee, that PCC had failed to satisfy the requirements of the bid regarding financial resources. It failed to provide audited financial statements, bank statements, and a letter from the bank containing sufficient information. However, it had furnished other documentation relating to its financial position and credit worthiness. The court held that on a proper reading of the tender conditions, what the tenderer had to show was that the financial resources to carry out the contract were readily available, and secondly it had to furnish evidence of that fact including, where credit facilities would be relied on, proof that such facilities had been approved. The words “provide audited financial statements, bank statements, or letters from the bank, as proof of availability of funds” were no more than advisory or indicative of the various possibilities of proving that financial resources were readily available.

Heher JA stated as follows:

[1] The award of public tenders is notoriously subject to influence and manipulation. Section 217(1) of the Constitution of the Republic of South Africa, 1996 requires an organ of state to contract for goods or services “in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”. These principles must inspire all aspects of the process which makes provision for the conclusion of such a contract. ... Unfortunately, as experience in this Court proves, the high standards that the Constitution sets seem to be more honoured in the breach than in the observance.

[2] Without attempting a comprehensive survey of the circumstances which will offend against section 217(1) certain general observations are demonstrated as true by the facts of the present case:

(1) a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to

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<sup>269</sup> [2007] SCA 26 (RSA) (also reported at [2007] JOL 19529 (SCA)) par [1]–[2]. See also *GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works* [2007] JOL 20439 (D).

fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal;

(2) a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion. In saying this I do not suggest that the tender board is not entitled to prescribe formalities which, if not complied with, will render the bid invalid, provided both the prescripts and the consequences are made clear. What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.

It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price. This is particularly relevant to the activities of a “technical evaluation committee” which examines the tenders for formal compliance but does not evaluate the merits of the bids.<sup>270</sup>

The court held in favour of Phoenix Cash and Carry and confirmed the order of the court *a quo* that the award of the tender should be set aside and new tenders be invited. What is of importance is the principle that fairness relates to substance and not to form. The court also identified fairness as applicable among tenderers and between tenderers and the public body. To this must be added fairness to the public, which also has a direct interest in public procurement.<sup>271</sup>

In the case of *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works, and others*<sup>272</sup> the appellant applied for an order directing the respondent to make available certain documentation relating to the award of a tender to enable it

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<sup>270</sup> [2007] SCA 26 (RSA) (also reported at [2007] JOL 19529 (SCA)) par [1]-[2].

<sup>271</sup> This latter interest was referred to in the matter of *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (Ck) at 391, where Ebrahim AJ stated that a body such as the Provincial Tender Board must be acutely aware of its duty to administer the financial resources of the Province for the benefit of all of its residents. It must ensure that the limited finances that are available are spent as beneficially as possible.

<sup>272</sup> 2008 1 SA 438 (SCA).

to pursue an appeal against the award. The court held that there was an obligation on the respondent to act fairly towards an unsuccessful tenderer as provided for in section 217 of the Constitution, and, because fairness is inherent in a tender process.<sup>273</sup> Section 217 of the Constitution contemplates a fair system, which entails that from the time of the award of the tender the appellant has the right of access to the information necessary to formulate its appeal properly.<sup>274</sup> The court ordered the respondent to provide the appellant with the required documentation.

(c) *Equitableness*

The dictionary meaning of equity is “fairness; recourse to principles of justice to correct or supplement the law”.<sup>275</sup> Equitable means “fair and impartial”.<sup>276</sup>

Watermeyer describes an equitable system as one where the only grounds for not awarding a contract to a tenderer who satisfies all of the requirements are “blacklisting”, lack of capability or capacity, legal impediments and conflicts of interest.<sup>277</sup> Bolton describes equitableness as the equalling of disparate groups in South Africa.<sup>278</sup>

The courts have held that what is equitable is also dependant on all of the relevant circumstances.<sup>279</sup> Due weight must be given to each relevant circumstance.<sup>280</sup> There exists no test or formula to determine what is

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<sup>273</sup> *Id* par [9] at 443B.

<sup>274</sup> *Id* par [15] at 444I-445A.

<sup>275</sup> *Concise Oxford English Dictionary* 2001.

<sup>276</sup> *Ibid.*

<sup>277</sup> Watermeyer [no date] *Executive Summary* www.cuts-international.org/.

<sup>278</sup> Bolton *Law of Government Procurement* 50.

<sup>279</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 30. One aspect would for instance be that parastatals are often perceived to have an unfair advantage in competing for contracts with the private sector. They can base their price on operating costs alone, might have tax concessions, are not always obliged to earn a return on their investment, and they might even undercut the prices of competitors despite making losses. Where parastatals are permitted to compete with the private sector, it is necessary to develop criteria that allow the private sector to compete with parastatals in an equitable manner.

<sup>280</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 33 the court had to decide what is equitable in terms of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land* Act 19 of 1998. In this regard the court held that in that instance the court had to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances, which would necessitate bringing out an equitably principled judgment.

equitable. The circumstances to be taken into account include but are not limited to the nature of the parties' rights and interests as well as those of the state and the public in general. The general tone and purpose of section 217 and the Constitution as a whole will be relevant. In that regard the utilisation of public procurement to address the legacies of apartheid by means of preferential treatment of previously disadvantaged South Africans can be equitable.

The Constitutional Court has held that the right to equality provided for in section 9 of the Constitution reflects a substantive conception thereof as opposed to a formal conception of equality.<sup>281</sup> The implication hereof is that in certain circumstances private parties may be treated differently by the state.<sup>282</sup> Equity does not necessarily mean that all people or all groups should be treated equally and can include, in public procurement, measures to address the inequalities of the past. It can be used to redress inequalities brought about by the previous government.<sup>283</sup> However, the concept is broader than the mere extension of redress to disparate groups, and needs to be interpreted by taking into account the obligation of fairness and the rights of participants in the procurement process to be treated equally.

In the matter of *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town & another*,<sup>284</sup> the court held that the Equality Court has jurisdiction to enquire into and review matters pertaining to complaints of unfair discrimination under the *Promotion of Equality and Prevention of Unfair Discrimination Act*<sup>285</sup> (the "*Equality Act*"). It does not have jurisdiction to do so under the *Promotion of Administrative Justice Act*. However, the Equality Court may enquire into whether any administrative action constitutes unfair discrimination or not and grant the necessary relief in terms of the *Equality Act*. This includes administrative actions taken during the tender process.

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<sup>281</sup> See *Harksen v Lane* 1997 11 BCLR 1489 (CC) and *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs* 2004 4 SA 490 (CC).

<sup>282</sup> See Du Plessis 1998 *Stell LR* 239.

<sup>283</sup> Bolton *Law of Government Procurement* 49-53.

<sup>284</sup> [2009] JOL 22914 (C).

<sup>285</sup> Act 4 of 2000.

In the subsequent proceedings before the Equality court the court had to decide if the Respondent's tender process was unfair, as the requirement that tenderers had to have experience and expertise in road building amounted to indirect discrimination against previously disadvantaged groups, as contemplated in terms of the *Equality Act*.<sup>286</sup> The Respondent had a policy of reserving 30% of a project to historically disadvantaged people. Entities with 1% black ownership qualified for such status. The court held with regard to this policy:

This threshold in respect of entities diluted corrective and restorative measures designed to protect and advance persons and categories of persons disadvantaged by unfair discrimination and cannot, by any stretch of one's imagination, amount to a genuine attempt on the part CoCT to have affirmed black professional firms.

Professional firms previously advantaged could have obtained disadvantaged status and benefited from such measure or practice by getting on board black professionals with 1% interest. Such move would have defeated the very object of these measures and undermined genuine attempts to promote the achievement of equality. In our view, such policy and practice while it appears to be legitimate, is actually aimed at maintaining exclusive control by members of the white group.<sup>287</sup>

The respondent further had a policy of reappointing suppliers who had done previous work for the respondent. The respondent justified this policy on the basis that the suppliers had special expertise and skills. In this regard the court held:

Historically, all major civil and structural engineering contracts were awarded to white firms. It effectively meant that, in terms of this policy, any subsequent work to be performed on those sites had to be awarded to the same firm. This flies in the face of the constitutional measures "to protect or advance persons or categories of persons disadvantaged by unfair discrimination". Generally, it makes good sense to make re-appointments, but where it exclusively benefits those firms which have been advantaged historically, such re-appointments would, in my view, not be legitimate.<sup>288</sup>

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<sup>286</sup> *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape (no 2)* 2008 6 SA 434 (Eqc) also reported at [2009] JOL 22914 (C).

<sup>287</sup> *Id* par 25 and 26.

<sup>288</sup> *Id* par 30.

The court found the above procurement policies of the Respondent to be discriminatory. In addition to referring to the provisions of section 217 of the Constitution, the Equality court also relied on section 9 of the Constitution and the *Equality Act* in reaching its decision.

The principles of section 217 of the Constitution are supported by and amplified by the other provisions of the Constitution, other legislation, and decisions by the Constitutional Court, which need to be read together in order to ensure equitability in public procurement.<sup>289</sup>

(d) *Transparency*

The Concise Oxford Dictionary defines “transparent” as “easily seen through; evident: obvious: easily understood: free from affection or disguise: frank”.<sup>290</sup> The preamble to the Constitution states that the Constitution is adopted, *inter alia*, to lay the foundations for a democratic and open society, and the Constitution pertinently refers to the values of accountability, responsiveness and openness.<sup>291</sup> The value of openness is given effect to in the Bill of Rights. The principle of transparency is entrenched in section 33, which provides for the right of access to information. This section is also applicable to public procurement.

Watermeyer defines a transparent system as one in which the procurement process and criteria upon which decisions are to be made are publicised. The decisions, including decisions made during the procurement process and the decision to finally award the tender, are made publicly available, together with the reasons for those decisions. It is possible to verify that the criteria were applied.<sup>292</sup>

He states:

A procurement system is considered to be transparent if

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<sup>289</sup> *Id* par 9, where the court held that these provisions and the decisions of the CC are not mutually exclusive but complement each other.

<sup>290</sup> *Concise Oxford English Dictionary* 2001.

<sup>291</sup> S 1(d) of the Constitution.

<sup>292</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

- 1) the terms upon which the procurement process are to be conducted and the criteria upon which any decisions are to be made are properly documented and made widely available;
- 2) the eventual procurement award decision, and where appropriate, any intermediate decisions, are made publicly available as are the reasons given for these decisions; and
- 3) it is possible to verify that the documented procedures and criteria were indeed applied.

He is of the opinion that a transparent procurement system is characterised by the documentation of clear rules and the means to verify that those rules were followed. Such a system allows for challenges to be made and ruled on in terms of an adjudication procedure. If the challenge was successful, it must be readily translated into compensation in the form of the reasonable costs associated with the preparation and submission of a tender. Transparency in procurement can be improved through

- 1) the capturing of key information in an electronic data base and the use of web-based information technology to publish information on procurement opportunities and awards of contracts;
- 2) the harmonising of procurement processes, procedures and methods within a country;
- 3) standardisation of procurement documentation; and
- 4) the introduction of challenge procedures in the form of adjudication where procurement processes, procedures and methods are comprehensively documented.<sup>293</sup>

Bolton describes this as a requirement of openness. Information should be generally accessible and available, rules and practices should be published, contracts should be advertised, the criteria to be applied should be disclosed, and an opportunity should be provided to determine whether or not the principles of section 217 had been complied with.<sup>294</sup>

Our courts have on various occasions held that the values of openness, transparency and accountability are foundational to the Constitution.<sup>295</sup> It has

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<sup>293</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>294</sup> Bolton *Law of Government Procurement* 54.

<sup>295</sup> *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 2 SA 110 (SCA).

been held that a democratic state should function with transparency, so that any member of the public can see that justice is being done.<sup>296</sup>

Transparency, accountability and the prevention of corrupt practices are in the public interest.<sup>297</sup> As in the case of the advertisement of a sale by auction of estate assets in terms of the provisions of section 82(1) of the *Insolvency Act*,<sup>298</sup> advertisements of tenders which are informative go to the heart of fairness and are crucial to openness, transparency and fairness.<sup>299</sup>

Transparency is relative and determined by circumstances. The need for transparency does not necessarily entail that every fact in minute detail needs to be furnished to possible tenderers.<sup>300</sup>

A public authority is entitled to apply policies, standards and precedents not precluding the exercise of a discretion. The policies, standards or precedents must be compatible with the enabling legislation and must be disclosed to the affected persons before the decision is reached.<sup>301</sup>

It was also held that the justification of administrative and executive decisions is truly possible only if there is transparency.<sup>302</sup> A free flow of information is the very essence of justification.<sup>303</sup> In order that it may be used effectively, information must be provided at the time and under the circumstances when it is useful to those who require it.<sup>304</sup> In the case of *Tetra Mobile Radio (Pty) Ltd*

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<sup>296</sup> *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456 (T).

<sup>297</sup> *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng (no 2)* 2003 6 SA 308 (W), see par 12 at 312F, G-H. See also Williams and Quinot 2007 SALJ 339-363.

<sup>298</sup> *Insolvency Act* 24 of 1936.

<sup>299</sup> *Muller v De Wet* 2001 2 SA 489 (W) at 499G/H-500D.

<sup>300</sup> *SAPO Ltd v Chairperson, Western Cape Provincial Tender Board* 2001 2 SA 675 (C), where it was held that where, prior to tendering, all tenderers had been informed of the criteria to be applied, in particular that weightings would be allocated to criteria and that such weightings would not be disclosed to them, the tenderers had been treated equally. No tenderer received such information as to enable it to obtain any advantage over others. The tender process was held to be fair, accessible, visible, subject to examination and enquiry, open, and transparent.

<sup>301</sup> *Id* 676.

<sup>302</sup> Reg 24.6 of ST 38 that any decision by the Board regarding the awarding of a contract shall be final and the Board is not obliged to give any reason for the acceptance or passing over of a tender, is clearly not transparent and in contravention of both the constitution, the enabling act and PAJA.

<sup>303</sup> *Nextcom (Pty) Ltd v Funde* 2000 4 SA 491 (T) at 510B-B/C and E.

<sup>304</sup> *Id* 511. Compare Klaaren "Access to Information" 24-4.

*v MEC, Department of Works, and others*<sup>305</sup> the court granted access to documentation relating to an award to enable the unsuccessful tenderer to bring an appeal against the award, albeit on the basis of the constitutional imperative of fairness as provided in section 217 of the Constitution.<sup>306</sup>

It was also held, albeit with regard to taxation, that transparency could be fostered by providing the public with timely, accessible and accurate information, thereby ensuring that there are no favourites and no sacrificial victims.<sup>307</sup>

With regard to public procurement, transparency must be ensured through all the stages of the process namely identification of the need, compilation of the tender requirements, the invitation to tender, the processing and evaluation of the tender, the award of the tender, the review procedures, and the supervision of the execution of the tender. To achieve this, procurement information needs to be generally and timeously available and accessible. This includes information on the applicable rules, practices and policies, the available procurement opportunities, the criteria applicable to select the successful tenderer, the awards made, the decisions made, review and the reasons for decisions, and the conclusion of the work.<sup>308</sup>

Transparency enhances public confidence in the procurement system, it promotes openness and accountability on the part of the state, it assists good decision making and prevents corruption, and it promotes participation in the accompanying competition. This will all culminate in the state's obtaining value for money.<sup>309</sup>

#### (e) *Competitiveness*

Many procurement systems attempt to mimic the workings of the open market by requiring that public entities seek competitive bids from potential suppliers

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<sup>305</sup> 2008 1 SA 438 (SCA).

<sup>306</sup> Par [9] at 443B.

<sup>307</sup> *Mpande Foodliner CC v Commissioner for the South African Revenue Service* 2000 4 SA 1048 (T) at 1068.

<sup>308</sup> See Evenett and Hoekman "Transparency" 272.

<sup>309</sup> For a general discussion on transparency see Bolton *Law of Government Procurement* 53-59.

of goods and services. Over time, an increasing number of governments have also pursued more far-reaching efforts to subject production units directly to competitive forces by privatising state-owned enterprises, encouraging competitive entry into sectors traditionally reserved for the state (for instance, utilities), and contracting out activities to the private sector.<sup>310</sup>

The Concise Oxford Dictionary<sup>311</sup> defines competitive as “relating to or characterised by competition – as good as or better than others of a comparable nature”.

Bolton states that competitiveness is interconnected and interrelated with the principle of cost-effectiveness. Both of these principles are concerned with the attainment of value for money. The implication for public procurement is that contracts should be awarded only after a number of suppliers have been afforded the opportunity to compete for the particular contract. This will also contribute to such values as integrity, transparency and accountability.<sup>312</sup>

Watermeyer defines a competitive system as one that provides for appropriate levels of competition to ensure cost-effective and best-value outcomes.<sup>313</sup> This implies that the most meritorious should succeed above the less meritorious. The requirement of merit means that price should not be the only factor. One needs, for instance, to look at the life cycle of the product or service. To put it simply, a more expensive product might last longer than a less expensive one. Although the initial outlay may be more expensive, it may be more cost-effective, and therefore cheaper in the long run, to procure the more expensive product because of its longer lifespan.<sup>314</sup> A competitive tender presupposes a procedure which ensures that the body adjudging tenders is presented with comparable offers in order that its members are

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<sup>310</sup> Hoekman 1998 *WBRO* 249-269. In a survey of the empirical literature on the impact of competitive tendering and outsourcing, Domberger, Hall and Lee 1995 *Economic Journal* 1454-1470 conclude that savings, because of competitive tendering and outsourcing, in the order of 20 percent are common and do not come at the expense of quality.

<sup>311</sup> *Concise Oxford English Dictionary* 2001.

<sup>312</sup> Bolton *Law of Government Procurement* 41-42.

<sup>313</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>314</sup> This reflects the principle of value for money.

able to compare them. This implies that an invitation to tender has to be clear and unambiguous. The criteria and other requirements set out in the tender must be easily understandable, be precise, not open to contradictory interpretations, scientifically correct, and in sufficient detail to ensure that what is required by the procuring entity is what is tendered for by the tenderers. In short, the invitation to tender has to speak for itself. Its real import must not be disguised, so that all potential tenderers know exactly what they need to tender for.

Competitors have to be treated equally in the sense that they must all be entitled to tender for the same thing. It does not serve the aim of competitiveness if only one or some of the tenderers know what the true subject of the tender is. That would deprive the public of the benefit of an open, competitive process.<sup>315</sup> It is essential that the goods or services be defined in such a manner and in such detail, for instance with regard to specifications and performance criteria, that the tender prices can be directly compared.<sup>316</sup> Tenders must also be invited timeously and effectively so as to enable the widest possible participation.

The best value for money can be obtained through competition, in that efficiency and economy are assured. Favouritism and monopolies are prevented and the best deal can be struck. In public procurement a tender process is not the only way of ensuring competition, and other competitive procedures which ensure a sufficiently wide participation can be utilised. Other procedures that can be employed are requests for quotations, competitive negotiations, the use of lists of suppliers, electronic procurement, variations on the foregoing, and various other

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<sup>315</sup> *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA). In this case the tender board entered into a tender contract providing for an ancillary contract to regulate matters not determined under the tender contract. The ancillary contract, when concluded, contradicted the tender contract, by awarding greater rights than had been put out to tender. The ancillary contract was thus subversive of an open tender procedure and of the Act. The ancillary contract was therefore unlawful. The court also held that to allow a tender board to withhold from the body of tenderers its intention to conclude a secret agreement with one of them, an agreement which the others have never seen and never had a chance to match, would be entirely subversive of a credible tender procedure.

<sup>316</sup> *WED (Pty) Ltd v Pretoria City Council* 1988 1 SA 746 (A).

practices.<sup>317</sup> It must be kept in mind that circumstances like emergencies, where time is a factor, might require procedures which might be less competitive. The principle of cost-effectiveness may also dictate a procedure which is less competitive.<sup>318</sup>

Competitiveness can never be absolute and has to be balanced with other requirements and modified by the particular circumstances of each case. To be truly competitive the greatest practical and cost-effective participation dictated by the circumstances needs to be ensured. This entails that an appropriate procurement method be utilised and that the tender requirements be such that all potential tenderers can participate, knowing that they are offering the same product and will be adjudicated in terms of the same criteria. The most meritorious tender should be successful.

(f) *Cost-effectiveness*

A cost-effectiveness action can be described as being “effective or productive in relation to its costs”.<sup>319</sup> Bolton states that cost-effectiveness should be applied throughout the procurement process. This includes the planning stage, the process of procurement, and the contract administration. Cost-effectiveness does not entail preferring the lowest price only, but should involve other factors like promptness of delivery, the level of service, future operating costs and similar factors. The particular circumstances need to be taken into account as emergencies, for instance, may require non-competitive methods to be used. Efficiency needs to be taken into account as part of cost-effectiveness.<sup>320</sup>

Watermeyer states that a system is cost-effective when the system is standardised with sufficient flexibility to attain best-value outcomes in respect

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<sup>317</sup> These different methods of procurement will be discussed in more detail when the different procurement regimes are evaluated hereinafter.

<sup>318</sup> That is the reason why open tendering is not required for amounts less than a specified limit, as it is too expensive. The National Treasury has issued a practice note in which certain thresholds are set out for procurement by means of petty cash, verbal or written quotations, and competitive bids. See National Treasury 2005 *Threshold Values* [www.treasury.gov.za/](http://www.treasury.gov.za/). See also Bolton *Law of Government Procurement* 43.

<sup>319</sup> *Concise Oxford English Dictionary* 2001.

<sup>320</sup> Bolton *Law of Government Procurement* 43-45.

of quality, timing and price, and demands the least resources to effectively manage and control procurement processes.<sup>321</sup>

Although the system in terms of which procurement is done should be cost-effective,<sup>322</sup> the outcome of the system utilised should also be cost-effective.<sup>323</sup> This means not only that the system utilised must be cost effective, in the sense that the best procedures at the lowest cost are used during the stages of procurement, but also that the product which is eventually procured is cost-effective. All aspects of cost-effectiveness should be kept in mind through all of the stages of procurement.<sup>324</sup>

The above entails that cost-effectiveness must be considered already when deciding on the need for procurement and what will fulfil the need the most effectively.<sup>325</sup>

When the method of procurement is decided on, the time and the cost required by the method to be used as well as the costs of what is to be procured must be taken into account. The method chosen must be proportional to the time demands, nature, size and value of the procurement. Urgency, for instance where lives are at stake, might necessitate procurement from a single supplier without any competitive process. The procurement of low-value items like single stationary items or refreshments do not warrant a costly procurement procedure.<sup>326</sup> This will also apply to products like fuel, where prices are regulated. In this regard the PFMA and the MFMA regulations provide for

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<sup>321</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

<sup>322</sup> In the sense of "working productively with minimum wasted effort and expense" *Concise Oxford English Dictionary* 2001.

<sup>323</sup> This relates to obtaining value for money.

<sup>324</sup> The stages are identification of the need, the compilation of tender requirements, the invitation to tender, the processing and evaluation of the tender, the award of the tender, the review procedures, and the supervision of execution of the tender.

<sup>325</sup> The MFMA provides in s 11 and 112(1) that each municipality and each Municipal system must have and implement a Supply Chain Management Policy which is cost-effective. In respect of contracts exceeding R10 million, the MFMA reg 21(d) provides that the financial and economic standing, experience and track record, and the nature, quality and reliability of products or services to be rendered must be taken into account. Specific provision is made in reg 35 and 38 for the furnishing of information and the rejection of bids under prescribed circumstances, in the procurement of consultancy services.

<sup>326</sup> These items when procured in large quantities can of course be costly.

threshold values for four types of procurement, namely petty cash purchases, verbal or written quotations' written price quotations and competitive bidding.<sup>327</sup>

Value for money does not necessarily entail that the lowest tender should be accepted.<sup>328</sup> A product with a longer lifespan or cheaper maintenance costs might be more cost-effective than its cheaper counterpart. The lowest tender could even be the most expensive tender. Ensuring cost-effectiveness entails taking all of the relevant circumstances into account so that the most meritorious is the one accepted. Cost-effectiveness can also be described as value for money, taking into account whole-life costs.<sup>329</sup> When services are procured, factors like expertise, experience, a proven track record, knowledge of the workings of a department or system and the availability of manpower may be important factors influencing value for money.

The procurement regulations and National Treasury guidelines do not prescribe in detail what factors need to be taken into account to determine the cost-effectiveness of the proposed procurement.<sup>330</sup> However, it is provided that an accounting officer should appoint a bid evaluation committee which must *inter alia* verify the capability or ability of the bidder to execute the contract and must

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<sup>327</sup> PFMA reg 16A6.1 read with Practice Note Number SCM 2 of 2005, see National Treasury 2005 *Threshold Values* [www.treasury.gov.za/](http://www.treasury.gov.za/). Petty cash purchases up to R2000, written or verbal quotations between R2000 and R10 000, written quotations between R10 000 and R200 000, and competitive bidding over R200 000. The accounting officer may lower but not increase these threshold values. The MFMA SCM reg 1 and 12(1) have similar provisions and furthermore provide that competitive bidding must be used for contracts with a duration period exceeding one year.

<sup>328</sup> Turpin *Government Procurement* 66 states: "value for money is not necessarily the same as the lowest price though it might be. Factors such as promptness of delivery, reliability in service, level of future operating costs, or compatibility with existing equipment may indicate acceptance of some other than the lowest tender. Current guidance emphasises the need to take into account whole-life costs and not simply the initial procurement cost".

<sup>329</sup> Best value for money in the context of a technical component in procurement is the optimum combination of whole-life cost and quality to meet a user department's requirements, and not the lowest short-term cost. Wholelife cost takes into account all of the aspects of cost over the lifetime of the asset, including capital, maintenance, management operating costs and closure or disposal costs.

<sup>330</sup> Regulations issued to the PFMA and by National Treasury. In respect of contracts exceeding R10 million, the MFMA reg 21(d) provides that the financial and economic standing, experience and track record, and the nature, quality and reliability of products or services to be rendered must be taken into account. Specific provision is made in reg 35 and 38 for the furnishing of information and the rejection of bids under prescribed circumstances, in the procurement of consultancy services.

verify the bidder's tax clearance certificate.<sup>331</sup> The PFMA regulations provide that the tender of a contractor that abused the supply chain management system, committed fraud or other improper conduct in relation to the supply chain management system, or failed to perform a previous contract may be disregarded.<sup>332</sup> Some detail is provided in the regulations issued in terms of the PFMA and MFMA on what basis the sale and letting of state property should take place.<sup>333</sup>

In general it can be stated that the factors that need to be taken into account to ensure cost-effectiveness include the price, the whole-life cost of the product or service, the nature and quality of the product or service, the technical knowledge and capacity of the contractor, the experience and track record of the contractor, commitments as to after-sales service, the availability of equipment to do the work, the qualifications and competence of the personnel, the number of staff employed, and the financial standing of the contractor.<sup>334</sup> The PFMA, MFMA, the regulations promulgated in terms thereof and the treasury instructions do not deal with the above factors in detail, or state the weight that should be attached thereto. Organs of state have a broad discretion in determining the factors and the weight that should be attached

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<sup>331</sup> National Treasury 2004 *Implementation of SCM* [www.treasury.gov.za/](http://www.treasury.gov.za/). See *Basadi Joint Venture v MEC of Education, Province of the Free State* [2008] JOL 21070 (O).

<sup>332</sup> Reg 16A9.2.

<sup>333</sup> The PFMA reg 16A7.1 provides that movable property must be sold at market-related value or by way of price quotations, competitive bids or auctions, whichever is the most advantageous to the state, unless determined otherwise by the relevant treasury. Reg 16A7.3 and 16A7.4 provide that immovable property must be sold at market-related value or let at market-related tariffs, unless the relevant treasury determines otherwise. Property may be let free of charge with the prior approval of the relevant treasury. Reg 16A7.5 provides that the accounting officer or accounting authority must, annually when finalising the budget, review all fees, charges, rates, tariffs, scales of fees or other charges relating to the letting of state property to ensure sound financial planning and management. In terms of the MFMA the SCM reg 40(2)(b) provides that an SCMP must stipulate that immovable property may be sold only at market-related prices except when public interest or the plight of the poor demands otherwise. Movable assets may be sold only by way of written price quotations, a competitive bidding process, or auction at market-related prices, whichever is the most advantageous to the municipality or municipal entity. With regard to the letting of assets, reg 40(2)(c) provides that the SCMP must provide that immovable property is let at market-related rates except where the public interest or the plight of the poor demands otherwise. All fees, charges, rates, tariffs, scales of fees or other charges relating to the letting of immovable property must be annually reviewed.

<sup>334</sup> See Trepte *Public Procurement*.

thereto. The courts will not easily interfere with the exercise of such a discretion.<sup>335</sup>

Cost-effectiveness must also be ensured during the contract administration and management phase. This must already be kept in mind when drafting the agreement.<sup>336</sup> In particular, proper procedures and methods for contract administration, dispute avoidance and dispute resolution are essential in large procurement agreements, like the Gautrain project.<sup>337</sup> Disputes have to be avoided, but if this is not possible, cost-effective dispute resolution procedures must be put in place. Litigation is usually expensive and counterproductive.<sup>338</sup> Risks should be managed. Risk management can take the form of performance security,<sup>339</sup> insurance,<sup>340</sup> warranties<sup>341</sup> and provisions relating to *force majeure*,<sup>342</sup> and delays in contractual performance, as provided for in the General Conditions of Contract prescribed by National Treasury.<sup>343</sup> Other methods of risk management exist too, such as dispute avoidance and dispute resolution, which are not contained in General Conditions of Contract but can be used effectively to ensure a cost-effective contract administration and management phase.<sup>344</sup> The SCM Regulations issued in terms of the MFMA require that an SCMP must provide an effective risk-management system for the

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<sup>335</sup> See *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 48.

<sup>336</sup> The PFMA reg 16A6.3(a) provides that bid documentation and general conditions of contract must be in accordance with the instructions of National Treasury or the prescripts of the Construction Industry Development Board in the case of a bid relating to the construction industry. National Treasury has issued General Conditions of Contract (GCC) which apply to all bids, contracts and orders including bids for functional and professional services, sales, hiring, letting and the granting or acquiring of rights, but excluding immovable property, unless otherwise indicated in the bidding documents.

<sup>337</sup> This is a multi million rand project by the Gauteng Provincial Government to construct a dedicated, high velocity passenger train service between Pretoria, the OR Tambo international airport and Johannesburg.

<sup>338</sup> In particular the legal procedures for review of tender procedures are time consuming, costly and counterproductive. A body which can swiftly deal with complaints regarding procurement decisions, without excluding the role of the courts can address this problem.

<sup>339</sup> GCC clauses 3.1-3.2.

<sup>340</sup> GCC clause 11.1.

<sup>341</sup> GCC clause 15.1.

<sup>342</sup> GCC clause 25.1. "Force majeure" is defined in GCC clause 1.12.

<sup>343</sup> GCC clause 21.

<sup>344</sup> These can include the resolution of factual disputes by third parties, the issue of certificates on the completion of certain phases of the contract, the use of mediators, referees and similar procedures.

identification, consideration and avoidance of potential risks.<sup>345</sup> The regulations provide no detail on how to achieve this, and it is left to the individual local authorities to develop such policies.

Value for money or cost-effectiveness need not be a measure of monetary cost alone, and collateral objectives should also be taken into account.<sup>346</sup> It must also be kept in mind that all of the principles mentioned in section 217 of the Constitution are interrelated and interconnected. Cost-effectiveness cannot be evaluated in isolation and all of the circumstances of the case and the other prescripts of section 217 of the Constitution need to be taken into account.

It can be concluded that the procurement system must be cost-effective through all the stages of the procurement process, as well as the outcome of the procurement process. This entails that cost-effectiveness needs to be taken into account already when deciding on what is needed and how the needs will be best satisfied. The method of procurement must be proportional to the time demands, nature, size and value of the procurement. When evaluating a tender the factors that need to be taken into account to ensure cost-effectiveness are *inter alia* the price, the whole-life cost of the product or service, the nature and quality of the product or service, the technical knowledge and capacity of the contractor, the experience and track record of the contractor, commitments as to after-sales service, the availability of equipment to do the work, the qualifications and competence of the personnel, the number of staff employed, and the financial standing of the contractor. Risk management, dispute avoidance and dispute resolution form an integral part of a cost-effective procurement system and play an important role in contract management and administration.

The achieving of collateral objectives is relevant in achieving cost-effectiveness. Reaching a state's socio-economic objectives may entail that

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<sup>345</sup> Reg 41(1).

<sup>346</sup> An example would occur where a more labour-intensive procedure is used, or the provision of training to unskilled labourers is part of the tender.

an initially more expensive tender be accepted in that it may achieve socio-economic benefits like the transfer of skills. It has to be determined how such secondary objectives can be achieved in the most cost-effective manner. Cost-effectiveness cannot be seen in isolation. It will depend on all of the circumstances a case, and the other primary and secondary objectives of public procurement must be taken into account when evaluating whether or not this objective has been achieved in a particular instance.

*(g) Conclusion*

The principles set out in section 217 of the Constitution are, broadly speaking, in accordance with the objectives of public procurement as found in the Model Law and the GPA. These principles cannot be seen in isolation. They overlap and influence one another and must be evaluated in the light of the particular circumstances that exist.

Fairness connotes fairness to all involved including the state, the general public and all possible tenderers. It implies procedural fairness, a public duty to act fairly. This does not mean that a person is entitled to a perfect system or to be free from all errors. Fairness also implies substantive fairness, namely conformity with the notion of basic fairness and justice. Fairness can also be related to equitableness and reasonableness.

The circumstances to be taken into account to determine equitableness include but are not limited to the nature of the parties' rights and interests as well as those of the state and the public in general. The utilisation of public procurement to address the legacies of apartheid by means of the preferential treatment of previously disadvantaged South Africans can be equitable. Equity does not necessarily mean that all people or all groups should be treated equally and can include measures to address the inequalities of the past. It can be used to redress the disadvantage of disparate groups caused by the actions of the previous government.

Transparency must be ensured through all the stages of the procurement process. To achieve this, procurement information needs to be generally and

timeously available and accessible. It must also be kept up to date. This includes information on the applicable rules, practices and policies, the available procurement opportunities, the criteria applicable to select the successful tenderer, the awards made, the decisions made, review and the reasons for decisions, and the conclusion of the work. Transparency enhances public confidence in the procurement system, it promotes openness and accountability on the part of the state, it assists good decision making, it prevents corruption, and it promotes participation in the accompanying competition.

Competitiveness can never be absolute and has to be balanced with the other requirements in context. To be competitive the largest practical and cost-effective participation dictated by the circumstances needs to be ensured. This entails that an appropriate procurement method be utilised and that the tender requirements be such that all potential tenderers can participate knowing that they are offering the same product and will be adjudicated on the same criteria. The most meritorious tender should be successful.

Through all of the stages of the procurement process, as well as the outcome of the procurement process, the procurement system must be cost-effective.<sup>347</sup> This entails that cost-effectiveness needs to be taken into account already when deciding on what is needed and how the needs will be best satisfied. The method of procurement must be proportional to the time demands, nature, size and value of the procurement. The goods or services procured must be the most cost-effective, taking into account the whole-life cycle of the product or service. Risk management, dispute avoidance and dispute resolution form an integral part of a cost-effective procurement system and play an important role in contract management and administration.

Reaching a state's socio-economic objectives may entail that an initially more expensive tender be accepted, in that it may achieve socio-economic benefits like the transfer of skills. It has to be determined how such secondary

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<sup>347</sup> Bolton *Law of Government Procurement* 43.

objectives can be achieved in the most cost-effective manner. Cost-effectiveness cannot be seen in isolation. It will depend on all of the circumstances of a particular case, and the other primary and secondary objectives of public procurement must be taken into account when evaluating whether or not this objective has been achieved in a particular instance.

The application of the principles contained in section 217 of the Constitution will ensure that value for money is obtained in the procurement process. These principles conform to those contained in the Model Law and GPA and the generally accepted function of public procurement, namely to ensure competition, integrity, transparency, efficiency and value for money.

### *5.3.3 The Public Finance Management Act*

As public procurement is in essence a financial activity of the state, the provisions of chapter 13 of the Constitution, which relates to financial matters, are applicable to public procurement. In section 213 the Constitution provides for a National Revenue Fund into which all money received by the national government has to be paid. Money may be withdrawn from the National Revenue Fund only in terms of an appropriation by an Act of Parliament or as a direct charge against the National Revenue Fund. The latter may be done only as provided for in the Constitution or an Act of Parliament.<sup>348</sup>

Section 216 of the Constitution provides that national legislation must establish a National Treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing:

- (a) generally recognised accounting practices;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.

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<sup>348</sup> Sch 5 of the PFMA for instance provides for direct charges with regard to the salaries of the president, ministers and deputy ministers, members of parliament, judges and magistrates.

The PFMA was promulgated to give effect to the above constitutional obligations. The National Treasury was established in terms of section 5, and the National Revenue Fund in terms of section 11 of the PFMA. In similar vein, Provincial Treasuries<sup>349</sup> and Provincial Revenue Funds<sup>350</sup> were established.

The *Exchequer Act*<sup>351</sup> remained in place during the transition to the constitutional era. This implied that the procurement regime and National Treasury regulations which existed during the pre-constitutional era remained in place, save that they were now subject to constitutional provisions including section 217. The *Exchequer Act* was replaced by the PFMA, which commenced on 1 April 2000. The purpose of the PFMA, which gives effect to chapter 3 of the Constitution, is to regulate the financial management in national and provincial governments. It endeavours to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies.<sup>352</sup> The Act applies to departments, public entities listed in Schedules 2 and 3, constitutional institutions, parliament and the provincial legislatures.<sup>353</sup>

The transitional arrangements made in terms of section 93 of the PFMA *inter alia* entail that anything done in terms of a provision of the *Exchequer Act*,<sup>354</sup> which could be done in terms of a provision of the PFMA, must be regarded as having been done in terms of this Act. It also entails that all treasury regulations and instructions made or issued in terms of the *Exchequer Act* remain in force until repealed in terms of section 76 of this Act. Section 76 further provides that the National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies with regard to the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.<sup>355</sup>

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<sup>349</sup> S 17.

<sup>350</sup> S 21.

<sup>351</sup> Act 66 of 1975.

<sup>352</sup> Preamble and s 2.

<sup>353</sup> S 4.

<sup>354</sup> Act 66 of 1975.

<sup>355</sup> S 76(4)(c).

As was the case with the repealed *Exchequer Act*,<sup>356</sup> the PFMA is the foundation for the current National Treasury. For all practical purposes the National Treasury, as established under the *Exchequer Act*, continued to exist, albeit in terms of and subject to the provisions of the new Act. The National Treasury has to promote and enforce transparency and effective management in respect of the revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.<sup>357</sup> The National Treasury is in charge of the national revenue fund.<sup>358</sup> No money may be withdrawn from the fund except in terms of an appropriation by an Act of Parliament or as a direct charge against the fund, which is provided for in either the Constitution or an Act of Parliament.<sup>359</sup>

The PFMA also establishes a provincial treasury for each province.<sup>360</sup> For all practical purposes the provincial treasuries, as established under the *Exchequer Act*, continued to exist, albeit in terms of and subject to the provisions of the new Act. The provincial treasuries have to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities.<sup>361</sup> Parliament and each provincial legislature must appropriate money in terms of provincial appropriation acts for each financial year for the requirements of the state and the provinces.<sup>362</sup> This is necessary as no money may be withdrawn from the Provincial Revenue Fund save in terms of an appropriation in terms of a provincial act or as a direct charge as provided for in a provincial act or provincial constitution.<sup>363</sup>

Every department, trading entity<sup>364</sup> and constitutional institution must have an accounting officer.<sup>365</sup> The accounting officer has to ensure that that department,

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<sup>356</sup> Act 66 of 1975.

<sup>357</sup> S 5.

<sup>358</sup> S 11.

<sup>359</sup> Sch 5 of the PFMA provides for direct charges with regard to the salaries of the president, ministers and deputy ministers, members of parliament, judges and magistrates.

<sup>360</sup> S 17.

<sup>361</sup> S 18.

<sup>362</sup> S 26.

<sup>363</sup> S 24.

<sup>364</sup> A "trading entity" is defined in s 1 of the Act to mean "an entity operating within the administration of a department for the provision or sale of goods or services, and established

trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective<sup>366</sup> and a system for properly evaluating all major capital projects prior to a final decision on the project.<sup>367</sup> An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.<sup>368</sup>

Every public entity must have an accounting authority which must be accountable for the purposes of this Act.<sup>369</sup> The accounting authority in essence fulfils the same role in public entities that the accounting officer fulfils in state departments, trading entities and constitutional institutions.<sup>370</sup> An accounting authority for a public entity must also ensure that that public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.<sup>371</sup>

The PFMA once again only sets out a framework within which the relevant accounting officer<sup>372</sup> or accounting authority<sup>373</sup> must have and maintain a procurement system. This framework echoes the constitutional requirements of fairness, equitableness, transparency, competitiveness and cost-effectiveness. This entails that every such state department, trading entity, constitutional institution and public entity can have its own procurement system as long as it falls within the prescribed framework. The one distinct disadvantage hereof is that there can in theory be as many procurement

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(a) in the case of a national department, with the approval of the National Treasury; or  
(b) in the case of a provincial department, with the approval of the relevant provincial treasury acting within a prescribed framework”.

<sup>365</sup> S 36.

<sup>366</sup> S 38(1)(a)(iii).

<sup>367</sup> S 38(1)(a)(IV).

<sup>368</sup> S 38(2).

<sup>369</sup> S 49.

<sup>370</sup> S 49(2) provides that if the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity. If it does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity. Specific legislation applicable to that public entity may designate another person as the accounting authority.

<sup>371</sup> S 51(1)(a)(iii).

<sup>372</sup> In the case of a department trading entity or constitutional institution.

<sup>373</sup> In the case of a public entity.

systems as there are departments, trading entities, constitutional institutions and public entities. This can create difficulties in ascertaining the different policies, and distinguishing the detail of the different policies. It can create uncertainty in the interpretation of the policies, lead to unnecessary litigation and a waste of time, effort and money because of a lack of standardisation. This position is ameliorated to a certain extent by the fact that the National Treasury may issue instructions or make regulations which are applicable to all of the above institutions.

Section 76(4)(c) of the PFMA provides that the National Treasury may issue National Treasury Regulations for the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Such National Treasury Regulations were promulgated on 31 May 2000<sup>374</sup> and later replaced by the Treasury Regulations of 15 March 2005.<sup>375</sup> Regulation 16A deals with supply chain management,<sup>376</sup> in particular with regard to public procurement, and provides for a framework that is applicable to departments, constitutional institutions and public entities listed in Schedules 3A and 3C of the Act.<sup>377</sup> Regulation 16A does not apply to public entities listed in schedules 2, 3B and 3D to the Act.<sup>378</sup>

In terms of regulation 16A the accounting officer or accounting authority must develop and implement an effective and efficient supply chain management system in his or her institution for the acquisition of goods and services and the disposal and letting of state assets, including the disposal of goods no longer required.<sup>379</sup> The supply chain management system must be implemented by a separate supply chain management unit within the office of that institution's chief financial officer.<sup>380</sup>

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<sup>374</sup> GN R556 in GG 21249 of 31 May 2000.

<sup>375</sup> GN R225 in GG 27388 of 15 March 2005.

<sup>376</sup> In National Treasury 2004 *SCM* [www.treasury.gov.za/](http://www.treasury.gov.za/) 10-11 "supply chain management" is defined as a system in terms of which an integrated management approach is used to manage all of the steps of the supply chain. They include demand management, acquisition management, logistics management and disposal management.

<sup>377</sup> Reg 16A2.1.

<sup>378</sup> Reg 1.2.1.

<sup>379</sup> Reg 16A3.1.

<sup>380</sup> Reg 16A4.

Provision is made for procurement through either a tender<sup>381</sup> process or by way of quotations, depending on the value of the goods or services.<sup>382</sup> In the case of procurement through a tender process, provision must be made for tender specification, evaluation and adjudication committees.<sup>383</sup> In terms of the regulations the accounting officer or accounting authority must ensure the following:

- The tender documentation and the general conditions of the contract must be in accordance with the instructions of the National Treasury, or the prescripts of the Construction Industry Development Board.<sup>384</sup>
- Evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA and the BBBEEA, must be included in the tender documentation.<sup>385</sup>
- Tenders must be advertised in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure.<sup>386</sup>
- The awards of tenders must be published in the *Government Tender Bulletin* and the other media by means of which the tenders were advertised.<sup>387</sup>
- In the case of information technology, the contract must be prepared in accordance with the *State Information Technology Act*.<sup>388</sup>
- When goods or services are procured through, or as part of a public private partnership, regulation 16 must be complied with.<sup>389</sup>
- In the case of the appointment of consultants, the applicable instructions issued by National Treasury must be complied with.<sup>390</sup>

If it is impractical to invite competitive tenders, the goods or services may be procured by other means. The reasons for such a deviation must, however,

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<sup>381</sup> The regulations refer to a bidding process. For the sake of consistency the terms tender and tenderer will be used instead of bid and bidder.

<sup>382</sup> Reg 16A6.1. The thresholds are determined by National Treasury.

<sup>383</sup> Reg 16A6.2.

<sup>384</sup> Reg 16A6.3 (a).

<sup>385</sup> Reg 16A6.3 (b).

<sup>386</sup> Reg 16A6.3(c). In urgent cases shorter periods may be used.

<sup>387</sup> Reg 16A6.3 (d).

<sup>388</sup> Act 88 of 1998.

<sup>389</sup> Reg 16A6.3 (e).

<sup>390</sup> Reg 16A6.3 (f).

be recorded and approved by the accounting officer or accounting authority.<sup>391</sup> Detailed provision is made for the selling and letting of state assets.<sup>392</sup> These relate to movable and immovable assets.<sup>393</sup>

It is also provided that high ethical standards and the National Treasury's Code of Conduct for Supply Chain Management Practitioners must be adhered to by all officials and other role players involved in supply chain management.<sup>394</sup> It is expressly regulated that an official or another role player must disclose any conflict of interest that may arise, treat all suppliers and potential suppliers equitably, not use his position for private gain or to improperly benefit another person, ensure that he does not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act, be scrupulous in his use of public property, and assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.<sup>395</sup>

If an official or another role player, or if any close family member, partner or associate of such an official or role player has any private or business interest in any contract to be awarded, that official or role player must disclose that interest and withdraw from participating in the process relating to that contract.<sup>396</sup> If an official in the supply chain management unit becomes aware of a breach of or failure to comply with any aspect of the supply chain management system, he must immediately in writing report the breach or failure to the accounting officer or accounting authority.<sup>397</sup>

There are provisions specifically aimed at preventing the abuse of the system.<sup>398</sup> In this regard the accounting officer or accounting authority must

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<sup>391</sup> Reg 16A6.4.

<sup>392</sup> Reg 16A7.

<sup>393</sup> Reg 16A7.1 in the case of movable assets and reg 16A7.3 and reg 16A7.4 in the case of immovable assets. See in this regard the debate on whether or not s 217 of the Constitution is applicable to the sale of immovable property, in ch 2 above.

<sup>394</sup> Reg 16A.8.

<sup>395</sup> Reg 16A8.3.

<sup>396</sup> Reg 16A8.4.

<sup>397</sup> Reg 16A8.5.

<sup>398</sup> Reg 16A9.

take all reasonable steps to prevent abuse of the supply chain management system.<sup>399</sup> Such an officer or authority must investigate any allegation of corruption, improper conduct or failure to comply with the supply chain management system made against an official or another role player.<sup>400</sup>

Prior to awarding any contract, the accounting officer/authority must ensure that, in terms of National Treasury's database, no recommended tenderer or any of its directors is listed as a company or person prohibited from doing business with the public sector.<sup>401</sup> Any tender from a supplier who fails to provide written proof from the South African Revenue Service that that supplier either has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations must be rejected.<sup>402</sup> If the recommended tenderer has committed a corrupt or fraudulent act in competing for the particular contract his tender must be rejected.<sup>403</sup> A contract awarded to a supplier which committed any corrupt or fraudulent act during the tender process or the execution of that contract must be cancelled.<sup>404</sup> Likewise, if any official or other role player committed any corrupt or fraudulent act during the tender process or the execution of that contract that benefited that supplier, the contract must be cancelled.<sup>405</sup>

If a tenderer or any of its directors has abused the institution's supply chain management system, or committed fraud or any other improper conduct in relation to such system, or failed to perform on any previous contract, such a tender may be disregarded and the relevant treasury informed thereof.<sup>406</sup>

The national and provincial treasuries have to establish mechanisms to address complaints with regard to alleged non-compliance with the prescribed norms and standards. It must also be ensured that recommendations for

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<sup>399</sup> Reg 16A9.1(a).

<sup>400</sup> Reg 16A9.1(b).

<sup>401</sup> Reg 16A9.1(c). Williams and Quinot 2008 *SALJ* 246-256.

<sup>402</sup> Reg 16A9.1(d).

<sup>403</sup> Reg 16A9.1(e).

<sup>404</sup> Reg 16A9.1(f)(i).

<sup>405</sup> Reg 16A9.1(f)(ii).

<sup>406</sup> Reg 16A9.2.

remedial actions to be taken in the case of non-compliance, including criminal action to be taken in the case of corruption, fraud or other criminal offences, can be made.<sup>407</sup>

In terms of the regulations, clearance for a recommended tenderer must be obtained if the National Industrial Participation Programme applies to the contract.<sup>408</sup> The National Industrial Participation Programme is based on a cabinet memorandum of 1996.<sup>409</sup> This programme will be dealt with in more detail in the discussion of the collateral objectives of public procurement.

The regulations further provide that the National Treasury may issue instructions to accounting officers and accounting authorities.<sup>410</sup> These instructions are referred to as practice notes. The practice notes issued relate to General Conditions of Contract (GCC) and Standard Bidding Documents (SBD),<sup>411</sup> threshold values for petty cash expenditures, written and verbal quotations and competitive tender procedures, and the compilation of lists of prospective suppliers,<sup>412</sup> and a code of conduct for supply chain management practitioners.<sup>413</sup>

Although many of the issues dealt with in the regulations and practice notes will lead to a limited standardisation of the procurement systems of the entities to which they apply, many matters that could be standardised are not dealt with in the regulations and practice notes. This difficulty will be dealt with in more detail when the comparison with the Model Law and the GPA is drawn.<sup>414</sup>

The PFMA in essence echoes the requirements of the Constitution. It is a framework act which does not take the constitutional principles of public procurement much further. It is left to the regulations to give flesh to these

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<sup>407</sup> Reg16A9.3.

<sup>408</sup> Reg 16A10.

<sup>409</sup> Cabinet Memorandum 10/1996.

<sup>410</sup> PFMA s 6(2).

<sup>411</sup> Practice Note no 1 SCM dated 5 Dec 2005.

<sup>412</sup> Practice Note no 3 SCM dated 10 May 2005. This practice note repealed Practice Note no 2 SCM.

<sup>413</sup> Practice Note no 4 SCM dated 5 December 2005.

<sup>414</sup> This will be done in ch 6.

principles. In the regulations, promulgated in terms of the PFMA, and the practice notes issued by the National Treasury, certain important issues are dealt with in more detail. However, it is still to a large extent left to the relevant procuring entities to devise a system within the framework given by the Constitution, the PFMA, the regulations and the practice notes. Although this allows a lot of leeway to the different entities to determine the detail of their procurement systems, it can be confusing to have so many different systems. It may not always be easy to obtain information on these different systems as no central register exists where such information is kept. This may make it difficult for many prospective historically disadvantaged and foreign tenderers to participate in the public procurement process. Depending on the circumstances, this could compromise transparency, effectiveness and competition in the procurement process.

#### *5.3.4 Local Government: Municipal Finance Management Act*

As already stated, chapter 13 of the Constitution regulates the financial matters of the state. Section 226 provides for Provincial Revenue Funds and for the withdrawal of monies only in terms of an appropriation by a provincial act or as a direct charge provided for in the Constitution or a provincial act. Chapter 7 of the Constitution regulates local government and provides for municipalities to govern in the local sphere of government.

The MFMA was promulgated in order to comply with constitutional obligations, in particular those contained in chapter 13 of the Constitution. The purpose of the MFMA is to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government.<sup>415</sup> The object of the Act is defined as being to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements in order *inter alia* to ensure transparency, accountability and appropriate lines of responsibility.<sup>416</sup> It also attempts to ensure the management of their revenues,

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<sup>415</sup> Preamble to the MFMA.

<sup>416</sup> S 2 of the MFMA.

expenditures, assets and liabilities and the handling of their financial dealings through a supply chain management system.<sup>417</sup>

The MFMA applies to all municipalities and municipal entities.<sup>418</sup> Municipal entities is defined by the *Municipal Systems Act*<sup>419</sup> as a private company referred to in section 86B(1)(a), a service utility, or a multi-jurisdictional service utility.<sup>420</sup>

A municipality may incur expenditure only in terms of an approved budget and within the limits of the amounts so appropriated.<sup>421</sup> The municipal manager of a municipality is the accounting officer of the municipality for the purposes of the MFMA.<sup>422</sup> The accounting officer is *inter alia* responsible for the management of the expenditure of the municipality. He must take reasonable steps to ensure that the municipality's supply chain management policy is implemented in a way that is fair, equitable, transparent, competitive and cost-effective.<sup>423</sup>

Chapter 11 of the MFMA provides for a supply chain management system. This system applies to

- the procurement by a municipality or municipal entity of goods and services;
- the disposal by a municipality or municipal entity of goods no longer needed;
- the selection of contractors to provide assistance in the provision of municipal services;
- the selection of contractors to provide assistance in the provision of municipal services where Chapter 8 of the *Municipal Systems Act* does not apply; and

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<sup>417</sup> Preamble and s 2.

<sup>418</sup> S 3.

<sup>419</sup> Act 32 of 2000, s 1.

<sup>420</sup> S 1.

<sup>421</sup> S 15.

<sup>422</sup> S 60.

<sup>423</sup> S 65. Ito s 99 the same holds true for municipal entities.

- the selection of external mechanisms referred to in section 80(1)(b) of the *Municipal Systems Act*<sup>424</sup> for the provision of municipal services in circumstances contemplated in section 83 of that Act.<sup>425</sup>

Each municipality and each municipal entity must have and implement a supply chain management policy which must be fair, equitable, transparent, competitive and cost-effective, and which complies with a prescribed regulatory framework for municipal supply chain management.<sup>426</sup> The Act gives a detailed exposition of the minimum that has to be addressed in the supply chain management system.<sup>427</sup> The most important aspects are the following:

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<sup>424</sup> Act 32 Of 2000.

<sup>425</sup> S 110.

<sup>426</sup> S 111.

<sup>427</sup> In terms of s 112 the supply chain system must cover at least the following:

- “(a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for –
- (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;
- (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;
- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;
- (l) the barring of persons from participating in tendering or other bidding processes, including persons –
- (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
  - (iii) whose tax matters are not cleared by South African Revenue Service;
- (m) measures for –
- (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
  - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;

- the methods of procurement municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;<sup>428</sup>
- procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;<sup>429</sup>
- open and transparent pre-qualification processes for tenders or other bids;<sup>430</sup>
- bid documentation, and the advertising of and invitations for contracts;<sup>431</sup>
- procedures and mechanisms for-
  - (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;<sup>432</sup>
- compulsory disclosure of any conflicts of interest;<sup>433</sup>
- the barring of persons from participating in tendering or other bidding processes, including persons –
  - (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or

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- (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by–
    - (i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
    - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act;
  - (o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
  - (p) contract management and dispute settling procedures; and
  - (q) The delegation of municipal supply chain management powers and duties, including to officials<sup>4</sup>.

<sup>428</sup> S 112 (a).

<sup>429</sup> S 112(d).

<sup>430</sup> S 112 (e).

<sup>431</sup> S 112 (g).

<sup>432</sup> S 112 (i).

<sup>433</sup> S 112 (j).

(iii) whose tax matters are not cleared by South African Revenue Service,<sup>434</sup>

- measures for combating fraud, corruption, favouritism and unfair and irregular practices and the promotion of ethics by all of the role players,<sup>435</sup> and
- contract-management and dispute-settling procedures.<sup>436</sup>

This regulatory framework deals with all of the important stages of procurement. Provision is further made in the MFMA on how to deal with unsolicited bids,<sup>437</sup> the approval of tenders not recommended,<sup>438</sup> the implementation of the system,<sup>439</sup> and contracts and contract management.<sup>440</sup> Councillors are barred from serving on municipal tender committees.<sup>441</sup> It also prescribes the conditions for and the process to be followed for public/private partnerships.<sup>442</sup>

Regulations have been issued which further deal with the above aspects.<sup>443</sup> These regulations are applicable to all municipalities and municipal entities.<sup>444</sup> In addition to the matters mentioned above the regulations also deal with other important issues like the delegation of powers and duties in procurement,<sup>445</sup> supply chain management units,<sup>446</sup> threshold values for different procurement methods,<sup>447</sup> lists of accredited prospective suppliers,<sup>448</sup> a two-stage tendering process,<sup>449</sup> a committee system for competitive tendering consisting of at least a tender specification committee, a tender evaluation committee and a tender

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<sup>434</sup> S 112 (l). See also *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 6 SA 220 (SCA).

<sup>435</sup> S 112(m).

<sup>436</sup> S 112(p).

<sup>437</sup> S 113.

<sup>438</sup> S 114.

<sup>439</sup> S 115.

<sup>440</sup> S 116.

<sup>441</sup> S 117.

<sup>442</sup> S 120.

<sup>443</sup> Municipal Supply Chain Regulations published in GN 868 GG 27636 of 30 May 2005.

<sup>444</sup> Reg 2.

<sup>445</sup> Reg 4.

<sup>446</sup> Reg 7.

<sup>447</sup> Reg 12.

<sup>448</sup> Reg 14.

<sup>449</sup> Reg 25.

adjudication committee,<sup>450</sup> the procurement of banking services,<sup>451</sup> the procurement of information technology and related services,<sup>452</sup> the appointment of consultants,<sup>453</sup> and the deviation from and ratification of minor breaches of procurement processes.<sup>454</sup> It is also regulated that a supply chain policy must stipulate to what extent the Proudly South Africa campaign is supported.<sup>455</sup>

The regulations further regulate awards to close family members of persons in the service of the state,<sup>456</sup> ethical standards,<sup>457</sup> inducements, rewards, gifts and favours to municipalities, municipal entities, officials and other role players,<sup>458</sup> sponsorships<sup>459</sup> and contracts providing for compensation based on turnover.<sup>460</sup>

Special provision is made for objections and complaints to be lodged with the municipality or municipal entity within 14 days of the action giving rise to the objection or complaint,<sup>461</sup> and the resolution of disputes, objections, complaints and queries by an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity.<sup>462</sup> Should the complaint not be resolved within 60 days it may be referred to the provincial treasury and, if still not resolved, to National Treasury.<sup>463</sup> The foregoing does not affect a person's right approach a court for relief at any time.<sup>464</sup>

The MFMA and the regulations issued in terms thereof provide more detail of what needs to be incorporated in the supply chain management policies of

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<sup>450</sup> Reg 26.

<sup>451</sup> Reg 30.

<sup>452</sup> Reg 31.

<sup>453</sup> Reg 35.

<sup>454</sup> Reg 36.

<sup>455</sup> Reg 34. This campaign aims to promote South African manufactured products.

<sup>456</sup> Reg 45.

<sup>457</sup> Reg 46.

<sup>458</sup> Reg 47.

<sup>459</sup> Reg 48.

<sup>460</sup> Reg 51.

<sup>461</sup> Reg 49.

<sup>462</sup> Reg 50. See also *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 4 SA 346 (T).

<sup>463</sup> Reg 50(5) and (6).

<sup>464</sup> Reg 50(7).

municipalities and municipal entities than the PFMA and its regulations do with regard to procurement on national and provincial level. However, the MFMA and the regulations essentially remain frameworks to which the supply chain management policies must comply. This will, to an extent, lead to a standardisation of the most important aspects of the procurement process that have to be addressed in the policies, but differences will remain on the detail of the respective policies. The differences need not be a major obstacle for prospective suppliers dealing with municipalities, as the municipalities' procurement policies can be obtained from the municipal offices. The better use by municipalities of information technology will also assist significantly to enhance the availability of their policies and procurement opportunities.<sup>465</sup> For suppliers that deal with different municipalities it will be necessary to scrutinise the different policy of each municipality to ensure compliance. On the one hand the system of allowing the procuring entities to develop their own supply chain systems allow for flexibility and the possibility of addressing specific circumstances. On the other hand it could influence the supply chain management system negatively if a proper supply chain management system does not exist or is not appropriate for the particular entity. It cannot be said that the decentralised system used on local government level is in principle not acceptable. The effectiveness and appropriateness of this system is largely dependant on the nature of the practical implementation by the particular procuring entity.

### 5.3.5 Local Government: Municipal Systems Act

The *Municipal Systems Act*<sup>466</sup> was promulgated *inter alia* to determine the powers and functions<sup>467</sup> of municipalities and municipal entities, including the provision of municipal services.<sup>468</sup> On local government level the provision of services is of paramount importance. As the provision of services is the core business of local government, the financial implications of the provision of such

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<sup>465</sup> This holds true for larger municipalities like Tswane and Johannesburg as well as smaller municipalities like Potchefstroom, where no procurement policy could be found on their respective websites during March 2007. Although Tswane Municipality had a link to "procurement policy", the link was not operative.

<sup>466</sup> Act 32 of 2000.

<sup>467</sup> Ch 3.

<sup>468</sup> Ch 8.

services are substantial. Service delivery agreements are often entered into with private parties. For this reason it is necessary to keep this Act in mind when discussing public procurement on local government level. This Act specifically makes provision for municipalities and municipal entities to enter into service delivery agreements and specifically deals with the requirements for entering into such service delivery agreements.<sup>469</sup>

If a municipality decides to provide a municipal service through a service delivery agreement it must select the service provider through a selection process which complies with chapter 11 of the MFMA and which is competitive, fair, transparent, equitable and cost-effective.<sup>470</sup> It is also provided that the procurement processes must be such that:

- all prospective service providers are allowed to have equal and simultaneous access to information relevant to the bidding process;
- the possibility of fraud and corruption is minimised;
- the municipality is accountable to the local community about progress with selecting a service provider;
- the reasons for any such decision are given, and
- the need to promote the empowerment of small and emerging enterprises is taken into account.<sup>471</sup>

Subject to the provisions of the PPPFA,<sup>472</sup> a municipality may determine a preference for categories of service providers in order to advance the interest of persons disadvantaged by unfair discrimination. The manner in which such preference is exercised may not compromise or limit the quality, coverage, cost and developmental impact of the services.<sup>473</sup> Provision is made for negotiations and agreements to be entered into with prospective service providers.<sup>474</sup> Such negotiations must be done on the basis of the bidding documents and any addenda, amendments or variations thereto. If

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<sup>469</sup> S 83 and 84.

<sup>470</sup> S 83(1).

<sup>471</sup> S 83(1).

<sup>472</sup> Act 5 of 2000.

<sup>473</sup> S 83(2).

<sup>474</sup> S 84.

negotiations fail or do not culminate in an agreement within the time allowed, negotiations may be entered into with the next ranked prospective supplier.<sup>475</sup>

Because of the nature of service delivery agreements, special provisions have been made for the procurement thereof. A service delivery agreement must still comply with the procurement principles provided for in the MFMA, but must specifically allow for negotiations to take place. This is a realistic approach to the procurement of services as the normal procedures might not always be suitable to enable the best results. The general principles applicable to public procurement on local government level, and how they are given content to, are the same as those provided for in the MFMA.

### 5.3.6 Administrative law

The applicability of the general principles of administrative law to public procurement and the constitutional principles underlying public procurement have been discussed in Chapter 2 and need not be repeated. Our courts have on numerous occasions held that the public procurement process, including the conduct of the process, the evaluation of the tender and the award of the contract, are all forms of administrative action.<sup>476</sup>

Administrative law has developed considerably since South Africa became a constitutional state. In particular the provisions of sections 32 and 33 of the Constitution as well as PAIA and PAJA have had a marked influence on administrative law. The principles contained in section 217 of the Constitution,

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<sup>475</sup> S 84(2).

<sup>476</sup> See Bolton *Law of Government Procurement* 18-19; *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W); *Umfolozzi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A); *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 (C); *ABBM Printing & Publishing (Pty) Ltd v Transnet* 1998 2 SA 109 (W); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 4 SA 375 (T); *Nextcom (Pty) Ltd v Funde* 2000 4 SA 491 (T); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T); *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA); *Compass Waste Services (Pty) Ltd v Chairperson, NC Tender Board* [2005] JOL 15344 (NC); *First Base Construction CC v Ukhahlamba District Municipality* [2006] JOL 16724 (E). An unsuccessful tenderer can take public procurement decisions on review also if the decision is not justifiable in relation to the reasons given, as stated in *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 1 SA 701 (O); *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 6 SA 220 (SCA).

the PFMA, the MFMA, and the regulations issued in terms thereof, are enforced in public procurement in South Africa through the application of administrative law. This should ensure and improve the integrity of the public procurement system.

### *5.3.7 Other legislation*

#### 5.3.7.1 Introduction

In addition to the above-mentioned Acts, which were specifically promulgated to comply with the constitutional provisions relating to procurement by government and public entities,<sup>477</sup> there exists a vast array of legislation and government policies which may have an effect on public procurement. Many of these try to correct the imbalances and prevent the discriminatory and arbitrary actions of government created by the past policy of apartheid. Many other provisions of the Constitution have an influence on public procurement, the most important ones being section 32, which provides for the right of access to information, and section 33, which provides for the right to administrative justice. Other constitutional requirements may also have an influence on public procurement, albeit indirectly. Such examples include the environmental rights provided for in section 24, the right to property in section 25, the right to housing provided for in section 25, the right to health care, food, water and security provided for in section 27, and most of the other rights contained in the Bill of Rights. The influence of these provisions and the Acts promulgated to give effect to these rights will not be discussed here as it does not fall within the scope of this study. The additional legislation which may have a direct influence on aspects of public procurement is cursorily discussed hereunder to enable an overall view of the legislation that needs to be taken account of when dealing with public procurement. As these Acts do not specifically deal with the attainment of the objectives or principles of public procurement, they are only mentioned and not discussed in detail.

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<sup>477</sup> S 217 of the Constitution.

(a) *Promotion of Access to Information Act*

The purpose of the *Promotion of Access to Information Act*<sup>478</sup> is to give effect to the constitutional right<sup>479</sup> of access to any information held by the state and any information held by another person that is required for the exercise or protection of any rights.<sup>480</sup> This enables all individuals involved in public procurement to have access to information which affects their rights in the process of public procurement. Individuals are now in a much better position to obtain information, to ensure that the correct procedures are followed, and to ensure that their rights are not infringed.<sup>481</sup> The provisions of PAIA have been dealt with extensively in academic literature and have often been the subject of decisions by the courts.<sup>482</sup>

Of interest is the decision in *MEC for Roads & Public Works, Eastern Cape & another v Intertrade Two (Pty) Ltd*,<sup>483</sup> where the Supreme Court of Appeal had the opportunity to deal with the right to information in the public procurement process. In the *Intertrade* decision, Intertrade had unsuccessfully requested certain information from the relevant MEC in regard to a tender. It brought an

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<sup>478</sup> Act 2 of 2000 which commenced on 9 March 2001.

<sup>479</sup> S 32 of the Constitution.

<sup>480</sup> S 32(1) (a) and (b) of the Constitution.

<sup>481</sup> See *Aquafund (Pty) Ltd v Premier, Province of the Western Cape* 1997 7 BCLR 907 (C); *Nisec (Edms) Bpk v Western Cape Tender Board* 1997 (3) BCLR 367 (1998 7 SA 228 (C)); *Water Engineering & Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council* [1999] 2 All SA 600 (W); *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd* [2003] 1 All SA 335 (W); *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* [1998] JOL 1475 (W) ([1997] 4 All SA 94 (W); 1997 10 BCLR 1429)); *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 1 SA 438 (SCA) ([2007] JOL 20719 (SCA)); *Barry Kotze Inspections CC t/a Bis in Joint Venture with Pugubye Investments (Pty) Ltd v City of Johannesburg* [2003] JOL 11747 (T); *SA Metal Machinery Co Ltd v Transnet Ltd* [1998] JOL 3984 (W); *Goodman Brothers (Pty) Ltd v Transnet Ltd* [1998] JOL 2357 (W); *MEC for Roads & Public Works, Eastern Cape v Intertrade Two (Pty) Ltd* [2006] JOL 17048 (SCA); *Traco BK v Minister of Justice* [1998] JOL 4063 (T).

<sup>482</sup> See for instance Devenish, Govender and Hulme *Administrative Law*; Hoexter and Lyster "Administrative Law". Currie and Klaaren *Benchbook*. With regard to public procurement in particular see Bolton *Law of Government Procurement* 242-250. See also *Unitas Hospital v Van Wyk* 2006 4 SA 436 (SCA); *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA); *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA); *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 6 SA 285 (SCA); *Claase v Information Officer, SAA (Pty) Ltd* 2007 5 SA 469 (SCA); *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 1 SA 66 (SCA); *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA); *Mittalsteel SA Ltd (previously known as Iscor Ltd) v Hlatshwayo* 2007 4 BCLR 386; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 1 SA 438 (SCA) ([2007] JOL 20719 (SCA)).

<sup>483</sup> [2006] JOL 17048 (SCA).

application for review and repeated its request in terms of the provisions of rule 53, read with rule 35(12), of the Uniform rules of court. The MEC refused to provide some of the information on the basis that Intertrade was restricted to access to the information falling within the ambit of the those rules. The MEC also contended that section 7(1) of PAIA precluded it from access to the information before the procedural remedies in terms of rule 53 read with rule 35(12) were exhausted. Section 7(1) reads as follows:

- This Act does not apply to a record of a public body or a private body if –
- (a) that record is requested for the purpose of criminal or civil proceedings;
  - (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
  - (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.

The court refrained from expressing any opinion on the question of whether or not the right to obtain information conferred by the rules and PAIA can be invoked contemporaneously. It held that section 2(1) of PAIA enjoins courts, when interpreting the provisions of the Act, to prefer any reasonable interpretation that is consistent with its objects over any alternative interpretation inconsistent therewith. The objects are generally to make information held by the state (and private bodies) accessible to the public to promote accountability. The rules themselves should, where reasonably possible, be interpreted in such a way as to advance, and not reduce, the scope of an entrenched constitutional right.<sup>484</sup> On the facts, the information was in any event requested before the institution of the proceedings, and section 7 could not operate as a bar to Intertrade's request.<sup>485</sup> The court expressed its displeasure with the MEC's conduct and reiterated that the purpose of the Constitution is to subordinate the organs of State to a new regimen of openness and fair dealing with the public.<sup>486</sup>

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<sup>484</sup> Par 18.

<sup>485</sup> Par 19.

<sup>486</sup> Par 21.

The grounds for refusal of access to information are one of the important issues in public procurement which are regulated by the Act. These grounds are listed in chapter 4 of Part 2 of PAIA.<sup>487</sup> They relate to:

- the protection of the privacy of natural persons;<sup>488</sup>
- records of the SARS;<sup>489</sup>
- commercial information of third parties;<sup>490</sup>
- confidential information of third parties;<sup>491</sup>
- safety of individuals and protection of property;<sup>492</sup>
- police dockets in bail proceedings, law enforcement and legal proceedings;<sup>493</sup>
- records privileged from production in legal proceedings;<sup>494</sup>
- defence, security and international relations;<sup>495</sup>
- the economic interest and financial welfare of the Republic and the commercial activities of organs of state;<sup>496</sup>
- research information;<sup>497</sup>
- operations of organs of state;<sup>498</sup>
- frivolous or vexatious requests;<sup>499</sup> and
- the public interest.<sup>500</sup>

In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & others*<sup>501</sup> Tetra wanted to appeal against the decision by the Central Procurement Committee established in terms of the now repealed *KwaZulu-Natal*

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<sup>487</sup> S 33-46.

<sup>488</sup> S 34.

<sup>489</sup> S 35.

<sup>490</sup> S 36.

<sup>491</sup> S 37.

<sup>492</sup> S 38.

<sup>493</sup> S 39.

<sup>494</sup> S 40.

<sup>495</sup> S 41.

<sup>496</sup> S 42.

<sup>497</sup> S 43.

<sup>498</sup> S 44.

<sup>499</sup> S 45.

<sup>500</sup> S 46.

<sup>501</sup> [2007] JOL 20719 (SCA).

*Procurement Act*.<sup>502</sup> The Appeal Tribunal was established in terms of the this Act. In order to do so, it requested certain documentation from the Central Procurement Committee. However, the relevant Act was silent on the obligation to deliver documentation, and the requested documentation was refused. The Supreme Court of Appeal held that fairness was inherent in the tender procedure. Its very essence was to ensure that before Government, national or provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation must be done of what is available and at what price, to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in section 217 of the Constitution permeate the procedure for awarding or refusing tenders.<sup>503</sup> It was also not necessary to rely on PAIA for the relief sought.<sup>504</sup> It was clear that in terms of section 217 of the Constitution read with the relevant Act a fair procurement system is contemplated which envisages that, from the time of the award, the appellant has the right of access to the information necessary to formulate its appeal properly.<sup>505</sup>

The court held that the problem of confidential information could be addressed by identifying and marking such information in the documentation as confidential. Tetra's attorney was prohibited from disclosing such parts to any other party, including Tetra, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to the documentation necessary for prosecuting its appeal, on the one hand, and third parties' rights to confidentiality, on the other.<sup>506</sup> The order relating to the confidential material in essence determined the following:

- On the copy of each document to be provided, the Central Procurement Committee must mark or record that part of the document which it considers to be confidential.

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<sup>502</sup> Act 3 of 2001.

<sup>503</sup> Par 9.

<sup>504</sup> Par 13.

<sup>505</sup> Par 15.

<sup>506</sup> Par 14. The court referred in this regard to *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W).

- Save for purposes of consulting with counsel or an independent expert, Tetra's attorney shall not disclose to any other party, including Tetra, any part of a document in respect of which the respondents claim confidentiality.
- Should Tetra dispute any claim to confidentiality and should the parties be unable to resolve such a dispute, Tetra shall on notice to the Central Procurement Committee and any person having an interest therein, have the right to apply to a judge in chambers for a ruling on the issue.
- Should circumstances require, either party shall have the right to apply to a judge in chambers for an amendment to the above orders.

Save for the provisions of PAIA the courts have on numerous occasions held that access to information is part of a fair procurement system as provided for in section 217 of the Constitution.<sup>507</sup> PAIA will, however, remain important for public procurement as it gives effect to the constitutional right of access to information and serves to give content to the provisions of section 217 of the Constitution.

(b) *Promotion of Administrative Justice Act*

The *Promotion of Administrative Justice Act*<sup>508</sup> was promulgated to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. It also gives effect to the right to be given written reasons for administrative decisions.<sup>509</sup> This Act is a powerful tool in the hands of all involved in public procurement, especially as most of the decisions taken in public procurement are administrative ones. All public procurement must comply with the Constitution, which demands a system which is fair, equitable, transparent, competitive and cost-effective. This can effectively be enforced by participants in public procurement through the mechanisms of the *Promotion of Administrative Justice Act*.

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<sup>507</sup> See for instance *MEC for Roads & Public Works, Eastern Cape v Intertrade Two (Pty) Ltd* [2006] JOL 17048 (SCA) and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 1 SA 438 (SCA) ([2007] JOL 20719 (SCA)).

<sup>508</sup> Act 3 of 2000.

<sup>509</sup> S 33.

The courts have on various occasions held that the public procurement process amounts to administrative action and that section 33 of the Constitution and PAJA, which gives content to section 33, are applicable to public procurement.<sup>510</sup> In particular the right to procedural fairness in the public procurement process is given effect to in this Act. This Act has been the subject of various academic writings and need not be dealt with in further detail.<sup>511</sup>

(c) *Sea Bird and Seals Protection Act*

In terms of the *Sea Bird and Seals Protection Act*,<sup>512</sup> the Minister of Economic Affairs may in his discretion buy, or without agency of the state tender board, cause products of sea birds or seals to be gathered and disposed of.<sup>513</sup> This legislation dates back to the pre-constitutional era and still refers to the state tender board. The regulations<sup>514</sup> issued in terms of this Act do not refer to public procurement. This Act will be subject to the provisions of section 217 of the Constitution, the PPPFA and the PFMA and procurement in terms of this Act will have to be done in accordance with the principles set out therein.

(d) *Housing Act*

In terms of the Constitution<sup>515</sup> everyone has the right to have access to adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The

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<sup>510</sup> See for instance the following SCA decisions: *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W); *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA); *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA); *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA); *Bullock v Provincial Government, North West Province* 2004 5 SA 262 (SCA); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA); *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 6 SA 220 (SCA).

<sup>511</sup> With regard to public procurement in particular, see Bolton *Law of Government Procurement* 209-227. See in general Currie and Klaaren *Benchbook*; Devenish *et al Administrative Law*; Hoexter and Lyster "Administrative Law".

<sup>512</sup> Act 46 of 1973.

<sup>513</sup> S 3(2)(c). This must be done in consultation with the Minister of Finance.

<sup>514</sup> GN R1933 of 22 October 1976; GN R1168 of 18 June 1982; GN 1857 of 16 September 1988; Proc 8 of 26 February 1993; and GN 1717 of 7 December 2007.

<sup>515</sup> S 26.

*Housing Act*<sup>516</sup> was promulgated for this purpose. National, provincial and local spheres of government must ensure housing development to address the housing needs of the population of South Africa.<sup>517</sup> In terms of this Act the Minister of Housing must for the purposes of such housing development determine a procurement policy which is consistent with Section 217 of the Constitution.<sup>518</sup> The responsible MECs of the different provinces must apply<sup>519</sup> a procurement policy in respect of housing development in accordance with the procurement policy determined by the Minister.

This Act specifically addresses the need for housing in South Africa. Procurement will play a significant role in the state's achieving its goal, as land needs to be obtained and houses built for this purpose. Although the Minister is empowered by the Act to determine the Department of Housing's own procurement policy, the provisions of section 217 still need to be complied with. In the Department's Social Housing Policy<sup>520</sup> it is stated as a guiding principle that the policy must operate within the provisions of the Constitution, the PFMA, the PPPFA and other statutory procurement prescripts.<sup>521</sup> The policy states that fair and equitable competition regarding access to Government resources must be instilled at all interfaces between organs of the State and the suppliers of housing goods and services, and that procurement in terms of the social housing policy must comply with these requirements.

This Act and the Housing Policy in effect reaffirm the principles of the existing public procurement regime already applicable to organs of state, and do not take the matter any further.

(e) *National Water Act*

The *National Water Act*,<sup>522</sup> regulates the use of water. It prescribes<sup>523</sup> that the minister may make regulations prescribing procedures for the allocation of water

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<sup>516</sup> Act 107 of 1997.

<sup>517</sup> S 2.

<sup>518</sup> S 3(2)(c)(A).

<sup>519</sup> S 7(3)(c).

<sup>520</sup> See DHS 2003 *Social Housing Policy* [www.housing.gov.za/](http://www.housing.gov.za/).

<sup>521</sup> At 7.

<sup>522</sup> Act 36 of 1998.

<sup>523</sup> S 26(1)(n).

by means of public tender or auction. No such regulations have been promulgated in terms of the Act. Should such regulations be issued they must comply with the principles contained in section 217 of the Constitution. The PFMA and PPPFA will still be applicable to any procurement by the department of Water Affairs.

(f) *Administrative Adjudication of Road Traffic Offences Act*

The *Administrative Adjudication of Road Traffic Offences Act*<sup>524</sup> provides<sup>525</sup> that the Road Traffic Infringement Agency<sup>526</sup> may appoint agents or contract with any person to perform functions vested in it in terms of the Act. The prescribed<sup>527</sup> procedures must be followed in respect of any such procurement or contract. No such procedures have been prescribed yet. Procurement in terms of this Act will still be subject to the ordinary public procurement regime.

(g) *National Forest Act*

The *National Forest Act*<sup>528</sup> provides<sup>529</sup> that the Minister need not implement a public tender process before entering into a community forestry agreement, despite any other law, unless he or she is of the opinion that such a process is necessary in any particular case. The purpose of a community forestry agreement is to enable a community to do anything in a State forest for which a license is required or to manage a State forest or part of it, whether alone or jointly with an organ of State.<sup>530</sup> This provision is aimed at redressing the imbalances of the past and to enable local communities to benefit from state-owned forests. The fact that tender procedures need not be followed does not necessarily conflict with the principles set out in section 217 of the Constitution. Each situation must be evaluated on its merits and substantive equality can be achieved through this provision.<sup>531</sup> The general principles relating to public procurement will still be applicable.

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<sup>524</sup> Act 46 of 1998.

<sup>525</sup> S 5.

<sup>526</sup> Established by s 3 of the Act.

<sup>527</sup> S 5(2).

<sup>528</sup> Act 84 of 1998.

<sup>529</sup> S 30(4).

<sup>530</sup> S 29(1).

<sup>531</sup> See the discussion on substantive equality in par 5.3.2 (c) above.

(h) *Correctional Services Act*

The *Correctional Services Act*<sup>532</sup> provides that the Minister may<sup>533</sup> subject to any law governing the award of contracts by the State, with the concurrence of the Minister of Finance and the Minister of Public Works, enter into a contract with any party to design, construct, finance and operate any prison or part of a prison established or to be established. The contract period in respect of the operation of a prison may not be for more than 25 years. The Act also provides<sup>534</sup> that all state departments must, as far as practicable, purchase articles and supplies manufactured by prisoner labour from the Department at fair and reasonable prices as determined by the Minister of Finance. This is an enabling provision specifically for the design, construction, financing or operation of any prison or part thereof. The ordinary laws applicable to public procurement, in particular the PFMA and PPPFA, must still be complied with.

(i) *Road Traffic Management Corporation Act*

The purpose of the *Road Traffic Management Corporation Act*<sup>535</sup> is to provide, in the public interest, for co-operative and co-ordinated strategic planning, regulation, facilitation and law enforcement in respect of road traffic matters. The above is applicable to national, provincial and local spheres of government. Its purpose is also to regulate the contracting out of road traffic services and to provide for the phasing in of private investment in road traffic.<sup>536</sup>

The Act provides<sup>537</sup> that any procurement under this Act must be undertaken in terms of the prescribed procedures.<sup>538</sup> The regulations<sup>539</sup> issued in terms of this Act do not contain any regulations with regard to procurement. The provisions of the PPPFA, the PFMA, the MFMA, and the regulations issued thereunder, will be applicable to any procurement in terms of this Act.

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<sup>532</sup> Act 111 of 1998.

<sup>533</sup> S 103.

<sup>534</sup> S 133(1).

<sup>535</sup> Act 20 of 1999.

<sup>536</sup> Preamble and s 2.

<sup>537</sup> S 43.

<sup>538</sup> These procedures must be prescribed in terms of the regulations issued in terms of s 48(1) of the Act.

<sup>539</sup> GN R1380 of 13 December 2001 and GN R386 of 30 April 2007.

(j) *National Land Transport Transition Act*

The purpose of the *National Land Transport Transition Act*<sup>540</sup> is to provide for the transformation and restructuring of the national land transport system of the Republic.<sup>541</sup> The question of procurement is extensively dealt with in the Act.

It provides<sup>542</sup> that a transport authority, in awarding contracts for goods and services, must apply a system which is fair, equitable, transparent, competitive and cost effective. It must be in accordance with the PPPFA and the relevant provisions of the *Local Government Transition Act*.<sup>543</sup> These Acts will apply with the changes required by the context. The Act also stipulates<sup>544</sup> that the Minister must encourage efficiency and entrepreneurial behaviour on the part of transport operators in the operation of public transport services and encourage them to tender competitively for contracts and concessions.

Transport authorities may, subject to the legislation applicable to local government, call for tenders for public transport services to be operated in terms of commercial service contracts and subsidised service contracts, prepare tender specifications and documents for that purpose, evaluate the tenders received, and award of tenders.<sup>545</sup> Only a provincial department, a transport authority and a core city may enter into a subsidised service contract with a public transport operator. This may be done only if the service to be operated in terms thereof has been put out to public tender in accordance with a procedure prescribed by or in terms of a law of the province, the tender has been awarded by the tender authority in accordance with that procedure, and the contract is entered into with the successful tenderer.<sup>546</sup>

The Minister must prescribe requirements for tender and contract documents to be used for subsidised service contracts, the use of which will be binding on contracting authorities, unless the Minister agrees that an authority may deviate from the requirements in a specific case. He must also provide model tender and

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<sup>540</sup> Act 22 of 2000.

<sup>541</sup> Preamble and s 2.

<sup>542</sup> S 13(4).

<sup>543</sup> Act 209 of 1993.

<sup>544</sup> S 5(1)(h)(iii).

<sup>545</sup> S 10(13)(f).

<sup>546</sup> S 47(2).

contract documents for subsidised service contracts as a requirement for contracting authorities, who may not deviate therefrom unless this is agreed to by the Minister.<sup>547</sup> The Minister may prescribe the responsibilities and duties of transport authorities concerning financial and physical matters, which may include procedures and requirements for the procurement of goods and services.<sup>548</sup>

(k) *Construction Industry Development Board Act*

The purpose of the *Construction Industry Development Board Act*<sup>549</sup> is to provide for the establishment of the Construction Industry Development Board, which must promote an integrated strategy for the reconstruction, growth and development of the construction industry.<sup>550</sup> To achieve this, the Act provides *inter alia* that the duties of the Board are to provide strategic leadership in procurement reform in the construction industry.<sup>551</sup> It also has to promote standardisation and uniformity in procurement documentation, practices and procedures,<sup>552</sup> best practice and value for money with regard to design,<sup>553</sup> and international competitiveness.<sup>554</sup> Regulations have already been issued in terms of this Act.<sup>555</sup> In terms of regulation 24 every client or employer who solicits competitive tenders in the construction industry must publish that invitation to tender on the official Construction Industry Development Board website. The solicitation must be in accordance, if applicable, with the Regulations in terms of the *Public Finance Management Act* or the Municipal Supply Chain Management Regulations and the best practice note Standard for Uniformity in Construction Procurement.<sup>556</sup>

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<sup>547</sup> S 47(4). GN R1329 of 6 December 2000, issued in terms of the Act, deals with some of these matters.

<sup>548</sup> S 13(5) and 13(6), subject to s 13(4).

<sup>549</sup> Act 38 of 2000.

<sup>550</sup> Preamble and s 4.

<sup>551</sup> S 5(1)(a)(vii).

<sup>552</sup> S 5(1)(a)(viii).

<sup>553</sup> S 5(1)(a)(x).

<sup>554</sup> S 5(1)(a)(xi).

<sup>555</sup> GN 692 of 9 June 2004. Best Practice notes have also been issued, namely BN 63 of 9 June 2004 (Construction Procurement Best Practice), BN 33 of 11 March 2005 (Best Practice Labour-Based Methods and Technologies for Employment Intensive) and BN 94 of 18 August 2006 (The Standard for Uniformity in Construction Procurement).

<sup>556</sup> BN 94 of 18 August 2006.

Although the Board can only promote its objectives it has persuasive value, especially in that it keeps a national register of contractors that comply with the regulations and best practice notes.<sup>557</sup> As procurement is one of the major contributors to the economy of the construction industry this Act endeavours to assist with reform in this sector of the economy.<sup>558</sup> It will have a major influence also on public procurement in this sector as it is partly designed to promote the uniform application of policies prescribed by the board throughout all spheres of Government.<sup>559</sup>

(l) *Disaster Management Act*

The *Disaster Management Act*<sup>560</sup> provides<sup>561</sup> that in the case of a national disaster that has been so declared, the Minister may make regulations, or issue directions, or authorise the issue of directions concerning *inter alia* emergency procurement procedures. Each province must prepare<sup>562</sup> a disaster management plan for the province as a whole, and such a management plan must provide for the procurement of essential goods and services.<sup>563</sup> In the event of a provincial disaster, the premier of a province, after a state of disaster has been declared, may make regulations or issue directions or authorise the issue of directions concerning emergency procurement procedures.<sup>564</sup> Each municipality must prepare<sup>565</sup> a disaster management plan for its area. Such a disaster management plan for a municipal area must contain contingency plans and emergency procedures to be implemented in the event of a disaster, providing for the procurement of essential goods and services.<sup>566</sup> The municipality may declare a local disaster, and if such disaster has been declared it may make

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<sup>557</sup> Reg 5(2)(b).

<sup>558</sup> The provisions in the regulations and best practice notes are very detailed and provide for standards and a code of conduct to be adhered to in the whole procurement process. Because of the extent thereof they are not discussed here, but they do merit a more detailed discussion.

<sup>559</sup> S 5(3)(a).

<sup>560</sup> Act 57 of 2002.

<sup>561</sup> S 27(2)(l).

<sup>562</sup> S 39.

<sup>563</sup> S 39(2)(k)(iii).

<sup>564</sup> S 41(2)(i).

<sup>565</sup> S 53.

<sup>566</sup> S 53(2)(k)(iii).

bylaws or issue directions or authorise the issue of directions concerning emergency procurement procedures.<sup>567</sup>

The Minister has to date not issued regulations regulating emergency procurement procedures. It is clear that situations may arise where the ordinary methods of procurement may not be adequate to address emergency situations, usually because of time constraints, as normal procurement methods are time consuming and their use would defeat the purpose of the procurement. However, such situations do present an opportunity for fraud, corruption and the misuse or abuse of the situation. It is essential to regulate emergency procurement to combat possible abuse.

*(m) Armaments Corporation of South Africa, Limited, Act*

The *Armaments Corporation of South Africa, Limited, Act*<sup>568</sup> provides<sup>569</sup> that the corporation must establish a system for tender and contract management in respect of defence material and, under certain circumstances,<sup>570</sup> the procurement of commercial material. The Act establishes the defence industrial participation programme management system.<sup>571</sup> The Act further provides that a member of the board of the corporation must disclose to the board any direct or indirect interest that such member, or his/her spouse, partner or family member, may have in any matter relating to the acquisition or procurement activities of the corporation.<sup>572</sup> An employee of the corporation or a member of a committee must disclose to the chief executive officer any direct or indirect interest that such an employee or member, or his or her spouse, partner or family member, may have in any matter relating to the acquisition or procurement activities of the corporation.<sup>573</sup>

In terms of section 17 of the Act the Armaments Corporation must provide the Secretary for Defence with a system, as required by section 38 (1)(a)(iii) of the

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<sup>567</sup> S 55(2)(l).

<sup>568</sup> Act 51 of 2003.

<sup>569</sup> S 4(2)(e).

<sup>570</sup> If required in a service level agreement or if requested in writing by the Secretary for Defence.

<sup>571</sup> S 4(2)(j).

<sup>572</sup> S 14.

<sup>573</sup> S 14(2).

PFMA, to evaluate all *defence matériel* acquisitions prior to a final decision's being made on such an acquisition. Such a system must be fair, equitable, transparent, competitive and cost-effective, and must comply with all relevant national legislation. It must also be supported by a tender and contract management system.

It is to be expected that special arrangements would be made in public procurement for the acquisition of goods and services relating to issues of security and defence. This falls outside the scope of this study and this issue will not be dealt with in more detail. Because of the possibility of fraud, corruption and the abuse of the element of secrecy, it is necessary to pertinently ensure that the system for such procurement minimises the possibility of abuse.

(n) *Broad Based Black Economic Empowerment Act*

The *Broad Based Black Economic Empowerment Act*<sup>574</sup> provides<sup>575</sup> for the economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio economic strategies. These strategies include, but are not limited to preferential procurement. The minister may in order to promote<sup>576</sup> the purpose of the Act, by notice in the Government Gazette issue codes of good practice on black economic empowerment (BEE). Such a notice may include qualification criteria for preferential purposes for procurement and other economic activities.<sup>577</sup> Every organ of state and public entity must take into account, and as far as reasonably possible apply, any relevant code of good practice issued in terms of this Act in developing and implementing a preferential procurement policy.<sup>578</sup> Qualification criteria for the sale of state-owned enterprises<sup>579</sup> and criteria for entering into partnerships with the private sector must be developed.<sup>580</sup>

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<sup>574</sup> Act 53 of 2003, hereinafter referred to as the BBEE Act. Black economic empowerment will be referred to as BEE.

<sup>575</sup> S 1.

<sup>576</sup> S 9(1).

<sup>577</sup> S 9(1)(b).

<sup>578</sup> S 10(b).

<sup>579</sup> S 10(c).

<sup>580</sup> S 10(d).

The Minister has already issued Codes of Good Practice on Black Economic Empowerment.<sup>581</sup> He has also issued Charters on Black Economic Empowerment for the financial,<sup>582</sup> property,<sup>583</sup> construction<sup>584</sup> and aviation sub-sectors<sup>585</sup> and the media, advertising and communication sectors.<sup>586</sup> In the Codes of Good Practice the preferential procurement element of BEE and the general principles for measuring preferential procurement are specifically dealt with.<sup>587</sup> Specific provision is also made in all five of the charters already issued for including BEE targets in procurement policies. The preferential treatment will still have to be in accordance with the PPPFA and the general principles of section 217 of the Constitution. The BBBEE Act is specifically designed to address the legacies of the past through the medium of public procurement. Public procurement is used by the government in this regard to achieve a collateral objective, namely that of rectifying the imbalances created by the past apartheid policies.

(o) *The Prevention and Combating of Corrupt Activities Act*

The *Prevention and Combating of Corrupt Activities Act*<sup>588</sup> in general prescribes<sup>589</sup> offences in respect of corrupt activities.<sup>590</sup> It also contains specific provisions relating to public procurement.<sup>591</sup> Amongst other issues, these relate to the invitation,<sup>592</sup> award<sup>593</sup> and withdrawal<sup>594</sup> of tenders. The Act also makes it an offence for any public officer to acquire any private interest in a contract, agreement, or investment emanating from or connected with, or which is made on account of a public body in which he or she is employed.<sup>595</sup>

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<sup>581</sup> GN 112 of 9 February 2007 and GN 218 of 8 February 2008.

<sup>582</sup> GN 110 of 9 February 2007.

<sup>583</sup> GN 1248 of 5 October 2007.

<sup>584</sup> GN 111 of 3 February 2007.

<sup>585</sup> GN 1578 in GG 31744 of 24 December 2008.

<sup>586</sup> GN 924 in GG 31371 of 29 August 2008

<sup>587</sup> GN 112 of 9 February 2007, Code series 500.

<sup>588</sup> Act 12 of 2004.

<sup>589</sup> S 13.

<sup>590</sup> S 3.

<sup>591</sup> S 13.

<sup>592</sup> S 13(1)(a)(ii)

<sup>593</sup> S 13(1)(a)(i).

<sup>594</sup> S 13(1)(a)(iii).

<sup>595</sup> S 17.

The Act provides criminal remedies in the case of the abuse of the procurement regime, and provides criminal sanctions against both the public official and the private individual who contravene its provisions. This is an important tool to ensure the integrity of the procurement regime.

(p) *Public Audit Act*

The office of the Auditor General is provided for in section 181(e) of the Constitution and is a constitutional institution. The *Public Audit Act*<sup>596</sup> provides for the financial responsibilities of the deputy auditor,<sup>597</sup> who must take all reasonable steps to ensure<sup>598</sup> an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective. The deputy auditor must also ensure such a system<sup>599</sup> for properly evaluating all major capital projects prior to a final decision on the project.

The importance of this Act does not relate to the above provisions only. The Auditor-General, as the independent external auditor of all national and provincial state departments and municipalities and any other institutions or accounting entities required by national or provincial legislation to be audited by the Auditor-General,<sup>600</sup> plays an important role in ensuring that the provisions of the PFMA and the MFMA are complied with by the relevant institutions.<sup>601</sup> As public procurement is regulated by the stipulated Acts, part of the functions of the Auditor-General is to audit public procurement. The function of the Auditor-General is crucial to ensuring the integrity of the public procurement process. In particular, the Auditor-General may, in addition to the report on compliance with the PFMA, MFMA and other legislation pertaining to financial matters,<sup>602</sup> report on whether or not the auditee's resources were procured economically and utilised efficiently and effectively.<sup>603</sup>

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<sup>596</sup> Act 25 of 2004.

<sup>597</sup> S 43.

<sup>598</sup> S 43(3)(b)(iii).

<sup>599</sup> S 43(3)(b)(IV).

<sup>600</sup> S 4(1).

<sup>601</sup> S 4(2).

<sup>602</sup> S 20(2)(b).

<sup>603</sup> S 20(3).

(q) *Government Immovable Asset Management Act*

The *Government Immovable Asset Management Act*<sup>604</sup> was assented to on 22 November 2007 but the date of its commencement was only 30 April 2009. The purpose of this Act is to provide for a uniform framework for the management of an immovable asset that is held or used by a national or provincial department. It also has to ensure the coordination of the use of an immovable asset with the service delivery objectives of a national or provincial department, and has to issue guidelines and minimum standards in respect of immovable asset management by a national or provincial department.<sup>605</sup>

The importance of this Act is that it provides that when an immovable asset is acquired or disposed of by organs of state, best value for money must be realised.<sup>606</sup> “Value for money” is defined<sup>607</sup> to mean, wherever possible, the optimisation of the return on investment in respect of an immovable asset in relation to functional, financial, economic and social return. It is not only financial and economic factors that are relevant for “value for money” but also functional and social returns. The inclusion of the element of social return is an indication that it is possible to take into account poverty, BEE and similar factors, in such transactions. Environmental friendly and energy saving endeavours may probably be thought of as leading to functional returns. The principle of including functional and social returns in “value for money” is sound and supportive of the public procurement principles contained in section 217 of the Constitution.

#### 5.3.7.2 Conclusion

With regard to public procurement, the legislation referred to above remains subject to section 217 of the Constitution. This entails that all procurement must be fair, equitable, transparent, competitive and cost-effective. In general the regulations are also subject to the provisions of the PFMA, the MFMA and the PPPFA, but address issues pertinent to the subject matter they regulate. Many of the acts address the social and economic imbalances in South African society

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<sup>604</sup> Act 19 of 2007.

<sup>605</sup> Preamble and s 3.

<sup>606</sup> S 5(1)(e).

<sup>607</sup> S 1.

today and seek to promote the advancement of members of previously disadvantaged groups through public procurement. Some of the Acts, in particular the *Public Audit Act*<sup>608</sup> and the *Prevention and Combating of Corrupt Activities Act*,<sup>609</sup> are supportive of the principles of public procurement, are designed to combat the abuse of the system, and serve to ensure the integrity of the public procurement regime.

The *Disaster Management Act*<sup>610</sup> is a helpful tool to ensure the effectiveness of the procurement system in cases of emergency. As the normal procurement procedures need not be followed in such instances the possibility of abuse is real. The sooner proper regulations in terms of the Act to regulate emergency procurement are issued, the better.

### 5.3.8 Collateral objectives

#### 5.3.8.1 Introduction

Although the primary function of public procurement is to obtain value for money in the procurement of goods and services, it is accepted that public procurement may be used by government as a means to further its socio-economic aims such as job creation, industrialisation, and green procurement.<sup>611</sup>

In the Green Paper on Public Sector Procurement (hereinafter referred to as the “Green Paper”) it was stated that public procurement must be used to address socio-economic reform.<sup>612</sup> According to the Green Paper this requires that public

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<sup>608</sup> Act 25 of 2004.

<sup>609</sup> Act 12 of 2004.

<sup>610</sup> Act 57 of 2002.

<sup>611</sup> Arrowsmith “National and International Perspectives” 3; Arrowsmith *Public and Utilities Procurement* 6-7; Bolton 2007 *PPLR* 36-67; Watermeyer 2004 *PPLR* 30-55; Watermeyer 2000 *PPLR* 226-250; McCrudden “Social Policy Issues” 219; De la Harpe 2008 *Spec Juris* 53- 74.

<sup>612</sup> No White Paper was issued. The Green Paper on Public Sector Procurement can be accessed at Polity 2009 *Green Papers* [www.polity.org.za/](http://www.polity.org.za/). The Government’s aim is to transform the public procurement process in order to achieve its socio-economic objectives within the ambit of good governance. In the Green Paper on Public Sector Procurement it was set out as follows:

“1.4.1. Socio-economic objectives:

- To seek value for money on behalf of all tax payers.
- To eliminate corruption in the procurement process.
- To make the public procurement process accessible to all by simplifying the process, and by encouraging fairness and transparency.

sector procurement must also be structured in a manner that promotes economic reconciliation and competitiveness. The structuring of contracts must be such that the participation of small, medium and micro enterprises is maximised. This needs to be done without compromising time, cost and quality in public procurement. The assessment of value for money must not be based on lowest cost alone. It must also include socio-economic criteria. Targets have to be set and delivery systems designed to facilitate the development of small, medium and micro enterprises, particularly those owned and operated by previously disadvantaged persons. This must be done in order to increase the volume of work available to the poor and to generate income for the marginalised sectors of society. Affirmative action needs to address the marginalisation from economic, political and social power of black people, women and rural communities, and to empower communities and individuals from previously disadvantaged sectors of society.<sup>613</sup>

The Constitution<sup>614</sup> specifically provides for collateral objectives to be achieved through public procurement. This has to be done in accordance with a framework enacted in terms of national legislation.<sup>615</sup> The PPPFA was enacted to provide such a framework. In other legislation and government programmes also, provision is made to achieve collateral objectives through public procurement. They generally relate to the advancement of previously disadvantaged persons and communities.<sup>616</sup>

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- To encourage greater competition in the public procurement process through the creation of an enabling environment for small, medium and micro enterprises while retaining quality and standards.
  - To support participation of a broadened range of enterprises with appropriate inland revenue registration and acceptable labour practices in order to ensure sustainability.
  - To revise the concept of value-for-money in the procurement process in terms of the new objectives which are to be applied.
  - To set out targeting policies in order to create opportunities for the broadest possible participation in the public procurement process.
  - To increase the volume of work available to the poor and enhance the income generation of marginalised sectors of society.”

<sup>613</sup> Green Paper part 3.

<sup>614</sup> S 217(2).

<sup>615</sup> S 217(3).

<sup>616</sup> The most important being the *Broad Based Black Economic Empowerment Act 53 of 2003*; the *Petroleum Products Act 120 of 1977*; the *Industrial Development Act 22 of 1940*; the *Armaments Corporation of South Africa, Limited, Act 51 of 2003*; the *Construction Industry Development Board Act 38 of 2000* and the National Industrial

Sections 217(2) and (3), the PPPFA, the National Industrial Participation Programme, the BBBEE Act and Public Private Partnerships will be discussed hereunder.

(a) *Section 217(2) of the Constitution*

Section 217(2) reads as follows:

Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

In section 217(2) of the Constitution collateral objectives are specifically provided for. It makes provision for procurement policies providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. The framework for such policies must be provided for in national legislation.<sup>617</sup>

It is important to note that the Constitution does not make the use of the prescribed collateral objectives compulsory. It provides that the principles of a system that is fair, equitable, transparent, competitive and cost-effective do not prevent organs of state from implementing the relevant procurement policies.<sup>618</sup> This ensures a flexible approach regarding the prescribed collateral objectives and enables government to change its procurement policies in line with changed circumstances. It also does not mean that the general principles applicable to public procurement may be ignored.<sup>619</sup> Both equitability and fairness, for instance, are principles applicable to public procurement which allow the use of public procurement to address the legacies of the past, in that substantive fairness and equitability is sought.<sup>620</sup> It is further provided that such procurement

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Participation Programme.

<sup>617</sup> S 217(2) of the Constitution.

<sup>618</sup> Bolton *Law of Government Procurement* 260-266. Watermeyer 2000 *PPLR* 226.

<sup>619</sup> Bolton *Law of Government Procurement* 263.

<sup>620</sup> See the discussion of fairness and equitability in par 5.3.2(b) and (c) above.

policies must be implemented in terms of a framework provided for in national legislation. The PPPFA provides such a framework and that organs of state must implement a preferential procurement policy.<sup>621</sup> However, this Act is limited to addressing the issues raised in section 217(2)(b).

A question which arises is whether sections 217(2)(a) and 217(2)(b), which are joined by the word “and”, should be read disjunctively or not. Section 217(2)(a) provides for categories of preference in the allocation of contracts. Section 217(2)(b) refers to the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. It is submitted that the two subsections should be read disjunctively. The categories in sub-section (1) ought not to be limited and should include environmental and socio-economic issues, for instance. This provision must be read and interpreted with reference to other provisions of the constitution, for example those providing for environmental rights and the right to housing.<sup>622</sup> In principle, environmental factors ought to be a collateral objective that should be pursued through public procurement and should, as a category, be afforded preference in public procurement.

In view of South Africa’s history it is to be expected that the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination would be specifically mentioned with regard to public procurement. There seems to be no reason why a limited interpretation should be given to section 217(2) by interpreting the word “and” between the two sub-sections conjunctively. Section 217(2) should be interpreted to allow for two possibilities, namely for procurement policies providing for categories of preference, as well as for procurement policies providing for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. A combination of the two can also be operationalised.

The only legislation that has been enacted as provided for in section 217(3) is the PPPFA. At this stage it is not possible for organs of state to allow any

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<sup>621</sup> S 2(1).

<sup>622</sup> See Currie and De Waal *Bill of Rights Handbook* 156 with regard to the interpretation of constitutional provisions. See also Bolton 2008 *JSAL* 31.

categories of preference in the allocation of contracts save as provided for in the PPPFA.

(b) *Preferential Procurement Policy Framework Act*

The PPPFA provides a framework within which preferential procurement policies of organs of state must be implemented.<sup>623</sup> The definition of “organs of state” in the PPPFA<sup>624</sup> differs from the definition of “organs of state” in the Constitution,<sup>625</sup> where the definition is broader than that of the PPPFA. Parastatals like Eskom and Telkom, although organs of state in terms of section 239 of the Constitution, are not covered by the definition in the PPPFA.<sup>626</sup>

The Constitution<sup>627</sup> does not make preferential procurement compulsory. The PPPFA in section 2(1) provides that organs of state must determine and implement their preferential procurement policies within the framework of the Act. Bolton is of the opinion that this implies that organs of state are obliged to implement a preferential procurement policy, as opposed to only a procurement policy which does not include the collateral goals provided for in section 217(2).<sup>628</sup> If regard is had to the definition of “preferential procurement policy” in the Act, namely a procurement policy contemplated in section 217(2) of the Constitution (which is not compulsory) and the wording of the section, this provision is open to a different interpretation. It could be interpreted to mean that only in the event of an organ of state’s wishing to determine and implement such a policy must it be done within the framework of the Act. The word “must” does not necessarily imply that organs of state are obliged to implement such policies, but only that if they wish to do so they must do so in terms of the Act.

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<sup>623</sup> The Act gives effect to the provisions of s 217(2) and (3) of the *Constitution of the Republic of South Africa*, 1996.

<sup>624</sup> S 1(iii).

<sup>625</sup> S 239.

<sup>626</sup> Bolton *Law of Government Procurement* 267. *Contra Fidelity Springbok Security Services (Pty) Ltd v SAPO Ltd* [2004] JOL 13215 (T).

<sup>627</sup> S 217(2) states that organs of state are not prevented from implementing such policies.

<sup>628</sup> Bolton *Law of Government Procurement* 269.

The framework provided by the PPPFA requires that a preference point system must be followed.<sup>629</sup> For contracts above R500 000<sup>630</sup> a maximum of 10 preference points may be awarded for specific goals.<sup>631</sup> The lowest acceptable tender is awarded 90 points for price. Contracts below R500 000 can be awarded a maximum of 20 preference points for a specific goal and 80 points for price.<sup>632</sup> These goals may include<sup>633</sup> contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability. They may further include implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994. The goals are provided for in the regulations issued in terms of the PPPFA.<sup>634</sup> These goals must, however, be clearly specified.<sup>635</sup> No preferencing outside of the point system provided for in the Act is permitted.<sup>636</sup>

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<sup>629</sup> S 2(1)(a).

<sup>630</sup> This is provided for in the Preferential Procurement Regulations RGN 725/22549/3 dated 10 August 2001 issued in terms of s 5 of the *Preferential Procurement Policy Framework Act 5 of 2000*. In *Barry Kotze Inspections CC t/a Bis in Joint Venture with Pugubye Investments (Pty) Ltd v City of Johannesburg* 2004 3 BCLR 274 (T) it was decided that the amount must be an estimate.

<sup>631</sup> S 2(1)(b)(i).

<sup>632</sup> S 2(1)(b)(ii).

<sup>633</sup> S 2(1)(d).

<sup>634</sup> GN R725 published in GG 22549 of 10 August 2001. They are set out in reg 16(3):

- “(a) The promotion of South African owned enterprises;
- (b) The promotion of export orientated production to create jobs;
- (c) The promotion of SMMEs;
- (d) The creation of new jobs or the intensification of labour absorption;
- (e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
- (f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
- (g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
- (h) The promotion of enterprises located in rural areas;
- (i) The empowerment of the work force by standardising the level of skill and knowledge of workers;
- (j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
- (k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations”.

<sup>635</sup> S 2(1)(d).

<sup>636</sup> See the unreported decision of de Villiers J in *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T).

Acceptable tenders which are higher in price than the lowest tender score fewer points on a pro-rata basis calculated on the tender prices in relation to the lowest acceptable tender, in terms of a prescribed formula. The contract must be awarded to the tenderer who scores the highest points unless there are objective criteria<sup>637</sup> in addition to the specific goals, which justify the award to another tenderer.<sup>638</sup> An “acceptable tender” is defined to mean any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.<sup>639</sup> It will thus be possible to prescribe environmental or similar criteria in the specifications and conditions of tender, but no preference may be allowed if that is not done within the framework of the PPPFA.

The question as to what “objective criteria” means has been dealt with in the matter of *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others*<sup>640</sup> The court held with regard to section 2(1)(f) of the PPPFA:

Paragraph (f), in my view, contemplates objective criteria *over and above* those contemplated in paragraphs (d) and (e). The criteria contemplated in paragraphs (d) and (e) would, if the specific goal is clearly specified in the invitation to submit a tender, be the basis for the award of a maximum of ten points. To my mind, the legislature therefore envisaged that over and above the objective criteria contemplated in paragraphs (d) and (e), there might be objective criteria justifying the award to another tenderer other than the tenderer who had scored the highest points. To put it differently, the legislature did not intend that criteria contemplated in paragraphs (d) and (e), should be taken into account twice, firstly in determining what score was achieved out of ten in respect of the criteria contemplated in these paragraphs and, secondly, in taking into account those selfsame criteria to determine whether objective criteria justified the award of the contract to another tenderer than the one who had scored the highest points.<sup>641</sup>

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<sup>637</sup> Objective criteria are not defined in the Act.

<sup>638</sup> S 2(1)(f). See also *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 4 SA 346 (T).

<sup>639</sup> S 1(i). See also *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* [2004] 3 All SA 715 (C) and *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] JOL 15567 (SCA).

<sup>640</sup> [2002] 3 All SA 336 (T). This decision was concurred with in *RHI Joint Venture v Minister of Roads & Public Works, Eastern Cape* [2003] JOL 10790 (Ck) par 32.

<sup>641</sup> *Id* par 52.

In *First Base Construction CC v Ukhahlamba District Municipality & others*<sup>642</sup> the court held that experience and expertise were objective criteria which justified the award to a tenderer who did not obtain the highest score in terms of the prescribed formula. In *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and others*<sup>643</sup> the court held that the fact that a tenderer was already engaged in work with the department was an objective criterion that could be taken into account when awarding a tender, in order to prevent a monopoly.

The definition of who qualifies as a historically disadvantaged individual is essential to preferential procurement.<sup>644</sup> A historically disadvantaged individual is a South African citizen who is female or has a disability, or had no franchise in national elections, due to the apartheid policy that had been in place prior to the introduction of the *Constitution of the Republic of South Africa, 1983*<sup>645</sup> or the *Constitution Act, 1993*.<sup>646</sup> Although preferential treatment is given to people who were unable to vote under the apartheid regime, the regulation can be interpreted to mean that no black person who was under the voting age of 18 in 1994 can claim such status in terms of race.<sup>647</sup> A person who became a South African citizen after the interim constitution came into effect is not regarded as a historically disadvantaged individual.<sup>648</sup>

An organ of state may on request be exempted from the provisions of the PPPFA if it is in the national or public interest, or if the likely tenderers are international suppliers.<sup>649</sup>

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<sup>642</sup> [2006] JOL 16724 (E) par 29 and 30.

<sup>643</sup> [2005] JDR 1033 (HC).

<sup>644</sup> A historically disadvantaged individual is defined in terms of s 1(h) of the regulations issued in terms of s 5 of the *Preferential Procurement Policy Framework Act 5 of 2000*.

<sup>645</sup> Act 110 of 1983.

<sup>646</sup> Act 200 of 1993.

<sup>647</sup> Bolton *Law of Government Procurement* 283. The ambiguity can easily be avoided by amending the regulation.

<sup>648</sup> Bolton *Law of Government Procurement* 283. It includes people who are females, have a disability and who would not have had the franchise in elections under the apartheid regime. It is understandable that people who would not have had franchise in elections are excluded. It is not clear why people with a disability and females are also excluded.

<sup>649</sup> S 3 of Act 5 of 2000.

There are discrepancies between the PPPFA and the regulations issued in terms thereof. Despite the fact that the Act does not make provision for such an exception,<sup>650</sup> the regulations stipulate<sup>651</sup> that a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points. The regulations provide for the allowance of points for functionality and price,<sup>652</sup> whereas the Act provides only for price.<sup>653</sup> It is also not clear in either the Act or regulations what the position is, should tenders be received that are above and below R500 000.<sup>654</sup> The fact that each department or institution is allowed to develop its own procurement policy leads to a vast array of different policies. It is clearly necessary to allow for individual circumstances, but more detailed guidelines which are generally applicable, save when expressly varied, would serve to standardise many of the policies.

The PPPFA sets out the framework within which historically disadvantaged persons should be given preference and how the Reconstruction and Development Programme should be achieved in public procurement. The problem with the Act is that it may lead to a mechanical evaluation of tenders based merely on the points system. This is especially true because of the peremptory provision in section 2 that the tenderer with the highest points must be awarded the tender. Although it is provided that the above is the case unless other objective criteria exist, in addition to the specific goals which justify the award to another tenderer, this qualification is not defined and no indication of what such criteria could be is provided in the Act or the regulations. A further problem with the Act is that it does not specifically provide for obvious categories of preference that ought to be allowed, for instance those of environmental and energy issues.<sup>655</sup> Matters such as whole-

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<sup>650</sup> The Act stipulates in s 2(1)(f)(f) that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in par (d) and (e) justify the award to another tenderer.

<sup>651</sup> Reg 9.

<sup>652</sup> Reg 8, in particular subreg (4) and (5).

<sup>653</sup> S 2(1)(b).

<sup>654</sup> S 10(1) of the regulations provides that in the event that in the application of the 80/20 preference point system all tenders received exceed the estimated Rand value of R500 000, or in the application of the 90/10 preference point system all tenders received are equal to or below R500 000, the tender invitation must be cancelled.

<sup>655</sup> Bolton *Law of Government Procurement* 281-282 argues that the PPPFA is open for an interpretation that other goals such as environmental goals may be pursued in terms of the

life costs, experience, efficiency, the transfer of technology, capacity building and other collateral objectives (save for preference in terms of the Act) receive too little attention.

The procurement regime, including the PPPFA, is not a simple one and requires one to have a fair knowledge of the principles involved and the applicable legislation and regulations to properly implement it. The lack of capacity in the procuring divisions of organs of state may undermine the proper implementation of this Act.

(c) *National Industrial Participation Programme*

One of the programmes introduced by government to promote its socio-economic policies is the National Industrial Participation Program.<sup>656</sup> This programme was introduced in terms of Cabinet Memorandum 10/1996. It falls under the auspices of the Department of Trade and Industry. No enabling legislation for this programme exists. The regulations issued in terms of the PFMA do, however, provide that compliance with the National Industrial Participation Programme is a precondition before a tender can be evaluated.<sup>657</sup> This indirectly provides some legal basis for its existence. One would expect a proper legal basis to be provided for such an important and far-reaching programme in an enabling Act. In the case of defence procurement, the *Armaments Corporation of South Africa, Limited, Act*<sup>658</sup>

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Act.

<sup>656</sup> Industrial Participation (IP) became obligatory on 1 September 1996 in terms of Cabinet Memorandum 10/1996. Cabinet endorsed the IP Policy and its operating guidelines on 30 April 1997. Details of the programme can be found at DTI 2009 *NIPP* [www.dti.gov.za/](http://www.dti.gov.za/). Industrial Participation Programmes have been used by many countries in the past to offset major state purchases by requiring a *quid pro quo* of the percentage value of the order to be reinvested in some way in the purchasing country's economy. This allows the purchasing country to moderate the impact of large purchases in foreign dominated currencies, stimulate local industries, develop new industries, receive assistance in finding new markets, and benefit from skills and technology transfers. IP can also strengthen national industrial development strategies, for instance in directing investment into areas where risk may be slightly higher because the terrain is new or uncharted. This can have the further benefit of diversifying the country's manufacturing sector in terms both of products and of spatial distribution.

<sup>657</sup> Reg 16A10 provides that an accounting officer or accounting authority must obtain clearance for a recommended bidder from the Department of Trade and Industry in respect of contracts which are subject to the National Industrial Participation Programme of that Department.

<sup>658</sup> Act 51 of 2003, s 4(1)(a) and 4(2)(j).

provides for the establishment of a defence industrial participation programme management system.

In essence the National Industrial Participation Programme entails that in prescribed instances importers must undertake to invest in the Republic to be eligible to tender. All public purchases or lease agreements of goods, equipment or services, with an imported content equal to or exceeding US\$10 million (or the equivalent thereof) are subject to an industrial participation obligation.<sup>659</sup> The seller/supplier who incurs an industrial participation obligation will be required to participate in the South African economy as set out in the guidelines.<sup>660</sup> The obligation is that such a seller or supplier must invest in commercial and industrial activities equal to or exceeding 30% of the value of the imported content, which investment must be performed within seven years from the effective date of the Industrial Participation agreement.<sup>661</sup>

The objective of the National Industrial Participation Programme is to ensure economic benefits and support the development of local South African industry by making it a prerequisite for importers who wish to participate in public procurement to invest in South Africa. Its objective is further to support high-value added investment, or export projects that create competitive advantages in various sectors. It must also facilitate the transfer of previously unavailable technologies and market linkages to South African firms. Its further purpose is to provide a negotiating platform for the inclusion of SMMEs and black empowerment firms in industrial participation-linked investment and export deals.<sup>662</sup>

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<sup>659</sup> In the case of armaments other criteria apply. The *Armaments Corporation of South Africa, Limited*, Act 51 of 2003 in s 4(1)(a) and 4(2)(j) provides for the establishment of a defence industrial participation programme management system.

<sup>660</sup> The programme is obligatory, and can be discharged in various ways. These include investment, export promotion, or research and development collaborative business activities.

<sup>661</sup> Full details of the actual process of the NIPP workings are available in the form of a published booklet, "The National Industrial Participation Programme of the Republic of South Africa", distributed by the Department of Trade and Industry. Details can also be found at DTI 2009 *NIPP* [www.dti.gov.za/](http://www.dti.gov.za/).

<sup>662</sup> In the guidelines the objectives are set out to be:

- Sustainable economic growth
- Establishment of new trading partners
- Foreign investment into South Africa
- Exports of South African "value added" goods and services

Industrial Participation is, according to National Treasury, a precondition, but not a factor, in the adjudication of tenders, unless all tenders are relatively close.<sup>663</sup> This entails that as long as the industrial participation requirements are fulfilled the merits thereof will not be taken into consideration in evaluating the tender itself. The regulations issued in terms of the PFMA<sup>664</sup> provide only that compliance with the National Industrial Participation is a precondition before a tender can be evaluated. It is not provided that it is a factor in the evaluation of tenders.

The National Industrial Participation Programme is problematic. It is based on a cabinet memorandum<sup>665</sup> and provision for this programme is not specifically made in legislation, save in the case of the procurement of armaments.<sup>666</sup> It is referred to in the regulations<sup>667</sup> issued in terms of the PFMA. Although detail about the programme is given on the website<sup>668</sup> of the Department of Trade and Industry, its provisions are not published as regulations and it remains merely a policy instrument. Before South Africa became a constitutional state it would have been possible to argue that such a policy could be implemented as part of the State Prerogative,<sup>669</sup> but as South Africa is now a constitutional state all the powers of government must be derived from the constitution. For the sake of good governance, transparency, just administrative action and

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- Research and development collaboration in South Africa
  - Job creation
  - Human resource development
  - Technology transfer
  - Economic advantages of previously disadvantaged communities.

<sup>663</sup> That is according to the information given by DTI 2009 *NIPP* [www.dti.gov.za/](http://www.dti.gov.za/). Reg 10 of the PFMA provides that an accounting officer or accounting authority must obtain clearance for a recommended bidder from the Department of Trade and Industry, in respect of contracts which are subject to the National Industrial Participation Programme of that Department.

<sup>664</sup> Reg 16A10.

<sup>665</sup> Cabinet Memorandum 10/1996.

<sup>666</sup> The *Armaments Corporation of South Africa, Limited*, Act 51 of 2003 in s 4(1)(a) and 4(2)(j) provides for the establishment of a defence industrial participation programme management system.

<sup>667</sup> Reg 16A10 provides that an accounting officer or accounting authority must obtain clearance for a recommended bidder from the Department of Trade and Industry in respect of contracts which are subject to the National Industrial Participation Program of that Department.

<sup>668</sup> DTI 2009 *Home* [www.thedti.gov.za](http://www.thedti.gov.za).

<sup>669</sup> *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 4 SA 1 (A); *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry* 1997 3 SA 236 (SCA); *Director-General, Department of Trade and Industry v Shurlock International (Pty) Ltd* 2005 2 SA 1 (SCA).

legality, enabling legislation ought to be promulgated to specifically allow for the National Industrial Participation Programme.

(d) *Broad Based Black Economic Empowerment Act*

In order to redress the economic effects of apartheid, the South African government has adopted a BEE policy which is broad-based, inclusive, and part of the country's overall growth strategy.<sup>670</sup> South Africa's BEE policy is articulated in the 2003 Strategy for Broad-based Black Economic Empowerment (BBBEE Strategy) and is given effect in the BBBEE Act. The BBBEE strategy outlines government's policy instruments for achieving BEE and sets out a scorecard to measure three core elements of BEE progress in all enterprises and sectors: direct empowerment through ownership and control of enterprises and assets; human resource development and employment equity; and indirect empowerment through preferential procurement and enterprise development.

The BBBEE Act provides that the Minister of Trade and Industry may issue codes of good practice on BEE.<sup>671</sup> It further provides that every organ of state and public entity must take into account and, as far as it is reasonably possible, apply any relevant code of good practice in *inter alia* determining qualification criteria for the issuing of licences, concessions, developing and implementing a preferential procurement policy, and developing criteria for entering into partnerships with the private sector.<sup>672</sup> The Minister of Trade and Industry may publish and promote a transformation charter for a particular sector of the economy if he or she is satisfied that such a charter has been developed by major stakeholders in that sector and advances the objectives of the Act.<sup>673</sup>

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<sup>670</sup> This BEE policy was developed with reference to the Constitution, particularly s 217(2), which enables organs of state to implement procurement policy for (a) categories of preference in the allocation of contracts and (b) the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, the BBBEE Act, 2003 has as its objective to facilitate broad-based black economic empowerment and provide for the issuing of codes of good practice to be applied by organs of state and public entities *inter alia* in developing criteria for entering into partnerships with the private sector.

<sup>671</sup> S 9.

<sup>672</sup> S 10.

<sup>673</sup> S 12.

The Minister has already issued Codes of Good Practice on Black Economic Empowerment.<sup>674</sup> He has also issued Charters on Black Economic Empowerment for the financial,<sup>675</sup> property<sup>676</sup> and construction<sup>677</sup> sectors. In the Codes of Good Practice the preferential procurement element of BEE and the general principles for measuring preferential procurement are specifically dealt with.<sup>678</sup> Specific provision is also made in all five of the charters already issued for including BEE targets in procurement policies. The preferential treatment will still have to be in accordance with the PPPFA and the general principles of section 217 of the Constitution.

(e) *Public/Private partnerships*

In South Africa, Public/Private Partnerships<sup>679</sup> (hereinafter referred to as “PPPs”) have become a major form of procurement and an instrument to realise government’s objective of Black Economic Empowerment. Treasury Regulation R16 issued in terms of the PFMA regulates PPP in national and provincial government. Regulation R309, issued in terms of the MFMA, regulates PPP in local government.<sup>680</sup> The National Treasury Standardised PPP Provisions<sup>681</sup> as well as a PPP manual<sup>682</sup> were issued by Treasury during 2004 to assist with procurement of PPPs. All of these regulations and provisions are intended to ensure that BEE is achieved in public/private partnership agreements. PPP

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<sup>674</sup> GN 112 of 9 February 2007 and GN 218 of 8 February 2008.

<sup>675</sup> GN 110 of 9 February 2007.

<sup>676</sup> GN 1248 of 5 October 2007.

<sup>677</sup> GN 111 of 3 February 2007.

<sup>678</sup> GN 112 of 9 February 2007, Code series 500.

<sup>679</sup> See the following useful websites with regard to PPP in South Africa as well as other countries: National Treasury 2009 *Home* [www.treasury.gov.za](http://www.treasury.gov.za); Polity 2009 *Government Sites* [www.polity.org.za/](http://www.polity.org.za/); NBI 2009 *PPP Centre* [www.pppcentre.com](http://www.pppcentre.com); SANRAL 2009 *Home* [www.nra.co.za](http://www.nra.co.za); SADCBA 2009 *Home* [www.banking.org.za/](http://www.banking.org.za/); Scottish Government 2009 *Infrastructure Investment* [www.scotland.gov.uk/](http://www.scotland.gov.uk/); CCPPP 2009 *Home* [www.pppcouncil.ca](http://www.pppcouncil.ca); IP3 2009 *Home* [www.ip3.org](http://www.ip3.org); NCPPP 2009 *Home* [www.ncppp.org](http://www.ncppp.org); GTZ 2009 *Public-Private Partnership* [www.gtz.de/](http://www.gtz.de/); SADC 2009 *News* [www.sadc.int](http://www.sadc.int); The World Bank 2009 *Home* [www.worldbank.org](http://www.worldbank.org); UNDP 2009 *PPPUE* [www.pppue.undp.org](http://www.pppue.undp.org); Partnership 2009 *Encouraging local churches* [www.partnershipuk.org](http://www.partnershipuk.org).

<sup>680</sup> Promulgated in GG 27431 of 1 April 2005.

<sup>681</sup> National Treasury Standardised PPP Provisions (“Standardisation”) First Issue: 11 March 2004 National Treasury PPP Practice Note no 1 of 2004.

<sup>682</sup> In accordance with s 76(4)(g) of the *Public Finance Management Act* 1 of 1999 (PFMA), National Treasury may issue instructions to institutions to which the PFMA applies in order to facilitate the application of the PFMA and the regulations promulgated under the PFMA. This National Treasury PPP Practice Note no 2 of 2004 “South African Regulations for PPPs” applies to departments, constitutional institutions, public entities listed or required to be listed in sch 3A, 3B, 3C and 3D to the PFMA and subsidiaries of such public entities.

forms an important part of public procurement and the realisation of South Africa's BEE objectives. It deserves a study on its own, and does not fall within the scope of this work.

(f) *Other legislation*

There is other legislation<sup>683</sup> that refers to measures to be taken to achieve BEE through public procurement. The other legislation does not deal with BEE in detail, save to stipulate that it should be performed in accordance with the provisions of section 217 of the Constitution and the PPPFA.

### 5.3.8.2 Conclusion

Because of the history of South Africa it is understandable that the legacies of the past need to be addressed in a variety of ways, including public procurement, which is likely to be used to its full extent to achieve this goal. This does not make South Africa unusual. It is accepted internationally that public procurement can be used to achieve the socio-economic objectives of a government. What is of importance is that the way in which it is done must comply with the accepted principles of public procurement. It remains a constitutional requirement that procurement must be done in terms of a system which is fair, equitable, transparent, competitive and cost-effective. The procurement policies that provide for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination must fall within the framework of the PPPFA. Although one may differ on the merits of the framework set out in the PPPFA, it makes it possible to comply with the general principles of public procurement taking the achievement of the government's socio-economic goals into account.

Unfortunately the PPPFA does not specifically deal with other important collateral objectives relating to the environmental, energy, food security, and other similar issues which already are important and will become even more so in the near future. However, it is already possible to address these issues to an extent by

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<sup>683</sup> They are the *Petroleum Products Act* 120 of 1977; the *Industrial Development Act* 22 of 1940; the *Armaments Corporation of South Africa, Limited, Act* 51 of 2003; and the *Construction Industry Development Board Act* 38 of 2000.

including aspects of them in the specifications for tenders. The Constitution allows in principle for these and similar issues to be afforded preferential treatment, but they should be addressed specifically in the PPPFA, or other enabling national legislation should be promulgated to accommodate this issue.

#### **5.4 World Bank Assessment 2001**

One of the functions of the World Bank is to promote social and economic progress in the developing world especially. It finances economic development in particular.<sup>684</sup> The concept of good governance was stressed by the World Bank when it introduced good governance as a requirement before loans, for instance, could be granted to any specific country.<sup>685</sup> It wishes to ensure sustainable development of the countries in receipt of loans through its insistence on good governance. The World Bank also carries out projects and provides services to help meet the development needs of individual countries and the international community.<sup>686</sup>

One such project is the Country Procurement Assessment Review. The purpose of this project is to assist countries to evaluate and amend their public procurement regimes. In collaboration with the South African government, the World Bank conducted a Joint Country Procurement Assessment Review of the South African public procurement system in September 2001.<sup>687</sup> The purpose was to study and analyse the existing public procurement matrix and to make recommendations to improve the economy, efficiency, predictability and transparency of the procurement process.<sup>688</sup> The report was published during February 2003.<sup>689</sup>

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<sup>684</sup> See Driscoll 1996 *How Do They Differ?* [www.imf.org/](http://www.imf.org/).

<sup>685</sup> The World Bank *Sub-Saharan Africa*.

<sup>686</sup> See the website of the World Bank with regard to the projects it is involved in at World Bank Group 2009 *Projects* [go.worldbank.org/](http://go.worldbank.org/).

<sup>687</sup> South Africa Country Procurement Assessment Report, *Refining the Public Procurement System in South Africa*, World Bank Report No 25751-SA Feb 2003 Vol 1, 2.

<sup>688</sup> *Id* 3.

<sup>689</sup> South Africa Country Procurement Assessment Report, *Refining the Public Procurement System in South Africa*, World Bank Report No 25751-SA Feb 2003 Vol 1.

#### 5.4.1 Weaknesses

Weaknesses in the South African procurement regime at the time were identified in the report under the following five headings:<sup>690</sup> Procurement Practices and Procedures; Procurement Documentation; The Industrial Participation Program (IPP); Procurement Proficiency of Government Staff; and Preferential Procurement Mechanism.

##### a) *Procurement Practices, and procedures*

It was found that procurement planning was insufficient and not linked with the budgeting and appropriation process. Prices were not always read out when bids were opened. In some instances the number of private sector members in tender committees outnumbered government officials, a fact which could lead to a conflict of interest. Consultants were not always selected and appointed in a systematic and competitive manner. Data on contract awards and the completion of contracts was not systematically maintained. Payments to suppliers and consultants were often delayed. There were considerable flaws in the application of procurement procedures and delays in contract awards.<sup>691</sup> In the Housing Subsidy Scheme, contracts were awarded on the basis of development proposals without their being subject to competitive bidding.<sup>692</sup>

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<sup>690</sup> *Id* 21-27.

<sup>691</sup> The following were identified in the report at 11 and 12:

- Failing to benchmark prices against other contract prices in order to establish value for money and realise savings to the state;
- Changing of specifications after the award of tenders;
- Poor planning in works contracts and excessive cost overruns;
- Irregular practices (including conflicts of interest) by some provincial tender boards, resulting in financial gain and other irregularities by tender board members;
- Failure by certain provincial tender boards to timeously call for tenders in respect of recurring commodities prior to the expiry of existing contracts resulting in the extension of existing contracts to overcome interruptions in supply;
- Excessive delays in the awarding of contracts resulting in escalation of costs;
- Lack of verification of quality, quantity and costs due to the non availability of procurement documents (poor record keeping);
- Subdividing of contracts in order to reduce the value of individual contracts to remain within delegated financial limits;
- Entering into lease agreements for properties which have not been utilised; and
- The capacity of provincial and local government to spend the allocated funds on infrastructure is generally low due to outdated institutional arrangements, poor planning, design and project management practices”.

<sup>692</sup> *Id* 10-11.

b) *Procurement documentation*

The documentation on procedures and conditions of contract and the related user manual are not user-friendly, are complex and are sometimes ambiguous. There is a need for standard bid and contract documentation, simplified documents for small and medium enterprises, and user-friendly manuals of procurement procedures.<sup>693</sup>

c) *The Industrial Participation Program (IPP)*

The report stated that the industrial participation obligation is restrictive, it comes with a cost which is normally included in the prices of goods and equipment, it stifles competition, can lead to a monopoly of those suppliers who have committed themselves to such investments, and there are immense monitoring costs involved.<sup>694</sup>

d) *Procurement Proficiency of Government Staff*

The report states that there is a lack of formal training of officials and that the current training, which is mostly on-the-job training, is insufficient. A comprehensive training program sustained over time and accompanied by a system of accreditation and continued in-house instruction is suggested.<sup>695</sup>

e) *Preferential Procurement Mechanism*

The report states that preferential procurement policies are not well formulated due to a lack of national targets. Qualification standards are insufficient or not adequately verified and the cost and outcomes of the preferential system are not adequately assessed to evaluate the merits of the system. The system does not cater for the capacity building of “disadvantaged enterprises” and there are no significant quantitative data on the cost and outcomes of the preferential system.<sup>696</sup>

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<sup>693</sup> *Id* 12.

<sup>694</sup> *Id* 13.

<sup>695</sup> *Id* 13.

<sup>696</sup> *Id* v.

#### 5.4.2 Recommendations

The report made eight recommendations on how to address the existing problems with the system.<sup>697</sup>

1. The Green Paper on Public Sector Procurement Reform must be followed up with the preparation and adoption of a national procurement policy framework further defining and perfecting the Green Paper's recommendations for implementation.
2. A National Legislative/Regulatory framework must be drafted to establish uniformity in tender procedures, policies and control measures.
3. A National Procurement Compliance Office must be established in the National Treasury, which would be responsible only for procurement policy formulation, laws and procedures, the provision of standard bidding documents and contracts, oversight on implementation by all Organs of State, the establishment of a procurement data capturing system, and the training of procurement staff.
4. The decision to abolish the Tender Boards must be implemented and their functions assumed by the responsible organs of state at the national, provincial and local levels.
5. A competitive procedure must be established under the National Public Housing Scheme for the award of development contracts to obtain savings in the expenditure of fiscal revenues.
6. The Industrial Participation Program must be abolished as it conflicts with the basic principles of efficient, fair and transparent procurement.
7. With regard to the Preferential Procurement system:
  - the regulations must be revised to provide for "graduation" of previously disadvantaged enterprises when they have reached a certain turnover rate, to avoid the possibility that only an elite group continues to benefit from the system.
  - the system must be made more economical and monitorable, so that results can be measured to test its merits.

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<sup>697</sup> *Id* 49-51.

- national targets for preferential procurement policies must be set to enable organs of state to respond better to the need for national empowerment objectives.
  - accounting offices must be required to report quarterly on achieving these targets.
8. Procedures for the competitive selection and appointment of consultants must be established, using standard request for proposals and contract documents, with guidelines for criteria for evaluation.

Since the publication of the World Bank's report many of the above issues have been addressed. It must be kept in mind that at the time of the report the MFMA had not been enacted and regulations had not yet been issued in terms thereof.<sup>698</sup> Of further importance is the *Supply Chain Management, Guide for Accounting Officers/Authorities* published by National Treasury during February 2004, in which many of the above issues are addressed. A supply chain management office has in the mean time been established in the National Treasury. This office issues supply chain management practice notes to achieve standardisation of policy, documentation, contracts and procedures. The State Tender Board has also in effect been phased out. In terms of the *Housing Act*<sup>699</sup> a new social housing policy<sup>700</sup> was issued with the provisions of the Constitution, 1996, the PFMA, the PPPFA and other statutory procurement prescripts<sup>701</sup> as the guiding principles. New regulations for preferential procurement are in the final stages of preparation.

The issues that have not been properly addressed to date are the possible abolition of the Industrial Participation Programme and the shortcomings in the PPPFA. It is also not possible to determine to what extent the problems identified in the report with regard to procurement practices and procedures and the proficiency of the procurement officials have been addressed.

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<sup>698</sup> They were only promulgated in 2005 in GN 868 GG 27636 of 30 May 2005.

<sup>699</sup> Act 107 of 1997.

<sup>700</sup> DHS 2003 *Social Housing Policy* [www.housing.gov.za/](http://www.housing.gov.za/).

<sup>701</sup> At 7.

The value of this report is that it identified shortcomings in the procurement regime of South Africa and made suggestions as to how they could be addressed. When South African law is compared with the Model Law and the GPA, the findings of this report will be referred to again.

## 5.5 Conclusion

Since the inception of the South African state<sup>702</sup> as we know it today, up to the constitutional era which commenced in 1994, public procurement has undergone some major changes, and its importance has grown exponentially. Public procurement has always been to an extent a reflection of South Africa during the different stages of its history. Under the Dutch administration, after the first European settlement in the Cape, procurement was done for the benefit of the VOC, and it could not really be described as public procurement. As early as during this period, the use of tenders for procurement was prevalent.<sup>703</sup> Publication was ensured by publishing invitations in the *placaaten*.<sup>704</sup> Decentralisation of public procurement to local government level occurred.<sup>705</sup> The lowest price was the determining factor.

During the period of the different Republics, public procurement became more formalised. Already the foundations of certain public procurement principles were noticeable in the two colonies and two republics, in particular in the ZAR. The most notable principles were the following:

- competition in the form of tender procedures,<sup>706</sup>

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<sup>702</sup> Starting with the formation of the South African Union in 1910.

<sup>703</sup> See, for instance, the *placaat* by Zacharias Wagenaer dated 9 September 1666, warning farmers to deliver all of their grain to the VOC, or else their houses would be searched for grain. Jeffreys and Naude *Kaapse Plakaatboek*. See the *placaaten* dated December 1681, 2 and 3 May 1707, 11 January 1708, 6 and 10 April 1723. See also Hahlo and Kahn *South African Legal System* 540.

<sup>704</sup> Examples are: Resolution dated 27 April 1679 by Hendrik Crudop. *Placaat* dated 4 March 1681 signed by Simon van der Stel advertising the selling of tobacco to the highest bidder and to buy grain from the lowest bidder. A *placaat* dated 11 Oktober 1779 advertised for tenders to deliver limestone to the VOC for the building of a hospital.

<sup>705</sup> Hahlo and Kahn *South African Legal System* 533-541; Hahlo and Kahn *Union of South Africa* 51. Municipal boards were established in terms of Ordinance 836 of 1836.

<sup>706</sup> See the *placaaten* dated December 1681, 2 and 3 May 1707, 11 January 1708, 6 and 10 April 1723. See also Hahlo and Kahn *South African Legal System* 540. See the *placaat* dated 9 December 1801 in the Cape Colony in which the sale of government-owned windmills by public auction was advertised. In terms of s 43 of Ordinance number 9 dated 15

- cost effectiveness in that tender procedures were prescribed only for procurement above a certain monetary threshold<sup>707</sup> and the most advantageous contract under the circumstances had to be entered into;<sup>708</sup>
- transparency in that a proper description of the intended procurement had to be given by means of timeous advertisements,<sup>709</sup> tenders had to be delivered at the specified time and place in unopened envelopes,<sup>710</sup> and proper records of the tender proceedings had to be kept;<sup>711</sup>
- the integrity of the system, in that anti-corruption legislation was enacted.<sup>712</sup>

The principle that the most advantageous contract under the circumstances had to be entered into seems a very practical provision and allows other considerations, save that of price, to be taken into account.

During the period of the Union of South Africa, as was the case immediately prior thereto, the preferred method of public procurement was tender procedures. A distinction was made between procurement on national, provincial and local government levels. Public procurement on the national level was centralised by means of the tender board that dealt with all tenders above the prescribed monetary threshold. The principles of public procurement that came to the fore were:

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August 1836, signed by B D'Urban. Eight days notice was given to contractors to tender to do certain work cheaper than the existing offer; *Orange Free State Constitution Act of 1845* ch LXXII, s 26; and in the ZAR *Volksraadsbesluiten* 12 Februarij 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>707</sup> *Volksraadsbesluiten* 12 Februarij 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>708</sup> In the Cape Colony: *To Consolidate and Amend the Law Relating to the Municipalities Act* 45 of 1882. S105.

<sup>709</sup> *Volksraadsbesluiten* 12 Februarij 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>710</sup> *Volksraadsbesluiten* 12 Februarij 1868 art 253. In 1875 a more detailed proclamation was issued in this regard: *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144.

<sup>711</sup> *Gouvernements Kennisgewing Krachtens besluit van den Uitv. Raad*, dd 10 Augustus 1875, art 144

<sup>712</sup> In the ZAR: *The Law Against Bribery of Officials Act* 10 of 1894 amended by the First Volksraad Resolution 31 August 1895 art 580.

- cost effectiveness, in that a distinction based on the value of the intended procurement was made between a formal and an informal procedure.<sup>713</sup>
- transparency, in that advertisement of tenders had to be made in the public press and by means of posted or hand bills.<sup>714</sup> Tenders had to be submitted timeously, opened in public, and the tender amounts read out to those present.<sup>715</sup>
- integrity, in that tenderers had to comply with the conditions set out in the advertisement to be considered,<sup>716</sup> and tenders that had been opened or were qualified could be disregarded.<sup>717</sup> If a tender other than the lowest tender were to be recommended the reasons for the decision had to be stated.<sup>718</sup> The head of the department that requested the procurement had to provide a report to the tender board stating his recommendations and his reasons for such recommendations.<sup>719</sup> Provision was made for blacklisting and penalties if wrong information had been given.<sup>720</sup> Suppliers could be blacklisted in cases of unsatisfactory completion of contracts, fraud or bribery.<sup>721</sup> Penalties could be imposed on a supplier to whom a tender was awarded on the basis of incorrect information supplied by such a supplier.<sup>722</sup>
- collateral objectives, in that the preferencing of local suppliers over foreign suppliers was allowed.<sup>723</sup>

The provisions from which these principles are extrapolated were more basic than today's regulations, but the goals they sought to achieve were similar to those of modern public procurement.

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<sup>713</sup> Reg 5.

<sup>714</sup> Reg 7.

<sup>715</sup> Reg 8.

<sup>716</sup> Reg 7.

<sup>717</sup> Reg 7.

<sup>718</sup> Reg 9.

<sup>719</sup> Reg 9.

<sup>720</sup> Reg 9.

<sup>721</sup> Reg 21.

<sup>722</sup> *Exchequer and Audit Act 23 of 1956 s 61(2).*

<sup>723</sup> Reg 18.

Public procurement, during the period of the Republic, from 1961 to 1994, was similar to that when it was a Union. The procurement for matters of state security became more secretive and reflected that government's securocratic neurosis. The protection of its ideologies became so important that it created a separate, secretive procurement regime for procurement which they believed was of national importance. Public procurement became more centralised and the position of the State Tender Board was strengthened during this period.

In particular the State Tender Board had the power to invite offers in any manner it deemed fit to determine the manner in which and the conditions subject to which such offers had to be made,<sup>724</sup> and without giving reasons for its decisions, to accept or reject any offer for the conclusion of an agreement.<sup>725</sup> Its powers to curb abuse were also strengthened in that it could impose a monetary penalty on any person with whom the board concluded an agreement on the strength of information furnished by such person which, subsequent to the conclusion of such an agreement, was shown to have been incorrect information.<sup>726</sup> It could also resolve that no offer from certain persons should be considered for a period determined by the board under prescribed circumstances.<sup>727</sup>

Although South Africa already had a well-developed administrative law in this period of its history,<sup>728</sup> participants were hampered in many respects. There was no right to access to information held by the state, no right to be given reasons for administrative decisions, and the grounds for review were limited.<sup>729</sup> In ordinary public procurement many decisions were taken on review, albeit on the limited grounds available. With regard to a large portion

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<sup>724</sup> S 4(1)(b).

<sup>725</sup> S 4(1)(c).

<sup>726</sup> S 13(2).

<sup>727</sup> If it was of the opinion that such persons amended or withdrew their offers after the closing date for submission; failed to sign a contract or to provide security as provided in the tender documentation; failed to comply with the conditions of the agreement entered into or performed unsatisfactorily under such agreement; and promised or offered or gave a bribe or acted fraudulently, in bad faith or improperly. See GN R1237 of 1 July 1988 reg 3(5).

<sup>728</sup> Baxter *Administrative Law* 43-44.

<sup>729</sup> See *Pretoria North Town Council v A1 Electric Ice-cream Factory (Pty) Ltd* 1953 3 SA 1 (A) and in general the authoritative work at that time on administrative law namely Baxter *Administrative Law*.

of public procurement, the then government had a tradition of secrecy and could hide behind the excuse of public interest (as interpreted by itself) and state security, thereby effectively emasculating any claims that participants may have had.

Tender procedures were still the norm and were driven largely by the notion that the lowest tender should be accepted. The concept of the most meritorious tender or the best value for money was not legislatively entrenched in the procurement system. Because of the lack of access to information and the limited grounds for review, it was difficult for tenderers to enforce their rights.

The most important aspect of the constitutional era in this context is the constitutional status afforded to public procurement. Reforms in public procurement were directed mainly at two issues: firstly, the promotion of principles of good governance, and secondly, the introduction of a preference system to address socio-economic objectives. The adoption of the PFMA and the MFMA were the most important legislative instruments to achieve good governance, and the PPPFA to achieve socio-economic reforms.

The most important objectives of the reform are the creation of a supply chain management function through the PFMA<sup>730</sup> and the MFMA,<sup>731</sup> and a competitive system for the appointment of consultants who are fully integrated with the financial management processes in government. Collateral objectives are pursued mainly through national legislation, namely the PPPFA, which is designed to address the legacies of the past through public procurement.

The principles contained in section 217 of the Constitution, together with provisions such as the right to information<sup>732</sup> and the right to just administrative action,<sup>733</sup> go a long way to ensuring that a balance is struck between the different interest groups, namely the government which procures

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<sup>730</sup> S 76(4)(c) thereof.

<sup>731</sup> S 106(1)(d) thereof.

<sup>732</sup> S 32 of the Constitution.

<sup>733</sup> S 33 of the Constitution.

the goods and services, the general public for whose benefit the procurement is done and which provides the funds for procurement through paying taxes, and lastly the private entities who participate in the procurement process. The legacies of the past are also pertinently addressed in the procurement process without negating the general principles necessary for a proper procurement system. The new procurement system constitutes an about-turn from an opaque, centralised, unequal, discriminatory society to an open, transparent, non-discriminatory and equal one.

The post constitutional public procurement regime heralds the introduction of a decentralised system of procurement where the responsibility for public procurement is in essence put in the hands of the accounting officer or accounting entity on national, provincial and local government level. Each procuring entity must have its own supply chain management policy in which public procurement is provided for. These policies are subject either to the PFMA, in the case of procurement on national and provincial level, or to the MFMA, in the case of procurement on local government level.

The constitutional imperative that public procurement must be effected in terms of a system which is fair, equitable, transparent, competitive and cost-effective is repeated in the PFMA, the MFMA and the regulations issued in terms of the two pieces of legislation. Content is given to these principles in the PFMA, the MFMA, the regulations issued in terms of them, and lastly in the different supply chain management policies of the procuring entities. The courts also ensure that these principles are applied in practice. By elevating these principles to constitutional imperatives a safety net is created which ensures that the courts are able to intervene should these principles not be complied with, either in that the supply chain management policies might not be in accordance with these principles, or that the practical implementation thereof is not in accordance with them.

The constitutional principles are adequately addressed in the PFMA, the MFMA and the regulations issued in terms thereof. In these pieces of legislation various provisions exist that provide that different issues relating to the principles must be

addressed in the supply chain management policies of the procuring entities. In many instances it is left to the procuring entities to determine how to address these principles and other issues raised in the two Acts and regulations issued in terms thereof. On the one hand this ensures flexibility and the opportunity to address the specific circumstances of each procuring entity. On the other hand, this could lead to marked differences between the different procuring entities, which could hamper the quest for efficiency, transparency and cost-effectiveness. A possible solution could be for National Treasury to compile a draft supply chain management policy to be used by all procuring entities, but which may be amended by the particular procuring entity if good reason exists to do so. This should lead to a more uniform procurement regime, whilst retaining the advantage of addressing the particular circumstances of each procuring entity.

The present public procurement regime is open to some criticism.<sup>734</sup> The provisions relating to public procurement are complex. A thorough knowledge of the workings of government is needed to understand the public procurement properly. This complexity does not, however, detract from its basic function of ensuring good governance in public procurement. The need to create enough capacity to implement these reforms is critical. Minimum norms and standards to promote uniformity in documentation, advertising, procurement methods, procurement criteria and the adjudication of tenders are essential to streamline the system and to make it more understandable and user friendly for all involved. The development of a procedure for a more speedy and effective resolution of disputes is essential, as the normal court procedures are slow, costly and cumbersome.<sup>735</sup> There needs to be a greater emphasis on the monitoring of public procurement as to its effectiveness, the achievement of certain goals, and the achievement of good governance and good procurement principles. Generally speaking, as is evident from the World Bank Country Procurement Assessment Report, the lack of effective

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<sup>734</sup> See South Africa Country Procurement Assessment Report, *Refining the Public Procurement System in South Africa*, World Bank Report No 25751-SA Feb 2003 Vol 1, 2 as discussed in 5.4 above.

<sup>735</sup> An independent administrative body to resolve disputes has great potential to resolve disputes quickly and more effectively. It should not exclude the jurisdiction of the ordinary courts.

implementation of the new regime for public procurement is the main difficulty, and not the system itself.<sup>736</sup>

Although the principle of decentralisation in public procurement is generally accepted as best practise, the South African system is complex and regulated by a vast array of legislative and administrative provisions as well as court case precedents. This can affect the principles of transparency, competitiveness and cost-effectiveness. It is not always easy to obtain and interpret all of the relevant legislative and administrative provisions as well as court case precedents. This difficulty is exacerbated by the different supply chain management policies of the procuring entities. Such complexity could dissuade potential suppliers from participating in the process, leading to a loss of competition and an increase in costs both to the supplier and to the procuring entity. A form of standardisation as suggested above, and the making available of all legislation, court rulings, administrative decisions and directives and all supply chain management policies at a central information point could address this problem. A dedicated website for this purpose could be developed and maintained by National Treasury.

The wisdom of engaging in a drastic about-turn from the pre-constitutional regime, rather than phasing the new system in over time, during which time training and capacity building could have taken place, may be questioned. The lack of standardisation of supply chain management policies increases the need for capacity, training, and dedicated personnel at each procuring entity. To work properly, the present system needs a well trained and dedicated staff component to deal with public procurement in each procuring entity. It is doubtful if all of the procuring entities, in particular the smaller entities, have the resources, capacity and expertise to comply with the challenges posed by the post-constitutional regime. As is apparent from the World Bank Country Procurement Assessment Report, the proper implementation of the system needs to be addressed.

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<sup>736</sup> See South Africa Country Procurement Assessment Report, *Refining the Public Procurement System in South Africa*, World Bank Report No 25751-SA Feb 2003 Vol 1, 2.

It is trite that to be able to plan and implement it is necessary to be able to measure. Although this need may be addressed adequately in some supply chain management policies it could be better formalised in the relevant Acts and regulations. They do provide for performance management to be addressed by the supply chain management policies but, save for the reports by the Auditor General, monitoring by National Treasury (and in particular by its Supply Chain Management Office) is not performed in sufficient detail. The Supply Chain Management Office could potentially play an important role in standardising supply chain management policies, providing training, building capacity, identifying weaknesses and addressing them, monitoring performance and taking proactive steps to ensure that the constitutional principles are achieved in practice.

Although our legal system, in particular our administrative law, in general provides adequate legal remedies for breaches of the procurement regime, it is notoriously expensive and time consuming to resolve disputes in our courts of law. One possibility would be to provide for administrative review, within strict time limits, of tender awards by a dedicated independent administrative body. It should enable smaller suppliers to enforce their rights, give direction to procuring entities, and save time and money for all of the parties concerned. In particular it would be possible for such a centralised body to recognise a negative trend or systemic problem at a particular procuring entity, which could then be reported to the National Treasury Supply Chain Management Office for remedial action. Such a body should not exclude the jurisdiction of the ordinary courts. Although other possibilities like a statutory arbitration body or an ombudsman exist, an administrative review body is preferable, as an arbitral body would exclude judicial review, and in South Africa the office of ombudsman has not always been effective.<sup>737</sup>

With regard to the PPPFA and its supporting regulations, it appears that many difficulties are experienced in practice. In addition to the fact that there is a lack of capacity in the different institutions, in the national and provincial

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<sup>737</sup> This is probably due to political appointments and a perceived or real lack of independence.

government departments, and in local government, many other factors contribute to the difficulties experienced. The Act is not easy to interpret. The definition of historically disadvantaged individuals is problematic. The provision that the tender scoring the highest points must be accepted lacks flexibility. Too much emphasis is put on price, whilst value for money and merit should rather be emphasised.<sup>738</sup> The goals<sup>739</sup> for which preference are allowed are too narrow. In particular, pressing socio-economic issues like the protecting the environment, dealing with climate change, providing renewable energy, conserving water and creating jobs need to be addressed by the PPPFA or similar legislation. The PPPFA and the regulations issued in terms thereof must be revised to ensure that they are not contradictory and ambiguous. The achievement of its goals and its effectiveness also needs to be monitored. The National Industrial Participation Programme needs to be legalised if it is to be continued with.

It is of course not possible to achieve a perfect public procurement system. One can safely state that the present system in South Africa does contain the essential elements necessary to balance the interests of government, the public, and private enterprise in a well functioning public procurement system. The constitutional principles of fairness, equity, transparency, competitiveness and cost-effectiveness are adequately addressed in the applicable legislation. The public procurement regime has the ability to be refined and for the principles to be fleshed out in a casuistic way through decisions of the court. And with increased experience and capacity building in the civil service, it will improve and be refined over time.

To determine whether or not the South African procurement regime and the constitutional principles inherent in it are in accordance with the generally

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<sup>738</sup> S 2(1) of the *Preferential Procurement Policy Framework Act 5 of 2000*. The rigid system of awarding either 90% (in the case of tenders over R500 000) or 80% (in the case of tenders under R500 000) of the points for price distract from the reforms introduced by the PFMA and the MFMA.

<sup>739</sup> S 2(1)(d) provides that the specific goals may include contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability and/or implementing the programmes of the Reconstruction and Development Programme as published in GG 16085 of 23 November 1994.

accepted principles of a public procurement system it is now necessary to compare the South African system with internationally accepted systems. The Model Law and the GPA have been selected for this purpose.

The next chapter will assess whether or not the principles identified in the GPA and the Model Law as requirements for a well functioning public procurement regime are adequately addressed in the South African procurement regime. It will further be determined how the issues that were identified as possible shortcomings in the South African procurement regime are addressed in the GPA and the Model Law, and whether or not possible solutions are presented by these regimes.

## CHAPTER 6

### COMPARATIVE ANALYSIS

#### 6.1 Introduction

In order to properly evaluate the current public procurement regime of South Africa it should be compared with internationally accepted regimes, instruments or systems. The GPA and the Model Law are two internationally accepted instruments for public procurement and of recent origin.<sup>1</sup>

These two instruments are particularly suited for this purpose for the following reasons. The Model Law is a model which has been constructed to be used as a framework for countries to refer to in reforming their procurement regimes.<sup>2</sup> It has in fact been used by many countries, especially in the developing world, as a template to reform their procurement regimes.<sup>3</sup> It constitutes a framework rather than a detailed exposition. The effect thereof is that the important principles pertaining to public procurement are addressed rather than the detail of the procurement process.<sup>4</sup> Because of the nature of a Model Law it has to represent the generally acknowledged and accepted principles of public procurement.<sup>5</sup> The work by UNCITRAL on model laws in general is accepted throughout the world.<sup>6</sup> South Africa was one of the countries represented on the working group on the Model Law.

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<sup>1</sup> The UNCITRAL Model Law on the Procurement of Goods and Construction was adopted by the Commission in 1993 and the Model Law on Procurement of Goods and Construction and Services in 1994. The Revised Model Law was finalised in 2007 but has not yet been finally adopted. The GPA was negotiated in the Uruguay Round of talks of the WTO, it was signed in Marakesh on 15 April 1994, and took effect on 1 January 1996. The Revised GPA was published in December 2006 but has not been adopted by the Government procurement Committee yet. It must be kept in mind that the Model Law is intended to serve as a model for reforming municipal law whilst the GPA is an international agreement. It is important to keep in mind that all three are based on the principles of a demand economy.

<sup>2</sup> For a detailed discussion see ch 4.

<sup>3</sup> Trepte *Regulating Procurement* 57-59. It is also promoted by the World Bank as a model to use in order to reform public procurement in Sub-Saharan countries. See Verdeaux 2005 *IGC* west.thomson.com/ 1.

<sup>4</sup> Westring 1994 *PPLR* 142-151.

<sup>5</sup> See Wallace, Yukins and Matechak 2005 *Procurement Lawyer* 12. They describe the Model Law as a backdrop for procurement reform world wide.

<sup>6</sup> See Verdeaux 2005 *IGC* west.thomson.com/1.

The GPA is a plurilateral agreement among some of the member states of the WTO, in terms of which their public procurement is regulated.<sup>7</sup> One of the objectives of the GPA is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding public procurement.<sup>8</sup> The GPA was finalised only after lengthy deliberations and discussions between state parties. It was also drafted as a framework with the emphasis on the applicable principles rather than on the detail of the public procurement process. Many countries gave inputs in the drafting of both the GPA and the UNCITRAL Model Law and it reflects the latest ideas of what standards, principles and objectives should be adhered to in order to ensure a proper public procurement regime. The number of parties to the GPA is still increasing. At this stage 40 WTO members are covered by the agreement, 19 countries have observer status under the agreement, 8 members are in the process of acceding to the agreement, and a further 6 WTO members have provisions in their respective Protocols of Accession to the WTO which call for them to seek accession to the GPA.<sup>9</sup> South Africa is a member of the WTO and it can be expected that pressure will in future be exerted on South Africa to become a state party to the GPA.

One of the criticisms that can be levelled against the Model Law is that because of its nature it does, to a degree, reflect the compromises reached by the drafters. Different political, economic and other concerns could therefore have played a role during the drafting thereof.<sup>10</sup> The same criticism, and perhaps more justifiably so, can be levelled against the GPA. Because of the nature of the GPA and its being an internationally negotiated instrument it reflects a compromise between different interests. Another criticism which is applicable to both the Model Law and GPA is that both instruments' main purpose is to promote international trade. Good public procurement is only a secondary goal and might even be compromised in an effort to promote

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<sup>7</sup> For a detailed discussion see ch 5.

<sup>8</sup> See art 1 of the GPA. See further Petros *et al* 1995 *PPLR* 65.

<sup>9</sup> Anderson 2007 *PPLR* 277-288 and WTO 2009 *Parties and observers* [www.wto.org/](http://www.wto.org/).

<sup>10</sup> Trepte *Regulating Procurement* 340. He is of the opinion that the Model Law, as it stands, operates without any overtly political objectives in mind. He does acknowledge its generalised objective of harmonising domestic systems to further international trade.

international trade. One of the main reasons for their not joining the GPA is that some states wish to discriminate against foreign suppliers and foreign products in the procurement process.<sup>11</sup>

Despite these criticisms the importance of the Model Law and the GPA is accepted by leading scholars on public procurement.<sup>12</sup> Both instruments constitute benchmarks against which other procurement regimes can be evaluated, and they reflect the international liberalisation of public procurement.<sup>13</sup> It must be kept in mind that different regimes will have different political or socio-economic objectives. Circumstances also differ from country to country, from economy to economy and from time to time. Despite these differences, a comparison of how the different regimes set out to achieve their ultimate purposes and the identification of principles common to the different regimes will assist in determining whether or not the South African public procurement regime complies with generally accepted principles applicable to public procurement.<sup>14</sup> The comparison in this chapter will be focused on the principles of public procurement as extracted from the different regimes. Although reference will be made to the respective provisions of the three regimes, it will not be endeavoured to analyse and compare the particular provisions in any detail.

It is necessary to distinguish between the primary objectives of public procurement and the collateral, secondary or socio-economic objectives thereof. The focus is on the primary objectives of public procurement but the collateral objectives of public procurement will also be referred to separately.

The six objectives of public procurement set out in the preamble to the Model Law are:

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<sup>11</sup> Petros *et al* 1995 *PPLR* 75.

<sup>12</sup> Anderson 2007 *PPLR* 255-273. See Wallace 1995 *PPLR* 57-62; Trepte 1995 *PPLR* 42-44; Trepte 1996 *PPLR* 159-162; Hunja "UNCITRAL Model Law" 97-109; Arrowsmith "National and International Perspectives" 3-26.

<sup>13</sup> Nicholas 2006 *PPLR* 162.

<sup>14</sup> It is not the purpose of the comparison to determine why the different regimes have a specific purpose, for instance the furtherance of international trade, but to determine what common principles are applicable to the practical implementation of a public procurement regime, and how the South African regime measures up to such principles.

- maximising economy and efficiency in procurement;
- fostering and encouraging participation in procurement proceedings by suppliers and contractors especially, where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
- providing for the fair and equitable treatment of all suppliers and contractors;
- promoting the integrity of and fairness and public confidence in the procurement process; and
- achieving transparency in the procedures relating to procurement.

The GPA in its preamble addresses two broad aspects: firstly the liberalisation and expansion of world trade and how to achieve this, and secondly the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries. The preamble in short recognises:

- the need to achieve greater liberalisation and expansion of world trade and to improve the international framework for the conduct of world trade;
- that protection of domestic products or services or domestic suppliers should not be afforded, and discrimination among foreign products or services or among foreign suppliers should not be allowed;
- that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;
- the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintaining the balance of rights and obligations at the highest possible level;

- the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries.

Although this agreement's objectives relate mainly to the expansion of world trade, it does lay down rules relating to procurement in general, which the signatories must comply with. Some of these rules relate to objectives that any national procurement system should strive to achieve.

The most important South African legislative provision on public procurement is found in the Constitution, which provides as follows in section 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 section from implementing a procurement policy providing for –
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

The principles applicable to public procurement as contained in the Model Law and GPA, will be identified and analysed. The essential provisions ensuring the application of these principles and requirements will also be identified. The South African public procurement regime will be compared with and evaluated against these principles. It is not the purpose of this study to compare and analyse in detail every provision that may be relevant to each principle. Some remarks will be made in conclusion. The collateral objectives of public procurement, as provided for in the three regimes, will thereafter be dealt with.

When evaluating the South African regime it must be kept in mind that in terms of the South African procurement regime each procuring entity has its

own supply chain management policy in which detailed provisions on public procurement may be contained. These different supply chain management policies differ from state organ to state organ. They are at times very detailed and at times only repeat the provisions of the applicable legislation and regulations. It is not practical for purposes of this study to analyse any of these procuring entities' supply chain management policies.<sup>15</sup> Only the provisions of the Constitution, the PFMA the MFMA and the regulations issued in terms of these acts will be analysed. Reference to court decisions will also be made.

## **6.2 Principles and objectives identified**

It is generally accepted that the primary objective of public procurement is an economic one, namely to obtain value for money.<sup>16</sup> Its secondary objective is to further the government's socio-economic policies.<sup>17</sup> To best achieve these objectives the procurement system must in its practical application comply with certain principles or objectives. They are also often referred to as goals or requirements. These principles are achieved through specific provisions in the public procurement systems.

As discussed in more detail in chapters Three and Four above, the following broad principles applicable to public procurement, which are common to the Model Law and the GPA, can be extracted:

- (a) economy, including value for money;
- (b) competitiveness;
- (c) effectiveness;<sup>18</sup>

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<sup>15</sup> They are numerous, numbering a few hundred, and diverse. They have to comply with the constitution, the applicable legislation and regulations making analyses thereof to identify the applicable principles of public procurement unnecessary. It would be of value to analyse some of these policies in order to determine to what extent they do comply with the applicable legislation and to what extent the principles of public procurement is understood and implemented by organs of state. It would be of value for a particular procuring entity to undertake such a study, or for National Treasury to determine to what extent these policies comply with the applicable legislation, regulation and directives. This is however not the purpose of this study.

<sup>16</sup> See par 2.3.1 above.

<sup>17</sup> See par 2.3.2 above.

<sup>18</sup> The GPA includes flexibility, promptness and cost-effectiveness under this principle.

- (d) transparency;<sup>19</sup>
- (e) the combating of abuse;<sup>20</sup>
- (f) accountability;<sup>21</sup> and
- (g) integrity.<sup>22</sup>

In addition to the above, the Model Law also pertinently refers to principles of fairness and equitability, as well as to the avoidance of risk.<sup>23</sup>

The principles set out above, including the additional principles pertinently contained in the Model Law, will be used in comparing the Model Law and the GPA with the South African regime.<sup>24</sup> The principles as applied in the different regimes will be analysed whereafter the essential provisions of the different regimes, which ensures the practical implementation of these principles, will be identified and a conclusion reached. As most of these principles are interrelated, overlap, and influence one another, and because more than one principle can be inherent in the same provision, only the provisions of the different regimes which are essential to the particular principle will be discussed. The objective is not to identify each and every provision which might contribute to the realisation of a particular principle, but rather to identify the essential provisions which ensure that the principle may be achieved.

For ease of reference and to assist in the comparison, a table referring to the essential provisions of the respective regimes will be used to compare the extent to which each of the three regimes relies on each of the principles. Reference will be made to the applicable provisions essential for the attainment of the principle, and a cross-reference will be made to the relevant

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<sup>19</sup> The GPA includes accessibility of information under this principle.

<sup>20</sup> The GPA includes the avoidance of a conflict of interests and of corrupt practices under this principle.

<sup>21</sup> The GPA includes independent and impartial procedures under this principle. The Model Law includes effective remedies and objectiveness hereunder.

<sup>22</sup> The GPA includes predictability and impartiality under this principle.

<sup>23</sup> Although these principles are not pertinently mentioned in the GPA, the GPA does contain provisions that should promote these principles.

<sup>24</sup> Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* in ch 2 identified the following objectives, namely value for money; efficiency of the process; probity (integrity); fair and equal treatment by contractors; industrial social and environmental policies; and outsourcing policies.

discussion earlier in this study. The different stages<sup>25</sup> of the procurement process must be kept in mind when referring to the provisions.<sup>26</sup> References will be contained in the tables rather than by way of footnotes, as this format will enable a better overview of the three regimes.

The following nine principles or objectives, which form the essence of the procurement regimes of both the Model Law and the GPA, will be discussed:

- Economy;
- Competitiveness;
- Effectiveness;
- Transparency;
- The combating of abuse;
- The avoidance of risk;
- Accountability;
- Fairness and equitability; and
- Integrity.

### **6.3 Economy**

#### *6.3.1 Introduction*

As public procurement is an economic activity, the principle of economy is the first principle that will be discussed.<sup>27</sup> The economic object of public procurement is to obtain the best product at the best price.<sup>28</sup> This is often referred to as the achievement of value for money.<sup>29</sup> It is generally accepted

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<sup>25</sup> See par 2.2.2 above.

<sup>26</sup> The comparison will not refer specifically to each and every stage of the procurement process in relation to each principle identified, for two reasons. Firstly, there is not a provision applicable to each and every stage under every principle identified. Secondly, in many instances a particular provision might be applicable to more than one or even all of the stages. The emphasis will be on the applicable principles and not on the different stages.

<sup>27</sup> For a general discussion of the economic background of public procurement see Trepte *Regulating Procurement* 63-132.

<sup>28</sup> Model Law Guide to Enactment par 14; Arrowsmith *Public and Utilities Procurement* 423; Bolton *Law of Government Procurement* 131; Trepte *Regulating Procurement* 63; and Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 28, where the authors describe it as “to successfully acquire the goods, works or services, needed by the government on the best available terms”.

<sup>29</sup> The term value for money can also in a broader sense refer to the cost of the achievement of all of the other principles applicable to public procurement – the

that to ensure that the lowest price is obtained the widest possible competition by potential suppliers is necessary, and the principle of competition will therefore have a direct influence on the principle of economy.<sup>30</sup> Economy can also relate to the question of the cost effectiveness of both the process and the subject matter of the procurement.<sup>31</sup> The implementation of the other principles also has cost implications. Although these principles do influence the economy of public procurement, they will be discussed separately. For present purposes the emphasis in the discussion under the principle of economy will be on how value for money with regard to the object of public procurement is achieved through the relevant provisions of the different public procurement regimes. The provisions which relate to the evaluation and award of tenders are the most important in determining how this principle is addressed. The aspect of competition will be dealt with separately.

### 6.3.2 Comparison

UNCITRAL has as its objective to further international trade through the progressive harmonisation and unification of the law of international trade. This is, amongst others, done through model laws. For this purpose, public procurement has been one of the areas for which a model law has been developed. Although UNCITRAL's underlying goal is to further international trade, this can only be done in the public procurement sphere if countries' public procurement regimes conform to the accepted principles for public procurement. In the Model Law it is accepted that the principle of economy is central to any public procurement regime.<sup>32</sup> In the preamble the maximising of economy and efficiency are specifically mentioned as objectives.<sup>33</sup> The underlying goal, of furthering international trade, does not detract from the importance of the principle of economy in the Model Law. It remains central to

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achievement of possible collateral objectives whilst taking into account all relevant circumstances like the economy of the country, emergency situations and similar circumstances. It will depend on the context whether.

<sup>30</sup> See par 2.3.1 above. See also Trepte *Regulating Procurement* 64-70; Arrowsmith *Public and Utilities Procurement* 3.

<sup>31</sup> See par 2.3.1 above. S 217 of the Constitution specifically refers to cost effectiveness. See par 5.3.2(f) above.

<sup>32</sup> See the Guide to Enactment par 8.

<sup>33</sup> Preamble Model Law.

the Model Law and is pertinently stated as an objective in its preamble. The principle of economy also runs as a golden thread through all the different stages of procurement provided for.

Open tender proceedings are given preference as the method through which economy can be achieved.<sup>34</sup> A variety of alternative methods of procurement are however available provided particular circumstances, making the use of these methods more appropriate, exist.<sup>35</sup> This is realistic and will contribute to the principle of economy.<sup>36</sup> In the Revised Model Law<sup>37</sup> provision is also made for ERAs which can ensure significant savings both in the costs of the subject of the procurement and the costs of the process.<sup>38</sup> In so doing, it also keeps abreast with the realities of the use of electronic communication in the market place. The circumstances under which the different alternative methods of procurement may be used are described in a fair amount of detail. This should assist officials in determining under which circumstances the particular method can be used. If these provisions are adhered to it should also ensure that the principle of economy is achieved and misuse avoided.

Price remains the main criteria to ensure that the principle of economy is achieved.<sup>39</sup> The lowest evaluated tender in price, based on the prescribed criteria, must be awarded the tender.<sup>40</sup> Provision is made for objective criteria to be applied for the pre-qualification of tenderers based on the tenderer's ability to perform. The tenders must also be evaluated in terms of objective and

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<sup>34</sup> Art 18(1) pertinently provides that a procuring entity when procuring goods or construction shall do so by means of tendering proceedings. Exceptions to this method are only allowed in accordance with art 19, 20, 21 and 22 of the Model Law. Similar provisions apply with regard to the procurement of services. See art 18(3) and ch IV.

<sup>35</sup> These include two stage tendering, restricted tendering, request for proposals, competitive negotiation, request for quotations and single source procurement. The Revised Model Law provides for electronic reverse auctions.

<sup>36</sup> In low value procurement a request for quotations may be more cost effective than tender procedures.

<sup>37</sup> Art 51*bis* - 51*sexies*.

<sup>38</sup> John Linarelli *The WTO Agreement on Government Procurement and the UNCITRAL Model Procurement Law: A View from Outside the Region* Copyright © 2006 by Asian Journal of WTO & International Health Law and Policy; See also Christopher R Yukins *A Case Study In Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement* 2006 Spring *Public Contract Law Journal* 457.

<sup>39</sup> Art 34.

<sup>40</sup> Art 34(4)(b)(i)).

quantifiable criteria and if practicable, a relative weight must be awarded to each criterion.<sup>41</sup> The requirements<sup>42</sup> of objectivity, preciseness, standardisation of description and technical or quality attributes, with regard to the description of the subject matter of the procurement, will ensure that the principle of economy is achieved. Abnormally low tenders are specifically dealt with in the Revised Model Law.<sup>43</sup>

Fraud, corruption, the mal performance of previous contracts, bankruptcy, and non-compliance with tax obligations are all factors that negatively influence the achievement of the principle of economy. They are pertinently addressed in the Model Law.<sup>44</sup>

Socio-economic factors may be taken into account when evaluating a tender. The achievement of government's policies will of course have an impact on the economic principle. The Model Law accepts that public procurement can be utilised to achieve these goals and allows for a margin of preference to be taken into account in the award of a tender.<sup>45</sup>

The Model Law is primarily designed to achieve the principle of economy in public procurement although the philosophy behind the development of model laws is to further international trade.

When evaluating the GPA it must be kept in mind that it was developed as a plurilateral agreement to open up as much of public procurement business to international competition as possible. Its purpose is, amongst others, to make government procurement more transparent and to ensure that parties to the GPA do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.<sup>46</sup> In the preamble it is stated that the GPA is

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<sup>41</sup> Art 34(4)(b)(ii).

<sup>42</sup> Art 16.

<sup>43</sup> Revised Model Law art 12*bis*.

<sup>44</sup> Art 6 and 15.

<sup>45</sup> Art 34(4)(b)(i).

<sup>46</sup> See [http://www.wto.org/english/tratop\\_E/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_E/gproc_e/gp_gpa_e.htm) [accessed on 15 March 2010]

necessary to achieve greater liberalisation and expansion of world trade and to improve the international framework for the conduct of world trade.

The principle of economy is not pertinently mentioned in the GPA. In view of the fact that it is a plurilateral agreement aspects that are pertinently dealt with are its scope and coverage,<sup>47</sup> which provides for a monetary threshold below which the GPA is not applicable, the valuation of contracts for purposes of applicability of the GPA,<sup>48</sup> national treatment and non – discrimination,<sup>49</sup> rules of origin,<sup>50</sup> and special and differential treatment of developing countries.<sup>51</sup> When evaluating the GPA it must be kept in mind that it does not apply to lower valued procurement agreements and are specifically designed to accommodate developing countries. The WTO does recognise that the attainment of value for money is an essential requirement of an efficient government procurement system.<sup>52</sup> When evaluating the provisions of the GPA it is clear that the principle of economy is also a central theme in the GPA.

With regard to the methods of procurement the GPA distinguishes in article VII between open tender procedures,<sup>53</sup> selective tender procedures<sup>54</sup> and limited tender procedures.<sup>55</sup> In all cases the tender procedure must comply with the provisions of articles VII to XVI.<sup>56</sup> The Revised GPA specifically provides for the use of ERAs.<sup>57</sup> No preference is shown with regard to the different procedures.

In the GPA it is provided that either the lowest tender or the most advantageous tender, based on the evaluation criteria set out in the tender

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<sup>47</sup> Art 1.

<sup>48</sup> Art 2.

<sup>49</sup> Art 3.

<sup>50</sup> Art 4.

<sup>51</sup> Art 5.

<sup>52</sup> See [http://www.wto.org/english/tratop\\_E/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_E/gproc_e/overview_e.htm) [accessed on 15 March 2010].

<sup>53</sup> In these procedures all interested parties may participate.

<sup>54</sup> In these procedures, only parties invited to participate may tender. The process must be consistent with the provisions of art X.

<sup>55</sup> In these procedures, the procuring entity contacts suppliers individually under the conditions of art XV to tender.

<sup>56</sup> Art VII.

<sup>57</sup> Art XIV.

documentation, must be awarded the tender.<sup>58</sup> The Revised GPA has similar provisions.<sup>59</sup> Although aspects like objectivity, preciseness, standardisation of description and technical or quality attributes,<sup>60</sup> with regard to the description of the subject matter of the procurement are provided for in the GPA, it is also provided that criteria for the qualification of suppliers may not be used to discriminate against non-domestic suppliers.<sup>61</sup> Technical specifications may also not create unnecessary obstacles in international trade. The GPA pertinently prohibits the use of tender criteria either to inhibit international trade or to protect domestic suppliers from international competition.

Tenderers may be excluded because of bankruptcy or false declarations,<sup>62</sup> persistent deficiencies in performance of government contracts, final judgements in respect of serious crimes, professional misconduct, acts, or omissions that adversely reflect upon the commercial integrity of the supplier or failure to pay taxes.<sup>63</sup>

The GPA has detailed provisions relating to developing countries.<sup>64</sup> The purpose thereof is to make it more attractive for developing countries to become parties to the GPA. It specifically ameliorates the effects that the principle of non-discrimination against foreign tenderers and the promotion of international competition will have.<sup>65</sup> It also provides for the use of offsets by developing countries to achieve its socio-economic goals.<sup>66</sup> The GPA does take into consideration the needs of developing countries and provide therefore despite the effect it has on the principle of economy.

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<sup>58</sup> Art XIII.4.

<sup>59</sup> Art XV.5.

<sup>60</sup> Art VI.

<sup>61</sup> Art VIII.

<sup>62</sup> Art VIII.h.

<sup>63</sup> Revised GPA art VIII.3

<sup>64</sup> Art I and V.

<sup>65</sup> Art I provides for appendixes in which certain sectors of the economy can be excluded from the operation of the GPA; art II allows for thresholds to be agreed upon below which the GPA will not apply; art V allows developing countries to safeguard their balance of payments, to promote the establishment or development of domestic industries, support industries wholly dependant on public procurement and to comply with regional agreements encouraging economic growth.

<sup>66</sup> Art XVI.

The GPA, as can be expected because of the nature thereof, has as its underlying principle the promotion of international trade, which is pertinently reflected in its provisions. The principle of economy is however not ignored and does it remain a core principle throughout the GPA. Although the main goal is not to promote the principle of economy but rather international trade the principle of economy is well served by the provisions of the GPA.

The South African Constitution does not refer to the principle of economy by name. By elevating the requirements of cost effectiveness and competition in public procurement to constitutional imperatives, the principle of economy is made central to the South African public procurement regime. These principles relate to the attainment of value for money in public procurement.<sup>67</sup> The principles of cost effectiveness and competitiveness are repeated in the applicable legislation and the regulations issued in terms thereof. All organs of state are bound by these principles.<sup>68</sup>

The Constitution does not refer to a specific method of procurement. In principle, all methods of procurement are therefore available to organs of state provided they are cost effective and competitive under the particular circumstances. The PFMA<sup>69</sup> and MFMA<sup>70</sup> prescribe the use of competitive procedures. This is also prescribed by the regulations issued in terms of the PFMA<sup>71</sup> and the regulations issued in terms of the MFMA.<sup>72</sup> Four main methods of procurement are specifically mentioned namely petty cash purchases, written or verbal quotations, formal written price quotations and competitive bidding. The prescribed monetary threshold will determine which method may be used.

The objective of obtaining value for money in public procurement is grounded by the constitutional imperatives of cost effectiveness and competition. Not

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<sup>67</sup> Bolton 40 and 99.

<sup>68</sup> These principles are referred to in the PFMA, the MFMA and the regulations issued in terms of these Acts.

<sup>69</sup> S 38(1).

<sup>70</sup> S 14(5).

<sup>71</sup> Reg 16A3.2(a).

<sup>72</sup> Reg 12(1).

only these factors but also the principles of fairness equitability and transparency are interrelated and influence each other. A balance between these principles needs to be obtained. This has been expressed by the courts as determining the most meritorious tender.<sup>73</sup> This implies a value judgement to be made when deciding to award a tender. Such decision must be based on all the relevant circumstances, the evaluation and award criteria, taking into account and balancing the constitutional imperatives.

In the South African regime tenders may also be excluded because of fraud, improper conduct, the abuse of the system or a failure to perform on previous government contracts or the failure to obtain tax clearance certificates.<sup>74</sup> Save for the aforementioned the criminal law and various pieces of legislation<sup>75</sup> are applicable to fraud and improper conduct. The fact that corruption in South Africa is rife is probably not because of a lack of regulation but rather because of the failure to properly implement and enforce the applicable provisions.

Because of South Africa's history of apartheid socio-economic factors in public procurement are pertinently referred to in the Constitution<sup>76</sup> and does the PPPFA specifically deal therewith. The emphasis is at present on benefiting the historically disadvantaged tenderer through a preference system and on BBBEE. Although this emphasis is to be expected more could probably be done to ensure real and tangible benefits for the previously disadvantaged on grass roots level through public procurement. The above emphasis and perceptions of corruption have even led to some suppliers to be referred to in the news media and by the man on the street as "tenderpreneurs".

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<sup>73</sup> *Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education* [2008] JOL 21327 (C).

<sup>74</sup> PFMA Reg 16A8, MFMA s 112(1)(m), MFMA Reg 38.

<sup>75</sup> See for instance the *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

<sup>76</sup> S 217(2).

### 6.3.3 Essential provisions

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>1. The maximising of economy and efficiency, the fostering and encouragement of participation in the procurement proceedings and the promotion of competition are described as some of the Model Law's objectives. (Preamble Model Law and par 3.2 above).</p>	<p>1. Economy is not directly identified as a goal of the GPA. The Agreement states that its purpose is to achieve greater liberalisation and expansion of world trade and to improve the international framework for the conduct of world trade. To achieve the above in public procurement, it is stated that it is desirable that governments do not protect domestic products or services or domestic suppliers and that they do not discriminate against foreign products or services or against foreign suppliers. International competition does have the potential to influence the economic outcome of public procurement. (Preamble GPA and par 4.1, 4.3.1 and 4.3.2 above).</p>	<p>1. The Constitution provides, amongst other principles, for a public procurement system that is competitive and cost-effective. These principles are repeated in both the PFMA and the MFMA. (S 217 of the Constitution; s 51(1) of the PFMA; and s 112 of the MFMA and par 5.3.2 above).</p>
<p>2. Preference is given to open tender procedures as they are generally deemed to be the most effective in promoting competition, economy and efficiency in procurement. (Guide to Enactment par 14; Model Law art 18(1) and par 3.3, 3.4 and 3.5 above).</p>	<p>2. The GPA distinguishes between open, selective and limited tender procedures without indicating any preference. (Art VII; Revised GPA art I and V.4).</p>	<p>2. The South African regime provides for open, competitive tender and other procedures. Thresholds for the use of petty cash purchases, written or verbal quotations, formal written price quotations and competitive bidding are laid down. The tender procedures must be done through bid specification, evaluation and adjudication</p>

Model Law	GPA	South African law
		committees. (PFMA Regulation 16A.6.2(b); MFMA S 112(1)(a) and par 5.3.2, 5.3.3 and 5.3.4 above).
<p>3. Alternative methods of procurement are provided for. They are procurement by means of:</p> <ul style="list-style-type: none"> <li>• two-stage tendering (art 19 and 46);</li> <li>• restricted tendering (art 20 and 47);</li> <li>• request for proposals (art 19 and 48);</li> <li>• competitive negotiation (art 19 and 49);</li> <li>• request for quotations (art 21 and art 50); and</li> <li>• single-source procurement (art 22 and art 51).</li> </ul> <p>In the Revised Model Law provision is further made for electronic reverse auctions. (Revised Model Law, art 51<i>bis</i> - 51<i>sexies</i>. See further par 3.5 above).</p>	<p>3. Selective tendering, where only those suppliers invited to do so may submit a tender, and limited tendering, where the entity contacts suppliers individually, are specifically mentioned without prescribing how it should be implemented. The use of electronic reverse auctions is regulated under the Revised GPA (Article VII.3 Revised GPA art XIV).</p>	<p>3. If it is impractical to invite competitive tenders, where tender procedures are indicated because of the value of the procurement, the goods or services may be procured by other means. The reasons for such deviation must, however, be recorded and approved by the accounting officer or accounting authority. The use of electronic reverse auctions are not dealt with but can be used if it complies with the applicable provisions. (PFMA Regulation 16A6.4 and par 5.3.3 above). In the PFMA Regulations provision is made for procurement through either a tender process or by way of quotations, depending on the value of the goods or services. Thresholds for the use of petty cash purchases, written or verbal quotations, formal written price quotations and competitive bidding are determined from time to time. (PFMA Regulation 16A6.1 and par 5.3.3 above).</p>

Model Law	GPA	South African law
		<p>The methods of procurement municipalities and municipal entities may use include tenders, quotations, auctions and other types of competitive bidding. Thresholds for the use of petty cash purchases, written or verbal quotations, formal written price quotations and competitive bidding are determined from time to time. (MFMA s 112(a) and par 5.3.4 above).</p>
<p>4. Tenders must be responsive and the tenderers must be qualified. (Ch III and par 3.2.4).</p>	<p>4. Tenders must conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If it is determined whether a tenderer has the capability to fulfil a contract, its legal, commercial, technical and financial capabilities must be evaluated. (Art XIII.4 and par 4.3.5 above).</p>	<p>4. Procurement policies must provide for the determining of the essential evaluation and adjudication criteria tenders and tenderers must comply with. (PFMA Regulation 16A6.3(b); MFMA s 112(1)(a) and par 5.3.3 and 5.3.4 above).</p>
<p>5. Clarification of tenders is allowed and arithmetical errors can be rectified. Substance and not form is important. (Art 34(1)(a) and (b) and par 3.3.3 above).</p>	<p>5. In the evaluation of tenders, substance and not form is important. Unintentional errors may be corrected by tenderers. (Revised GPA art XV.3 and par 4.3.5 above).</p>	<p>5. Substance and not form is important. Obvious errors may be corrected and clarifications sought. (<i>Metro Projects CC and Another v Klerksdorp Local Municipality</i> 2004 1 SA 16 (SCA) at par 13, MFMA Regulation 36 and par 5.3.2(b) and 5.3.4 above).</p>

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>7. As any form of bribery or similar conduct detrimentally affects the objective evaluation of tenders, which will be contrary to obtaining value for money, such conduct makes a tender non-responsive. (Art 15 and par 3.2.8 above).</p>	<p>7. Tenderers may be excluded because of bankruptcy, false declarations, persistent deficiencies in performance of government contracts, final judgements in respect of serious crimes, professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier or failure to pay taxes. (Art VIII(h); Revised GPA art VIII.3 and par 4.3.5 above).</p>	<p>7. Tenderers may be excluded because of fraud, improper conduct, the abuse of the system or a failure to perform on previous government contracts or the failure to obtain tax clearance certificates. (PFMA Regulation 16A8, MFMA s 112(1)(m), MFMA Regulation 38 and par 5.3.3 and 5.3.4 above).</p>
<p>8. The evaluation must be done only in terms of the procedures and criteria laid down in the tender documentation. (Art 34(4)(a) and par 3.3.3 above).</p>	<p>8. Awards must be done in terms of the criteria specified. (Art VIII.4(c) and par 4.3.5 above).</p>	<p>8. Evaluation must be done by evaluation committees in terms of the specifications. (PFMA Regulation 16A6.3(b); MFMA s 112(1) and par 5.3.3 and 5.3.4 above).</p>
<p>9. The lowest evaluated tender in price, based on the prescribed criteria, must be awarded the tender. (Art 34(4)(b)(i) and par 3.3.3 above).</p>	<p>9. The lowest tender or the most advantageous tender based solely on the evaluation criteria set down in the tender documentation must be awarded the contract. The Revised GPA refers to the most advantageous tender based on the evaluation criteria, and if price is the sole criteria, the lowest price. (GPA art XIII; Revised GPA art XV.5 and par 4.3.5 above).</p>	<p>9. The notion of the “most meritorious tender”, suggesting the tender that best complies with the constitutional imperatives provided for in s 217(1) of the Constitution, the provisions of the PPPFA and possible objective criteria, was used to determine the successful tender. <i>(Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education [2008] JOL 21327 (C) and par 5.3.2(f) above).</i></p>
<p>10. A margin of preference may be applied when awarding a</p>	<p>10. No offsets are allowed save in the instance of developing</p>	<p>10. Socio-economic factors, as provided for in the PPPFA and the</p>

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
contract. (Art 34(4)(b)(i) and par 3.3.3 above).	countries. The Revised GPA also does not allow the use of offsets save in prescribed circumstances in the case of developing countries. (Art XVI; Revised GPA Art V.6 and par 4.3.5 above).	NIPP, must be taken into account in public procurement. Provision is made for a margin of preference and the use of offsets. (S 217(2) of the Constitution; the PPPFA; the NIPP and par 4.3.8 above).
11. The criteria specified for tenders must, be objective and quantifiable, and be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable. (Art 34(4)(b)(ii) and par 3.3.3).		11. The supply chain management policies on local government level must determine the criteria to which bid documentation for a competitive bidding process must comply. The accounting officer or accounting authority must ensure that bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No 53 of 2003);  (MFMA Regulation 21; PFMA Regulation 16A6.3)
12. Specifications, plans, drawings, designs and requirements or descriptions of goods, construction or services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured.	12. Technical specifications must be drafted in terms of performance and functional requirements, rather than design or descriptive characteristics; be based on international or national standards. Technical specifications	12. Specifications must be drafted in an unbiased manner; take account of any accepted standards which the equipment or material or workmanship should comply with; where possible be described in terms of performance required rather than in

Model Law	GPA	South African law
<p>There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as “or equivalent” are included.</p> <p>Standardised features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs.</p> <p>Due regard shall be had for the use of standardised trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations. (Art 16).</p>	<p>may not refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements. (Art VI; Revised GPA art X.2 and par 4.3.5 above).</p>	<p>terms of descriptive characteristics for design; may not create trade barriers in contract requirements; may not make reference to any particular trademark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work; must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity; and must be approved by the accounting officer prior to publication of the invitation for bids. (MFMA Regulation 27(2) and par 5.3.4 above).</p>

Model Law	GPA	South African law
<p>13. The Revised Model Law provides for the rejection of abnormally low tenders (Revised Model Law art 12<i>bis</i> and par 3.2.7 above).</p>	<p>13. Abnormally low tenders may be verified so as to ensure the tenderers' ability to perform. (Art XIII.4(a) and par 4.3.5 above).</p>	
<p>14. Negotiations may be entered into if there is an urgent need for the goods, construction or services, and tendering proceedings would be impractical. For this exception to be available the circumstances giving rise to the urgency may not have been foreseeable by the procuring entity nor may it be the result of dilatory conduct on its part.</p> <p>Negotiations may also be entered into if owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods. (Art 19).</p>	<p>14. Negotiations may be entered into if no single tender is the most advantageous. (Art XIV.1(b) and par 4.3.5 above).</p>	<p>14. A supply chain management policy may provide that the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders may be negotiated. Such negotiation may not allow any preferred bidder a second or unfair opportunity, may not be to the detriment of any other bidder, and may not lead to a higher price than the bid as submitted. (MFMA Regulation 24 and par 5.3.4 above).</p>
	<p>15. The procuring entity may, in the public interest, decide not to award the contract. (Art XIII.4(b) and par 4.3.5 above).</p>	
		<p>16. Supply chain management policies must provide how unsolicited tenders should be dealt with. (MFMA s 113 and par 5.3.4 above).</p>

#### 6.3.4 Conclusion on the principle of economy

Procurement is in essence an economic activity by which a public entity acquires goods and services in the marketplace.<sup>77</sup> Price will always form a core element thereof but can seldom be the only criteria. A distinction can be made between factors or criteria that have a direct or indirect influence on value for money, like price or the whole-life costs of the product, and those that have no influence on value for money, for instance offsets, but are included to address socio-economic aspects.<sup>78</sup> Socio-economic objectives can of course in the broader sense also have an influence on the principle of economy.<sup>79</sup> All three regimes allow for criteria and factors other than price to be taken into account when evaluating a tender.

In order to determine which tender will ensure the best value for money the Model Law refers to the lowest evaluated tender, based on the prescribed criteria, and the GPA to the most advantageous tender, based solely on the evaluation criteria. In South Africa the notion has been applied of the most meritorious tender, taking into account all of the criteria, including the constitutional imperatives of section 217. All three of the methods to determine which tenderer should be awarded the contract will probably result in similar outcomes. What is important is that all three imply that a value judgment must be made taking the prescribed criteria into account. These criteria must as far as possible be objective and quantifiable, and a relative weight should be attached to each. The notions of “evaluation”, “most advantageous” and “merit” all enable some flexibility and a value judgement to be made. The requirement that the criteria have to be taken into account will ensure substantial objectivity.

The other principles applicable to public procurement will also have an influence on the principle of economy, and they also need to be complied with to ensure that the best value for money is obtained.

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<sup>77</sup> Trepte *Regulating Procurement* 9 and 63.

<sup>78</sup> These factors will have a cost implication but will usually not have a direct influence in achieving better value for money with regard to the particular procurement.

<sup>79</sup> A duty may be imposed on a tenderer to train unskilled labourers which in the long run should have economic benefits in the broader sense.

The South African public procurement regime contains all of the essential elements of the principle of value for money as contained in the Model Law and the GPA. The GPA and the Revised Model Law, as against the South African regime, specifically deal with the treatment of abnormally low tenders. The GPA also deals with the possibility of not awarding a tender if it is in the public interest not to do so.<sup>80</sup> The South African public procurement regime would benefit from the inclusion of specific provisions which regulate how abnormally low tenders should be dealt with, and the possibility of not awarding a tender if it is in the public interest<sup>81</sup> not to do so.

The Model Law provides in some detail for a specific number of alternative methods of procurement, other than tendering.<sup>82</sup> The same detail is not provided for in the South African regime.<sup>83</sup> The South African regime does, however, have a general provision which allows other methods of competitive bidding than those specified. The South African regime, as against the Model Law and the GPA, prescribes how unsolicited bids must be dealt with.

Although provision is made in all three regimes for the achievement of socio-economic objectives, as can be expected, because of the history of apartheid, the Constitution<sup>84</sup> specifically provides for the legacies of apartheid to be addressed in public procurement.<sup>85</sup> This could potentially have a cost implication and have a negative impact on the achievement of value for

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<sup>80</sup> Art XIII.4(b). Public interest is not defined and will probably be differently interpreted in an international context, where it forms part of a plurilateral agreement, than in a domestic context.

<sup>81</sup> Changed circumstances, or delays caused may make a specific tender obsolete or not in the best interest of the procuring entity to pursue. The possibility not to award a tender under such circumstances will promote the principle of economy.

<sup>82</sup> In the deliberations of the Working Group, provisions to enable and regulate further alternative methods of procurement not included in the Model Law and Revised Model Law were agreed upon. Specific provisions are proposed to provide for and regulate tendering with pre-selection and two-envelope tendering (art 34 and 35 A/CN.9/WG.I/WP.69/Add.3) and framework agreements (ch VI A/CN.9/WG.I/WP.69/Add.4).

<sup>83</sup> South Africa should consider regulating in more detail the use of alternative methods in more detail. This would assist to ensure more conformity amongst the different procurement entities.

<sup>84</sup> S 217(2)(b).

<sup>85</sup> This is addressed in the PPPFA. These provisions will make it difficult for South Africa to at present accede to the GPA or the Revised GPA once it comes into operation.

money. However, the potential cost implication is limited by providing for a point system in the PPPFA.<sup>86</sup>

Despite the fact that the detail of the provisions of the three regimes with respect to the achievement of value for money differ, at least the following provisions (in addition to the criterion of the lowest price) are essential to achieving value for money, and appear in all three regimes:

- provision for open and competitive procedures like tender processes;
- provision for alternative procurement methods other than tender procedures;
- provision for objective criteria for the pre-qualification of tenderers based on the tenderer's ability to perform;
- provision for objective and quantifiable criteria for the evaluation and award of tenders;
- provisions that ensures adherence to substance and not form;
- provision for the exclusion of tenders on the basis of fraud, corruption, the mal performance of previous contracts, bankruptcy, and non-compliance with tax obligations; and
- provision for socio-economic factors to be taken into account.

The South African regime compares favourably with the other two regimes with regard to the principle of economy. Although the detail of the provisions differs, the outcomes should be similar. The South African regime will benefit from specific provisions relating to how abnormally low tenders should be dealt with and the possibility not to award a tender if it is in the public interest not to do so. More detailed provisions on alternative methods of procurement should be provided which should ensure more conformity between the different procuring entities. In this regard, in addition to the provisions of the Model Law and Revised Model Law which relate to alternative methods of procurement, the provisions as proposed by the Working Group for the proposed new Model Law which deal with pre-selection, two-envelope

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<sup>86</sup> See par 5.3.8 above.

tendering procedures<sup>87</sup> and framework agreements<sup>88</sup> could provide valuable guidance on how these methods could be regulated.

## **6.4 Competitiveness**

### *6.4.1 Introduction*

The principle of competition in procurement is in essence an economic one which could safely have been dealt with under the principle of economy. However, it is instead discussed as a separate principle as it is dealt with separately in section 217 of the Constitution.<sup>89</sup> It is a core feature of the procurement process, in particular with regard to the methods of procurement.<sup>90</sup> It is believed that competition, as an economic principle, will ensure that suppliers will offer the best product at the best price.<sup>91</sup> It overlaps with the other principles mentioned,<sup>92</sup> for instance that of effectiveness in that it is generally accepted that effective competition will enhance the process. As public procurement takes place in the open market the principle of competition entails that an opportunity is given to a sufficient number of suppliers in the open market to offer their goods or services to the procuring entity on a competitive basis.<sup>93</sup> The purpose of such competition is to obtain the best product at the best price through the most cost-effective process.<sup>94</sup> The provisions which ensure or enhance competition will be the focus of attention in this section.

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<sup>87</sup> Art 34 and 35 UNCITRAL document A/CN.9/WG.I/WP.69/Add.3.

<sup>88</sup> Ch VI UNCITRAL document A/CN.9/WG.I/WP.69/Add.4.

<sup>89</sup> See par 5.3.2(e) above.

<sup>90</sup> Bolton *Law of Government Procurement* 41-42; Trepte *Regulating Procurement* 96-98; and Arrowsmith *Public and Utilities Procurement* 18-21 and 423.

<sup>91</sup> Bolton *Law of Government Procurement* 131; Trepte *Regulating Procurement* 66-68; Arrowsmith *Public and Utilities Procurement* 62-63, also refer to the possible effect public procurement may have on competition in general. The State could form the dominant purchaser in a particular sector and force out smaller suppliers, which in the long run could be detrimental to competition.

<sup>92</sup> The other principles, to varying extents, also influence competitiveness. In particular will the principles of transparency, combating of abuse and fairness and equitability have an influence on competitiveness. The principle of competition will be discussed without going into detail with regard to the provisions that are pertinent to the other principles.

<sup>93</sup> See par 2.2.2 and in particular par 5.3.2(e) above. A sufficient number of participants is necessary to ensure effective competition. It might become too costly and ineffective to ensure competition by as many suppliers as possible. See also Bolton *Law of Government Procurement* 131.

<sup>94</sup> See par 5.3.2(e) above and in particular Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/).

#### 6.4.2 Comparison

In the preamble of the Model Law it is stated that competition between suppliers should be promoted. To ensure effective competition open tender procedures are deemed to be the most effective.<sup>95</sup> The Model Law however makes a distinction between the procurement of services<sup>96</sup> on the one hand and the procurement of goods and construction on the other hand, when prescribing the methods of procurement to be utilised.

In the case of procurement of goods and construction, tender procedures are the rule.<sup>97</sup> Alternative methods may only be used in prescribed circumstances.<sup>98</sup> These alternative methods include two-stage tendering, request for proposals or competitive negotiation;<sup>99</sup> restricted tendering;<sup>100</sup> request for quotations;<sup>101</sup> and, single source procurement.<sup>102</sup> The Revised Model Law also makes provision for electronic reverse auctions.<sup>103</sup>

In the case of the procurement of services, it must be solicited by way of a notice to be published in a specified publication, in which interested providers are requested to submit a proposal.<sup>104</sup> Tender procedures may be used if the procuring entity determines that it is feasible to formulate detailed specifications and that tender proceedings would be more appropriate, taking into account the nature of the services to be procured.<sup>105</sup> Two-stage tendering, request for proposals, competitive negotiation, restricted tendering, request for quotations and, single source procurement may also be used if the

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<sup>95</sup> Guide to enactment par 14.

<sup>96</sup> "Services" is defined in art 12(e) to mean any object of procurement other than goods and construction.

<sup>97</sup> Art 18.

<sup>98</sup> Pursuant to art 19, 20, 21 and 22.

<sup>99</sup> Art 19. In competitive negotiation procedures the procuring entity must engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition. Competitive negotiation may, in cases of urgency, be used as an alternative to single-source procurement.

<sup>100</sup> Art 20.

<sup>101</sup> Art 21.

<sup>102</sup> Art 22.

<sup>103</sup> Art 51(*bis*)

<sup>104</sup> Art 37(1). This includes notices to apply to pre qualify in order to submit a proposal.

<sup>105</sup> Art 18(3)(a).

procuring entity determines that it would be more appropriate to use such a method.<sup>106</sup>

Competition is also ensured by providing that: the text of the law, the regulations, administrative rulings, directives and all amendments of the above are publicly accessible and systematically maintained;<sup>107</sup> suppliers be allowed to participate without regard to nationality;<sup>108</sup> tenders or proposals be rejected in the case of inducements by suppliers or contractors;<sup>109</sup> the descriptions of goods, construction and services may not create obstacles to participation based on nationality and such description must be in terms of relevant objective technical and quality characteristics;<sup>110</sup> the language used during the process must, save for the official language, also include a language customarily used in international trade;<sup>111</sup> the procurement notices must be published in a newspaper, trade-, technical-, or professional journal with a wide international circulation;<sup>112</sup> and, the fees payable to the procuring entity to participate are limited to the direct expenses to provide the tender documents.<sup>113</sup>

The principle of competition is central to the methods of procurement provided for in the Model Law. Tender procedures are deemed to be the most competitive method for the procurement of goods and construction and a notice of solicitation of services in the case of the procurement of services. Exceptions to the principal methods are allowed only in narrowly prescribed circumstances. The importance of promoting international trade through the Model Law is evident from the provisions ensuring that nationality is not an obstacle to participation in the procurement process. This clear preference for international competition does not negatively affect the provisions of the Model Law that ensure competition.

The GPA does not specifically refer to the principle of competition. It is however clear that this principle is entrenched in the GPA. It is stated in the

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<sup>106</sup> Art 18(3)(b).

<sup>107</sup> Art 5.

<sup>108</sup> Art 8. Exceptions where domestic participation only is allowed are provided for in art 8 and art 23.

<sup>109</sup> Art 15

<sup>110</sup> Art 16.

<sup>111</sup> Art 17.

<sup>112</sup> Art 24.

<sup>113</sup> Art 26.

preamble that the public procurement regimes of countries should not afford protection to domestic products or services or domestic suppliers and should not discriminate against foreign products, services or suppliers. As can be expected of an instrument of this nature specific provision is made for national treatment and non discrimination.<sup>114</sup>

Although the GPA does not prescribe specific methods of procurement it accepts tender procedures as the general method for procurement. It distinguishes between open, selective and limited tender procedures.<sup>115</sup> Because of the relatively high monetary thresholds set by parties for the GPA to be applicable, the GPA does not need to deal with alternative methods of procurement to regulate low valued procurement. The use of electronic reverse auctions is not excluded by the GPA and is specifically dealt with in the Revised GPA, albeit on a neutral basis.<sup>116</sup> No distinction is made between the procurement of goods and construction as opposed to the procurement of services.

Competition is ensured by providing that: qualifying procedures for suppliers should be published in adequate time and no discrimination be allowed against foreign suppliers;<sup>117</sup> conditions to qualify for participation in tendering procedures must be published in adequate time to enable interested tenderers to initiate and complete the qualification procedures and no discrimination against foreign suppliers are allowed;<sup>118</sup> a summary notice in one of the official languages of the WTO must be published for each intended procurement;<sup>119</sup> conditions for participation in tendering procedures shall be limited to those which are essential to ensure the tenderer's capability to fulfil the contract in question;<sup>120</sup> technical specifications must be based on performance rather than design or descriptive

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<sup>114</sup> Art III.

<sup>115</sup> Art VII.

<sup>116</sup> Art XIV.

<sup>117</sup> Art VIII. Such procedures must be published ensuring that adequate time is given to suppliers to initiate and complete the procedures; conditions for participation must be limited to those which are essential to ensure the tenderer's capability to perform; conditions for participation shall not be less favourable to foreign suppliers than to domestic suppliers; and, entities keeping suppliers lists should not use the process or time frames to exclude foreign suppliers and ensure that application for inclusion on the list can be made at any time.

<sup>118</sup> Art VIII(a).

<sup>119</sup> Art IX.8.

<sup>120</sup> Art VIII(b).

characteristics and be based on international standards, or if they do not exist, on similar recognised standards or codes;<sup>121</sup> procuring entities must follow a single qualification procedure;<sup>122</sup> and, tenderers may be excluded on grounds such as bankruptcy or false declarations.<sup>123</sup>

The principle of competition in the GPA is in particular evident with regard to the different provisions that prohibit discrimination against foreign suppliers. This is to be expected of an instrument like the GPA. Although less detail is provided than in the Model Law, competition is ensured through many provisions that are similar to that of the Model Law.

It is a constitutional requirement of the South African law that its procurement system must be competitive.<sup>124</sup> Competitive bidding procedures are used as the primary method to ensure competition in public procurement.<sup>125</sup> This can include electronic reverse auctions. Although tender procedures are the primary method of procurement, other procedures are allowed for procurement below certain thresholds.<sup>126</sup> If it is in a specific case impractical to make use of a competitive bidding process other methods of procurement are allowed, provided that the accounting officer or accounting authority record and approve the reasons for such a deviation.<sup>127</sup> Even though they are less competitive than tender procedures such procedures can be justified in terms of other constitutional principles like cost effectiveness. A committee system is used for competitive bidding procedures.<sup>128</sup> No distinction is made between the procurement of goods and the procurement of services.

Competition is ensured in the South African law through provisions providing: for minimum time periods for the advertisement of tenders;<sup>129</sup> for open and

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<sup>121</sup> Art VI.2.

<sup>122</sup> Art VIII(g).

<sup>123</sup> Art VIII(h).

<sup>124</sup> S 217(1) of the Constitution.

<sup>125</sup> MFMA Reg 12. PFMA Reg 6 and PFMA Reg 16A.6.2.

<sup>126</sup> See MFMA Reg 12, 15, 16, 17 and 18 and PFMA Reg 16A.6.2. These include verbal and written quotations and petty cash purchases.

<sup>127</sup> PFMA Reg 16A.6.4.

<sup>128</sup> This includes bid specification, bid evaluation and bid adjudication committees. See Municipal MFMA Reg 26 and PFMA Reg 16A.6.2.

<sup>129</sup> The PFMA Reg 16A.6.3(c) prescribes a minimum of 21 days and the MFMA Reg

transparent pre qualification criteria;<sup>130</sup> for evaluation and adjudication criteria to be included in the tender documentation;<sup>131</sup> that the description of goods and services must take account of accepted standards in terms of performance;<sup>132</sup> and, for the avoidance of abuse.<sup>133</sup>

In the South African public procurement regime competitive bidding is the principal method to ensure competition. Provision is made to use other methods, especially in low cost procurement. It is apparent that the combating of fraud, corruption and the abuse of the procurement process is dealt with in greater detail than the other regimes.

Despite the differences in detail of the provisions of three regimes, they all address similar aspects of the procurement process to ensure competition. In the Model Law emphasis is put on the promotion of international trade, in the GPA emphasis is put on non-discrimination against foreign suppliers whilst in the South African regime it will be difficult to conclude that one aspect is emphasised. It can however be said that the South African regime has more detailed provisions to combat fraud and corruption than the other two regimes.

#### 6.4.3 Essential provisions

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
1. Discrimination based on nationality is only allowed in exceptional circumstances. (Art III). Open tender procedures are generally deemed to be most effective in promoting competition, economy and efficiency	The public procurement regimes of countries should not afford protection to domestic products or services or domestic suppliers and should not discriminate against foreign products, services or suppliers. Special and	1. Section 217(1) of the Constitution provides for a competitive procurement system. (Par 5.3.2(e) above).

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22(1)(b) 30 days if the value of the tender is above R10 million and 14 days if it is less than R10 million.

<sup>130</sup> MFMA s 112(e).

<sup>131</sup> PFMA Reg 16A6.3(b).

<sup>132</sup> MFMA Reg 27(2).

<sup>133</sup> PFMA Reg 16A.9. The MFMA s 112(1) provides that measures combating fraud corruption, favouritism, unfair and irregular practices must be taken. See also PFMA Reg 16A6.8 and 16A6.9; MFMA s 112(m); MFMA Reg 38 and 46.

Model Law	GPA	South African law
<p>in procurement. (Guide to Enactment par 14; art 18(1) and par 3.1 above).</p>	<p>differential treatment is however afforded for developing countries. Tender procedures must be applied in a non discriminatory manner. (Preamble; art V; art VII).</p>	
<p>2. Preference is given to open tender procedures. (Guide to Enactment par 14; Model Law art 18(1) and par 3.3, 3.4 and 3.5 above).</p>	<p>2. Tender procedures are accepted to be the most common method of procurement. A distinction is made between open, selective and limited tender procedures.  (Art VII.3(a) and par 4.3.5 above).</p>	<p>2. In the PFMA Regulations provision is made for procurement through either a tender process or by way of quotations, depending on the value of the goods or services required. The MFMA provides for tenders, quotations, auctions and other types of competitive bidding. (PFMA Regulation 16A6.1; MFMA s 112(a) and par 5.3.3 and 5.3.4 above).</p>
<p>3. Alternative methods of procurement are provided for. They are:</p> <ul style="list-style-type: none"> <li>• procurement by means of two-stage tendering (art 19 and 46);</li> <li>• restricted tendering (art 20 and 47);</li> <li>• requests for proposals (art 19 and 48);</li> <li>• competitive negotiation (art 19 and 49);</li> <li>• requests for quotations (art 21 and 50); and</li> <li>• single-source procurement (art 22 and 51).</li> </ul> <p>In the Revised Model</p>	<p>3. Selective tendering, where only those suppliers invited to do so may submit a tender, and limited tendering, where the entity contacts suppliers individually, are mentioned in addition to open tender procedures. Selective tender procedures must ensure the efficient operation of the procurement system and supplies must be selected to participate in the procedure in a fair and non-discriminatory manner. (Art VII.3; art X and par 4.3.5 above).</p>	<p>3. If it is impractical to invite competitive tenders, the goods or services may be procured by other means. The reasons for such deviation must, however, be recorded and approved by the accounting officer or accounting authority. (PFMA Regulation 16A6.4 and par 5.3.3 above). In the PFMA Regulations provision is made for procurement through either a tender process or by way of quotations, depending on the value of the goods or services required. (PFMA Regulation 16A6.1 and par 5.3.3</p>

Model Law	GPA	South African law
<p>Law provision is also made for electronic reverse auctions. (Revised Model Law art 51 <i>bis</i> - 51 <i>sexies</i>. See further par 3.5 above.).</p>		<p>above). The methods of procurement municipalities and municipal entities may use include tenders, quotations, auctions and other types of competitive bidding. (MFMA s 112(a) and par 5.3.4 above).</p>
<p>4. In the case of procurement of services, the principle method of procurement namely the solicitation of proposals, set out in chapter IV, must be used. The procedures that must be used to ascertain the successful proposal are:</p> <ul style="list-style-type: none"> <li>• Proposals that obtain a technical rating above a set threshold must be subjected to a straightforward price competition, or the proposal with the best evaluation in terms of the prescribed criteria must be accepted;</li> <li>• the procuring entity negotiates with suppliers and contractors who have submitted acceptable proposals, after which they submit their best and final offers; and</li> <li>• the procuring entity holds negotiations solely on price with the supplier or contractor who obtained the highest technical rating in accordance with the set criteria.</li> </ul>	<p>4. No distinction is made between the procurement of services and the procurement of goods. (Par 4.3.5 above).</p>	<p>4. No distinction is made between the procurement of services and the procurement of goods. Specific provision is made for the procurement of banking services, IT services and the appointment of consultants. (PFMA Regulations 16A6.3, MFMA Regulations 30, 31 and 35, and par 5.3.3 and 5.3.4 above).</p>

Model Law	GPA	South African law
(Art 42, 43 and 44 and par 3.4 above).		
<p>5. Public accessibility of the text of the law, the regulations, administrative rulings, directives and all amendments of the above, is ensured. They must also be systematically maintained. (Art 5 and par 3.2.3 above).</p>	<p>5. Developed countries should establish information centres to respond to reasonable requests from developing country for information relating to laws, regulations, procedures and practices regarding public procurement, notices about intended procurements which have been published, and the nature and volume of products or services procured or to be procured, including available information about future tenders. (Art V.11) Any law, regulation, judicial decision, administrative ruling and any procedure (including standard contract clauses) regarding government procurement must be published to enable tenderers to become acquainted with them. (Art XIX.1; par 4.3.1 and 4.3.6 above).</p>	<p>5. No specific provision is made for the availability of information in the procurement legislation. Legislation, regulations and law reports are freely available in South Africa.</p>
<p>6. The manner, place and deadline for the submission of applications to prequalify must be sufficient for suppliers to prepare and submit their applications in time. The reasonable needs of the procuring entity must also be, taken into account.</p>	<p>6. Any conditions to qualify for participation in tendering procedures must be published in adequate time to enable interested tenderers to initiate and complete the qualification procedures and no discrimination against foreign suppliers are allowed.</p>	<p>6. Tenders must be advertised in at least the <i>Government Tender Bulletin</i> for a minimum period of 21 days before closure. (PFMA Regulations 16A6.3(c) and par 5.3.3 above). The supply chain management policies of municipal procuring entities must provide for</p>

Model Law	GPA	South African law
(Art 7(3)(iv)).	(Art VIII(a) and par 4.3.5 above).	tender documentation, the advertising of and invitations for contracts. (MFMA s 112(g) and par 5.3.4 above). The MFMA Regulations provide that a public advertisement must include the closure date for the submission of bids, which may not be less than 30 days in the case of transactions over R10 million or which are of a long term nature, or 14 days in any other case, from the date on which the advertisement is placed in a newspaper. (MFMA Regulations 22(1)(b) and par 5.3.4 above).
7. The unrestricted invitation to tenderers to participate in the process by means of proper and wide publication of the invitation is provided for. (Art 18(1) and par 3.2.3 above).	7. Detailed provision is made for the publishing of invitations to participate, save as otherwise provided for in the case of limited tendering. The invitation may take the form of a notice of proposed procurement or the form of a notice regarding a qualification system. For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO In particular, provision is made for the use of electronic media to disseminate the information. (Art VII:1; art IX ; art XV; Revised GPA art V:3; and par 4.3.5 above).	7. Tenders must be advertised in at least the <i>Government Tender Bulletin</i> for a minimum period of 21 days before closure. (PFMA Regulations 16A6.3(c) and par 5.3.3 above). The supply chain management policies of procuring entities must provide for tender documentation, and the advertising of and invitations for contracts. (MFMA s 112(g) and MFMA Regulation 22(1) and par 5.3.4 above).
8. Ascertainable uniform	8. Any conditions for	8. Evaluation and

Model Law	GPA	South African law
<p>criteria with regard to the qualifications of suppliers must be used. (Art 6 and par 3.2.4 above).</p>	<p>participation in tendering procedures shall be limited to those which are essential to ensure the tenderer's capability to fulfil the contract in question. (Art VIII(b) and par 4.3.5 above).</p>	<p>adjudication criteria, including the criteria prescribed in terms of the PPPFA and the BBBEEA must be included in the tender documentation. (PFMA Regulation 16A6.3(b) and par 5.3.3 above).  The Municipal SCM policies must provide for open and transparent pre-qualification processes for tenders or other bids. (MFMA s 112(e) and par 5.3.4 above).</p>
<p>9. A comprehensive description and specification of the goods, construction or services to be procured, must be set out in the tender documentation. (Art 16).  The criteria to be used in evaluating and comparing tenders and in selecting the successful tender must be fully disclosed. (Art 34 and par 3.2.9 and 3.3.3 above).  The criteria specified for tenders must be objective and quantifiable, and be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable. (Art 34(4)(b)(ii) and par 3.3.3).</p>	<p>9. Technical specifications must be based on performance rather than design or descriptive characteristics and be based on international standards, or if they do not exist, on similar recognised standards or codes. (Art VI.2 and par 4.3.5 above).</p>	<p>9. Bid documentation must include evaluation and adjudication criteria. (PFMA Regulations 16A6.3(b)).  The Municipal Supply Chain management policies must provide for the compilation of tender documentation. (MFMA Regulations 21 and par 5.3.4 above).  It is essential that the goods or services be defined in such a manner and detail, for instance with regard to specifications and performance criteria, that the tender prices can be directly compared. (<i>WED (Pty) Ltd v Pretoria City Council</i> 1988 1 SA 746 (A)).  Specifications must be drafted in an unbiased manner; take account of any accepted standards which the equipment or material or workmanship should comply with; and,</p>

Model Law	GPA	South African law
		where possible, be described in terms of the performance required rather than in terms of descriptive characteristics for design. (MFMA Regulation 27(2) and par 5.3.4 above).
10. The fees payable to the procuring entity to participate are limited to the direct expenses to provide the tender documents. (Art 26 and par 3.3.2 above).		
11. The provisions of the Model Law are applicable to all procuring entities save procurement involving national defence, or national security, or specifically excluded in the regulations. This ensures uniformity and competition. (Art 1)	11. Each state party must ensure that each procuring entity and its constituent parts follow a single qualification procedure. An exception is allowed if there is a duly substantiated need for a different procedure. Efforts must be made to minimise differences in qualification procedures among entities. (Art VIII(g) and par 4.3.5 above).	11. Each procuring entity has its own SCM policy. Limited uniformity is promoted through <i>The Guide for Accounting Officers /Authorities</i> issued by the SCM Office of National PFMA in February 2004, and the <i>Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government</i> , issued by the same department in 2003, under reference 07-04/2003. These documents contain only broad guidelines.
12. Any form of bribery, or similar conduct, makes a tender non-responsive. (Art 15 and par 3.2.8 above).	12. The exclusion of any tenderer on grounds such as bankruptcy or false declarations is permissible, provided that such an action is consistent with the national treatment and non-discrimination provisions of the agreement. (Art VIII(h) and par	12. The PFMA Regulations provide for the avoidance of abuse of the supply chain management system, including issues such as fraud, corruption, improper conduct, failure to comply with the supply chain management system, failure to perform on previous contracts and a failure to pay

Model Law	GPA	South African law
	4.3.5 above).	<p>taxes. (PFMA Regulation 16A6.9 and par 5.3.3 above).</p> <p>The MFMA provides for the barring of persons from participating in tendering or other bidding processes, including persons-</p> <ul style="list-style-type: none"> <li>(i) who were convicted for fraud or corruption during the previous five years;</li> <li>(ii) who wilfully neglected, reneged on or failed to comply with a government contract during the previous five years; or</li> <li>(iii) whose tax matters are not cleared by the South African Revenue Service.</li> </ul> <p>(MFMA s 112(l) and par 5.3.4 above).</p>
<p>13. In competitive negotiation procedures the procuring entity must engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition. Competitive negotiation may, in cases of urgency, be used as an alternative to single-source procurement. (Art 19 and 49 and par 3.5.5 above).</p>	<p>13. Negotiations may be entered into if so specified in the tender documents or if no tender is obviously the most advantageous. (Art XIV.1 and par 4.3.5 above).</p>	<p>13. The MFMA provides for the negotiation of the final terms of contracts. (MFMA s 112(1)(h)(iii) and par 5.3.4 above).</p>
	<p>14. The process of and the time required for qualifying tenderers should not be used in order to keep tenderers or other parties off a list of tenderers or to prevent them from</p>	

Model Law	GPA	South African law
	<p>being considered for a particular intended procurement. (Art VIII(c) and par 4.3.5 above).</p>	
	<p>15. Procuring entities maintaining permanent lists of qualified tenderers shall ensure that tenderers may apply for qualification at any time and that all qualified suppliers so requesting are included in the lists within a reasonably short time. (Art VIII(d) and par 4.3.5 above).</p>	
	<p>16. If, after publication of the notice, a tenderer not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification. (Art VIII(e) and par 4.3.5 above).</p>	
		<p>17. The supply chain system must provide measures for the combating of fraud, corruption, favouritism and unfair and irregular practices and for promoting the ethics of officials and other role players. (PFMA Regulations 16A6.8 and 16A6.9; MFMA s 112(m); MFMA Regulations 38 and 46; and par 5.3.3 and 5.3.4 above).</p>

#### *6.4.4 Conclusion on competitiveness*

In order to achieve competition, all three procurement regimes allow open tender procedures as the principal method for public procurement. Other methods are also allowed. These other methods take practical circumstances into account whilst still ensuring competition as far as is reasonably practical. The provisions in general endeavour to ensure the equal treatment of all suppliers.

The Model Law, as against the GPA and the South African regime, specifically provides that the fees payable to participate in an intended procurement must be limited to the direct costs of providing the documents to participate in such procurement. The GPA specifically provides that the process of and time required to qualify to tender may not be used to keep possible suppliers off the list of suppliers or to prevent them from being considered for participating in the tender. If lists of suppliers are used, potential suppliers must at any time be allowed to apply for inclusion in such a list. Although provision is made in all three regimes with regard to the combating of fraud and corruption, the South African regime provides more detail and also provides for ethical conduct by the role players.

The fact that competitiveness is a constitutional imperative in the South African regime ensures the application of the principle of competition in practice and creates a safety net, should a particular aspect not be addressed in the applicable legislation or supply chain management policy or in the practical implementation of a particular procurement. Save for the applicable legislative provisions, it remains the constitutional duty of the procuring entity to ensure competitiveness through its supply chain management policies. The possibility for procuring entities to address the principle of competition in different ways in the different supply chain management policies should lead to more flexibility and the ability to adapt to different circumstances. Over prescriptive regulation could lead to a situation where only the minimum requirements set out are complied with. The negative side of this system is that there may be marked differences in the supply chain management

systems of the different procuring entities, which may lead to confusion, ineffectiveness and an increase in costs for tenderers.

It can be concluded that competition can generally be ensured by the following mechanisms:

- the use of open tender procedures as far as is practical;
- the availability of alternative methods of procurement should the circumstances so require;
- the provision and accessibility of relevant information;
- the proper advertisement of or invitation to participate in the procurement;
- the provision of full details of the pre-qualification requirements for tenderers, which may not be used to exclude possible tenderers;
- a comprehensive description of the goods and services to be procured, including all relevant technical and performance requirements, which may not be used to exclude possible tenderers;
- the disclosure of the evaluation criteria, which must be objective and quantifiable, and the relevant weight to be attached thereto for the award of the tender;
- realistic time frames;
- the capping of fees and charges for documentation and information to the costs of the printing thereof;
- the prohibition of or at least the regulation of communications and negotiation between the procuring entity and tenderers on aspects relating to the substance of the tender; and
- the exclusion of tenders on the basis of fraud, corruption, mal performance, bankruptcy, false declarations, failure to pay taxes and the abuse of the system.

The South African procurement regime compares favourably with the other two regimes with regard to the principle of competition. The South African regime could benefit by specifically providing that the costs for participating in

the procurement process and the time frames set should not be used to exclude possible suppliers in the procurement process. The provision in the South African regime of codes of conduct with which both officials and suppliers must conform does not appear in the other two regimes and its inclusion could benefit the other two systems.

## **6.5 Effectiveness**

### *6.5.1 Introduction*

To ensure that all of the principles applicable to public procurement are achieved, in particular value for money, the procurement system must be effective. Effectiveness can be defined as productiveness with relation to the costs of the procurement process.<sup>134</sup> Effectiveness at every stage of the procurement process must be realised.<sup>135</sup> Effectiveness has economic implications but is not exclusively an economic principle and it is therefore dealt with separately. For a procurement system to be effective it needs to be flexible.<sup>136</sup> As flexibility is such an integral part of effectiveness it is not deemed necessary to deal with flexibility as a separate principle.

The principle of effectiveness could imply an evaluation of all the individual provisions of the particular regime in order to ascertain whether the particular provision achieves its purpose effectively. This is however not practical in this research. What will be identified are the essential provisions that are important to ensure the practical effectiveness of the procurement process.

Effectiveness is in essence dependent on the proper implementation and balancing of all of the other principles referred to in this chapter.

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<sup>134</sup> See par 5.3.2(f) above. Also see Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 31, which refers to it as “ensuring that the award process itself is conducted in a timely and cost-effective manner”. Bolton *Law of Government Procurement* 99-100 refers to cost-effectiveness through all of the stages of the procurement process.

<sup>135</sup> The different stages are the compilation of tender requirements; the invitation to tender; the submission and receipt of tenders; the processing and evaluation of the tender; the award of the tender; review procedures; and the supervision of the execution of the tender.

<sup>136</sup> Watermeyer [no date] *Executive Summary* [www.cuts-international.org/](http://www.cuts-international.org/) states that a system is cost-effective when the system is standardised with sufficient flexibility to attain best-value outcomes in respect of quality, timing and price, and uses the least resources to effectively manage and control procurement processes.

### 6.5.2 Comparison

The Model Law, in its preamble recognises the importance of maximising efficiency in public procurement. It seeks to achieve this by providing that: the legal and related information relating to public procurement are accessible to the public and systematically maintained;<sup>137</sup> the criteria to qualify to tender be set out in the tender documentation and that the qualifications of suppliers may be ascertained at any stage of the procurement proceedings;<sup>138</sup> invitations to tender, or to prequalify, be published in an official gazette and publication with a wide international circulation in a language customarily used in international trade;<sup>139</sup> communications between suppliers and the procuring entity must be in a form that provides a record thereof, and if not possible, it must be recoded immediately thereafter;<sup>140</sup> the language used in documentation must include a language customarily used in international trade;<sup>141</sup> specified information must be retained in the record of proceedings;<sup>142</sup> access to information be allowed;<sup>143</sup> specifications, plans, drawings, designs and requirements or descriptions of the goods or services, be based on the relevant objective technical and quality characteristics thereof using standardised features, requirements, symbols and terminology;<sup>144</sup> deadlines may be extended,<sup>145</sup> clarification of tenders sought and provided,<sup>146</sup> and only responsive tenders be accepted;<sup>147</sup> different procuring methods, of which tender proceedings is the principal method, be used depending on specified circumstances;<sup>148</sup> and, challenge and review proceedings be available.<sup>149</sup>

The above provisions relate to all the important stages of the procurement process and serve all the other principles applicable to public procurement.

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<sup>137</sup> Art 5; Revised Model Law, art 5(2).

<sup>138</sup> Art 6.

<sup>139</sup> Art 24. The detail to be contained in such publication are set out in art 25.

<sup>140</sup> Art 9. Minutes of meetings with suppliers must be kept in art 28.

<sup>141</sup> Art 17.

<sup>142</sup> Art 11. Art 5*bis* of the Revised Model Law provides for the use of electronic communications.

<sup>143</sup> Art 11(2).

<sup>144</sup> Art 16(3)(a).

<sup>145</sup> Art 30.

<sup>146</sup> Art 34.

<sup>147</sup> Art 34.

<sup>148</sup> Chapters II, IV and V.

<sup>149</sup> Chapter VI.

Not only does it serve the effectiveness of the procurement process but it also relates to the objective of the Model Law to enhance international trade. This is evident from the specific provisions relating to the accessibility of information, use of a language customarily used in international trade, the publication of advertisements in an international publication with a world wide circulation and the description of goods and services to be procured in using standardised features, requirements, symbols and terminology.

The GPA does not state an effective public procurement system to be one of its objectives. It does however express the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding public procurement.<sup>150</sup> Although the purpose of the GPA differs from that of municipal procurement regimes, the principle of effectiveness of the regime itself is applicable in order to establish an effective framework of rights and obligations.

The principle of effectiveness is served in the GPA by the provisions that provide that: legal and related information on public procurement be published to enable tenderers to become acquainted therewith;<sup>151</sup> the legal, commercial, technical and financial capabilities of the supplier to fulfil the contract must be evaluated;<sup>152</sup> conditions for participation must be limited to those which are essential to ensure the tenderers' capability to fulfil the particular procurement;<sup>153</sup> if several languages may be used, one of the languages used for submitting tenders shall be one of the official languages of the WTO;<sup>154</sup> invitations to participate in intended procurement must be published, save in the case of limited tenders;<sup>155</sup> taking into consideration the procuring entity's reasonable needs, sufficient time for suppliers to prepare and submit tenders must be provided;<sup>156</sup> unintentional

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<sup>150</sup> Preamble. This is necessary to achieve greater liberalization and expansion of world trade and to improve the international framework for the conduct of world trade.

<sup>151</sup> Art XIX.1.

<sup>152</sup> Art XIII.4

<sup>153</sup> Art VIII(b); Revised GPA art VIII.1 and Revised GPA art IX.7.

<sup>154</sup> Art XII.

<sup>155</sup> Art IX. The information that must be included in such a notice is set out in detail. Such a notice may before the time set for opening be amended or re-issued.

<sup>156</sup> Revised GPA art XI.1. Such deadlines may be extended.

errors in tenders may be corrected;<sup>157</sup> if electronic means are used it must be ensured that the technology used are generally available and interoperable with other generally available information technology systems and software;<sup>158</sup> there are proper access to information;<sup>159</sup> technical specifications must be in terms of performance rather than design or descriptive characteristics and be based on international standards, national technical regulations, recognised national standards, or national building codes;<sup>160</sup> different methods of procurement may be used;<sup>161</sup> negotiations may be entered into if so specified in the tender documents or if no tender is obviously the most advantageous;<sup>162</sup> and, effective challenge proceedings be provided;<sup>163</sup>

The purpose of the above provisions is not so much to ensure effective public procurement as to level the playing field between contracting parties to the GPA and in doing so promote international trade.<sup>164</sup> These provisions are less detailed than the provisions of the Model Law. The abovementioned provisions, if adhered to, will however contribute to the effectiveness of the public procurement process and do serve the principle of effectiveness.

The South African Constitution provides that its procurement regime must be cost effective. It does not refer to the broader and more general principle of

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<sup>157</sup> Art XIII.1(b) and Revised GPA art XV.3.

<sup>158</sup> Revised GPA art V.3 It must also maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

<sup>159</sup> This include: the publication of awards; explanations of the procurement procedures and practices; reasons for the rejection of applications to qualify or for not selecting a tenderer; Information which in the opinion of the procuring entity will impede law enforcement, may be contrary to the public interest, or will prejudice the legitimate commercial interest of a particular public or private enterprise, or which might prejudice fair competition between suppliers, need not be provided. See Art XVIII; Revised GPA art X.10(c), art XVI and art XVII.

<sup>160</sup> Art VI.2. Revised GPA art X.2. The specifications may not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

<sup>161</sup> In art VII.3, and in the Revised GPA art V.4(a) open, selective and limited tendering procedures are mentioned.

<sup>162</sup> Art XIV.I.

<sup>163</sup> Art XX and Revised GPA Art XVIII, Such proceedings must be in writing and generally available, non-discriminatory, timely, transparent and effective. Time limits may be imposed for tenderers to initiate challenge proceedings. Challenges must be heard by a court or by an impartial and independent review body. Provision must be made for at least rapid interim measures, the correction of breaches, and compensation for loss or damage suffered. These procedures must be completed in a timely fashion.

<sup>164</sup> The prohibition of discrimination between domestic and foreign suppliers is an often repeated requisite.

effectiveness. Effectiveness may at times come at a price and on the face of it be contrary to the principle of cost-effectiveness. The benefits of effectiveness, for example a more efficient and costly form of communication, may outweigh the negative cost implications if it furthers the principle of competition and in so doing ensures that better value for money is obtained. This constitutional imperative of cost effectiveness needs therefore to be balanced with the other applicable principles. Taking into account the importance of the other constitutional principles and that the outcome of the procurement should also be cost effective, a cost effective public procurement system will in general serve the more general principle of effectiveness.

The important provisions of the South African public procurement system that promotes effectiveness provide: for effective risk-, demand-, acquisition-, logistic-, disposal- and performance management;<sup>165</sup> for bid specification-, evaluation- ,and adjudication committees;<sup>166</sup> for the advertising of tenders in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure;<sup>167</sup> for open and transparent pre-qualification procedures;<sup>168</sup> that evaluation and adjudication criteria be included in bid documentation;<sup>169</sup> that specifications must be drafted in an unbiased manner, take account of any accepted standards, where possible be described in terms of performance required rather than in terms of descriptive characteristics for design, and may not create trade barriers in contract requirements;<sup>170</sup> that competitive bidding is the principle method of procurement but other methods may be used in prescribed circumstances;<sup>171</sup> that obvious errors may be corrected and clarifications sought;<sup>172</sup> for the treatment of unsolicited bids;<sup>173</sup> and for contract management and dispute settling procedures.<sup>174</sup>

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<sup>165</sup> PFMA s 38(1) and 51(1)) and MFMA Reg 9(b).

<sup>166</sup> PFMA Reg 16A6.2 and MFMA Reg 27.

<sup>167</sup> PFMA Reg 16A6.3(c). MFMA Reg 291(b) provides that a public advertisement must include the closure date for the submission of bids, which may not be less than 30 days in the case of transactions over R10 million or which are of a long-term nature, or 14 days in any other case, from the date on which the advertisement is placed in a newspaper. MFMA Regulations 22(1)(b) and par 5.3.4 above).

<sup>168</sup> MFMA s 112(1)(e) and MFMA Reg 20.

<sup>169</sup> PFMA Reg 16A6.3(b) and (c).

<sup>170</sup> MFMA Reg 27(2).

<sup>171</sup> PFMA Reg 16A6.4. The MFMA in s 112(1)(a) provides for tenders, quotations, auctions and other types of competitive bidding.

<sup>172</sup> *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) at par 13 and

The South African regime addresses the essential aspects, addressed by the Model Law and GPA, to ensure an effective public procurement system. It could however benefit from regulating how procuring entities should deal with abnormally low tenders, clarifications to tenders, the extension of deadlines and the refusal to award tenders should it be in the public interest to do so. On the other hand the South African regime specifically provides for contract management, demand-, acquisition-, logistic-, disposal- and risk management and the regular assessment of supply chain performance, which is not done in the other two regimes. The applicable acts, regulations and treasury instructions tend to set out the broader principles to which the procuring entities' supply chain management policies should adhere. The effectiveness of a particular procuring entity's procurement could be negatively affected by a weak supply chain management policy, particularly in view of the accepted lack of capacity and expertise in the civil service, especially on local government level. This can be addressed by providing more detailed requirements, with regard to the essential provisions that ensure effectiveness, in the applicable regulations. In this regard the Model Law's more detailed exposition of the requirements, during each stage of the procurement process, a procuring entity must adhere to, will provide good guidance.

### 6.5.3 Essential provisions

<b>The Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>1. In the preamble and the Guide to Enactment maximising efficiency in procurement is stated to be one of the objectives of the Model Law. (Guide to enactment par 8 and par 3.1 above).</p>		<p>1. The South African Constitution in section 217(1) refers to a cost-effective procurement system, and not to the broader principle of effectiveness. These principles are repeated in the PFMA and the MFMA. The PFMA provides that effective, efficient and transparent systems of</p>

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<sup>173</sup> MFMA Reg 36.  
<sup>174</sup> MFMA s 112(1)(p).  
<sup>174</sup> MFMA. s 116.

The Model Law	GPA	South African law
		<p>financial and risk management and internal control must be ensured; that all major capital projects be evaluated prior to a final decision on the project; that the accounting officer or accounting authority is responsible for the effective, efficient, economical and transparent use of resources; and that the accounting officer or accounting authority must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct and to manage available working capital efficiently and economically. (PFMA s 38(1) and 51(1)).</p> <p>The MFMA Regulations provide that supply chain management policies must provide for effective systems for demand management; acquisition management; logistics management; disposal management; risk management; and performance management. (MFMA Regulation 9(b) and par 5.3.2(f) and 5.3.3 above).</p>
2. The text of the enacted law, the procurement regulations and all administrative	2. Any law, regulation, judicial decision, administrative ruling and any procedure	2. Although no specific provision is made in the procurement regime, all laws and regulations are

The Model Law	GPA	South African law
<p>rulings and directives of general application, and all amendments thereof, must be made accessible to the public. Such information must be systematically maintained in order to keep it up to date. In terms of the Revised Model Law, judicial decisions and administrative rulings with precedence value must also be made available to the public and be updated. (Art 5; Revised Model Law, art 5(2) and par 3.2.3 above).</p>	<p>(including standard contract clauses) regarding government procurement must be published to enable tenderers to become acquainted with them. (Art XIX.1; par 4.3.1 and 4.3.6 above).</p>	<p>published in government gazettes and judgments of the court are regularly reported in accessible law reports.</p>
<p>3. The criteria to qualify to tender must be set out in the tender documents and applied equally to all suppliers. Such criteria relate to a variety of aspects such as professional and technical qualifications and abilities, legal capacity, financial means, the fulfilment of obligations to the state regarding taxes, and a clean criminal record. (Art 6 and par 3.2.4 above).</p>	<p>3. The conditions for participation must be limited to those which are essential to ensure the tenderers' capability to fulfil the contract in question. The Revised GPA refers to the legal, commercial, technical, and financial abilities of the tenderer to undertake the relevant procurement. (Art VIII(b); Revised GPA art VIII.1; and par 4.3.5 above).</p>	<p>3. The PFMA Regulations provide for bid documentation to include evaluation and adjudication criteria. (PFMA Regulation 16A6.3(b) and par 5.3.3 above). The MFMA provides for open and transparent pre-qualification processes for tenders or other bids. The MFMA Regulations provide for a competitive bidding process for the following stages: the compilation of bidding documentation; the public invitation of bids; site meetings or briefing sessions, if applicable; the handling of bids submitted in response to public invitation; the evaluation of bids; and the award of contracts (MFMA s 112(1)(e); MFMA Regulation 20</p>

The Model Law	GPA	South African law
<p>4. Provision is made for the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings. (Art 6 and par 3.2.4 above).</p>	<p>4. To determine whether a tenderer has the capability to fulfil a contract its legal, commercial, technical and financial capabilities must be evaluated. (Art XIII.4 and par 4.3.5 above).</p>	<p>and par 5.3.4 above). 4. Provision is made in the PFMA and the MFMA Regulations for bid evaluation and adjudication committees. (PFMA Regulation 16A6.2 and MFMA Regulation 27 and par 5.3.3 and 5.3.4 above).</p>
<p>5. All of the tender documents must be formulated in the language specified by the enacting state and in a language customarily used in international trade. (Art 17 and par 3.2.10).</p>	<p>5. If an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO. (Art XII and par 4.3.5 above).</p>	
<p>6. In the Revised Model Law the use of electronic communication is specifically provided for. (Revised Model Law Art 5<i>bis</i> and par 3.2.3 and 3.2.5 above).</p>	<p>6. When using electronic means, a procuring entity must ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software. It must also maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access. (Revised GPA art V.3 and par 4.3.5 above)</p>	<p>6. Although electronic communication is not specifically dealt with it is not excluded. The <i>Electronic Communication and Transaction Act 25 of 2002</i>, which promotes the use of e-communication, will be applicable.</p>

<b>The Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>7. The minimum information that must be retained in the record of proceedings of all procurements is set out in detail. (Art 11 and par 3.2.6 above).</p>	<p>7. Documentation relating to all aspects of the process concerning procurements covered by the Agreement must be retained for three years. (Art XX.4 and par 4.3.5 above).</p>	<p>7. In the case of Review proceedings rule 53 of the Uniform Rules of Court provides for a record of the proceedings to be filed. The MFMA Regulations provide that procedures for proper record keeping must be in place. (MFMA Regulation 20(h)).</p>
<p>8. Communications must be in a form that provides a record of the content of the communication, and if not possible, confirmation in a form which provides such record, must immediately be done after the communication. (Art 9 and par 3.2.5 above).</p>	<p>8. Documentation relating to all aspects of the process must be retained for three years. (Art XX.4 and par 4.3.5 above).</p>	<p>8. In Review proceedings a record of the proceedings must be filed in terms of rule 53 of the Uniform Rules of Court.</p>
<p>9. Detailed provision is made for access to information, or portions thereof, with due regard to the interest of the procurement entity and tenderers that certain information be kept confidential. (Art 11(2) and par 3.2.6 above).</p>	<p>9. In both the GPA and Revised GPA ample provision is made for the publication of awards, requests for explanations of the procurement procedures and practices; reasons for the rejection of applications to qualify or for not selecting a tenderer; and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer. Information which in the opinion of the procuring entity will impede law enforcement, may be</p>	<p>9. Sections 32 and 33 of the Constitution provides for the right to access to information and for just administrative action. These rights are specifically provided for in PAIA and PAJA. (Par 5.3.2(d) and 5.3.7(b) and (c) above).</p>

The Model Law	GPA	South African law
	<p>contrary to the public interest, or will prejudice the legitimate commercial interest of a particular public or private enterprise, or which might prejudice fair competition between suppliers, need not be provided. (Art XVIII; Revised GPA art X.10(c); Revised GPA Art XVI; Revised GPA Art XVII and par 4.3.6 above).</p>	
<p>10. The specifications, plans, drawings, designs and requirements or descriptions of the goods or services, to be procured, must as far as possible be based on the relevant objective technical and quality characteristics of such goods and services. In the formulation of any specifications, plans, drawings and designs, standardised features, requirements, symbols and terminology must be used. (Art 16(3)(a) and par 3.2.9 above).</p>	<p>10. Where appropriate, technical specifications prescribed by procuring entities must be in terms of performance rather than design or descriptive characteristics and be based on international standards, national technical regulations, recognised national standards, or national building codes. (Art VI.2. Revised GPA art X.2 and par 4.3.5 above).</p>	<p>10. Specifications must be drafted in an unbiased manner, take account of any accepted standards which the equipment or material or workmanship should comply with, where possible be described in terms of performance required rather than in terms of descriptive characteristics for design, may not create trade barriers in contract requirements, may not make reference to any particular trademark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity, and</p>

The Model Law	GPA	South African law
		must be approved by the accounting officer prior to publication of the invitation for bids. (MFMA Regulation 27(2) and par and 5.3.4 above).
<p>11. Several procurement methods are provided for in chapter II of the Model Law.</p> <p>(Par 3.3, 3.4 and 3.5 above).</p>	<p>11. No particular method is prescribed but open, selective and limited tendering procedures are specifically recognised.</p> <p>(Art VII.3, Revised GPA art V.4(a) and par 4.3.5 above).</p>	<p>11. Goods or services may be procured by means other than competitive bidding if it is impractical to invite competitive bids. The accounting officer or accounting authority must approve and record the reasons for deviating from inviting competitive bids. (PFMA Regulation 16A6.4 and par 5.3.3 above).</p> <p>The MFMA provides for tenders, quotations, auctions and other types of competitive bidding. (MFMA s 112(1)(a) and par 5.3.4 above).</p>
<p>12. Provision is made for the publication of invitations to tender or to prequalify, in an official gazette and in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.</p> <p>(Art 24 and par 3.3.2 above).</p>	<p>12. Invitations to participate in intended procurement must be published, save in the case of limited tenders, and may take the form of a notice of proposed procurement or a notice regarding a qualification system. The information that must be included in such a notice is set out in detail. Such a notice may before the time set for opening be amended or re-issued. (Art IX and par 4.3.5 above).</p>	<p>12. The PFMA provides for the advertising of tenders in at least the <i>Government Tender Bulletin</i> for a minimum period of 21 days before closure. (PFMA Regulation 16A6.3(c) and par 5.3.3 above).</p> <p>The MFMA Regulations provide that a public advertisement must include the closure date for the submission of bids, which may not be less than 30 days in the case of transactions over R10 million or which are of a long-term nature, or 14 days in any</p>

The Model Law	GPA	South African law
		<p>other case, from the date on which the advertisement is placed in a newspaper. (MFMA Regulations 22(1)(b) and par 5.3.4 above).</p>
<p>13. Detailed provision is made as to what has to be included in the advertisement of the invitation to tender and to pre-qualify. Potential tenderers may ask for clarification of the invitation to tender. The procuring entity is allowed to modify the tender documents before the expiry date for the tender. Such variation must be communicated to all potential tenderers who received documentation. (Art 25 and 28 and par 3.3.2 above).</p>	<p>13. Documentation must be forwarded to tenderers on request and reasonable explanations required by tenderers must be provided promptly. The Revised GPA sets out in detail what must be included in the documentation provided to tenderers. (Art XII.3. Revised GPA Art X and par 4.3.5 above).</p>	<p>13. The PFMA Regulations provide for bid documentation to include evaluation and adjudication criteria and the advertising of tenders. (PFMA Regulation 16A6.3(b) and (c) and par 5.3.3 above). The MFMA provides for bid documentation, advertising of and invitations for contracts. (MFMA s 112(1)(g) and par 5.3.4 above). The MFMA Regulations provide that advertisements for tenders must include a statement that bids may be submitted only on the bid documentation provided by the municipality or municipal entity. (MFMA Regulations 22(1)(b) and par 5.3.4 above).</p>
<p>14. Minutes of a meeting with potential tenderers must be kept. The minutes must indicate all clarifications to the tender documentation. Such minutes must be provided to all potential tenderers who received tender documentation. (Art 28(3) and par 3.3.2 above).</p>		<p>14. The MFMA Regulations provide that procedures for proper record keeping must be in place. (MFMA Regulation 20(h)).</p>
<p>15. The deadline for the</p>	<p>15. A procuring entity,</p>	

The Model Law	GPA	South African law
<p>submission of tenders may be extended if necessary to afford potential tenderers time to take the clarification or modification, or the minutes of the meeting into account in their tenders. The procuring entity may also, in its absolute discretion, extend the deadline if it is not possible for one or more suppliers or contractors, owing to circumstances beyond their control, to submit their tenders by the deadline. (Art 30 and par 3.3.2 above).</p>	<p>taking into consideration its own reasonable needs, must provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders. Such deadlines may be extended. (Revised GPA art XI.1 and par 4.3.5 above).</p>	
<p>16. Suppliers or contractors may be asked to clarify their tenders in order to assist in the examination, evaluation and comparison thereof. Purely arithmetical errors that are discovered during the examination of tenders may be corrected. Notice of any such correction must be given to the supplier or contractor. (Art 34(1)(b) and par 3.3.3 above).</p>	<p>16. Tenderers may be given the opportunities to correct unintentional errors. (Art XIII.1(b); Revised GPA art XV.3 and par 4.3.5 above).</p>	<p>16. Substance and not form is important. Obvious errors may be corrected and clarifications sought. (<i>Metro Projects CC v Klerksdorp Local Municipality</i> 2004 1 SA 16 (SCA) at par 13, MFMA Regulations 36 and par 5.3.2(b) and 5.3.4 above).</p>
<p>17. The procuring entity may regard a tender as responsive only if it is in accordance with all of the requirements set forth in the tender documents. The procuring entity shall not accept a tender if the supplier or contractor that submitted the tender</p>	<p>17. To be considered for the award, a tender must be in writing. It must comply with the essential requirements of the notices and tender documentation and be from a supplier that satisfies the conditions for participation.</p>	<p>17. The use of bid specification, evaluation and adjudication committees is provided for. (PFMA Regulation 16A6.2(b) and MFMA Regulation 26). The MFMA provides for open and transparent pre-qualification</p>

<b>The Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>is not qualified, if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error, if the tender is not responsive and where the tenderer unlawfully induced or attempted to induce the awarding of the tender to it. (Art 34 and 15 and par 3.2.8 and 3.3.3 above).</p>	<p>(Revised GPA art XV.4 and par 4.3.5 above).</p>	<p>processes for tenders or other bids. (MFMA s 112 (1)(e) and par 5.3.3 and 5.3.4 above).</p>
<p>18. In competitive negotiation procedures the procuring entity must engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition. Competitive negotiation may, in cases of urgency, be used as an alternative to single-source procurement. (Art 19 and 49 and par 3.5.5 above).</p>	<p>18. Negotiations may be entered into if so specified in the tender documents or if no tender is obviously the most advantageous. (Art XIV.1 and par 4.3.5 above).</p>	<p>18. The MFMA provides for the negotiation of the final terms of contracts. (MFMA s 112(1)(h)(iii) and par 5.3.4 above).</p>
<p>19. Provision is made for challenge and review proceedings in chapter VI of the Model Law. They include the possibility of review by the procuring entity, administrative review, the suspension of procurement proceedings and judicial review. (Par 3.6 above).</p>	<p>19. In article XX of the GPA and article XVIII of the Revised GPA, detailed provision is made for effective challenge proceedings. Such proceedings must be in writing and generally available, non-discriminatory, timely, transparent and effective. Time limits may be imposed for tenderers to initiate challenge proceedings. Challenges must be heard by a court or by an impartial and independent review body. Provision must</p>	<p>19. Remedies are provided for in both the common law, especially the law of contract, and the law of delict, as well as by administrative law. The MFMA provides for contract management and dispute settling procedures. (MFMA s 112(1)(p) and par 5.3.4 above).</p>

The Model Law	GPA	South African law
	<p>be made for at least rapid interim measures, the correction of breaches, and compensation for loss or damage suffered. It is specifically provided that challenge procedures must be completed in a timely fashion. (Par 4.3.7 above).</p>	
<p>20. The provisions of the Model Law apply to all procuring entities, ensuring uniformity.</p>	<p>20. It must be ensured that procuring entities follow a single qualification procedure, and that differences in qualification procedures between the procuring entities are minimised. (Art VIII(g); Revised GPA art IX.2 and par 4.3.5 above).</p>	<p>20. The South African procurement regime allows every procuring entity to compile its own supply chain management policy. These policies must still be in accordance with the Constitution, the PFMA the MFMA and the regulations issued in terms thereof. (Par 5.3.3 and 5.3.4 above).</p>
	<p>21. Parties are not prevented from imposing or enforcing measures necessary to protect public morals, order, or safety; to protect human, animal or plant life or health; to protect intellectual property; or measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour. (Revised GPA art III:2 and par 4.3.5 above).</p>	
	<p>22. In the case of a tender which is abnormally lower than the other tenders submitted, enquires</p>	

The Model Law	GPA	South African law
	<p>may be made to ensure that the tenderer can comply with the conditions of participation and is capable of fulfilling the terms of the contract to be awarded. (Art XIII.4(a); Revised GPA art XV.6 and par 4.3.5 above).</p>	
		<p>23. The PFMA Regulations and the MFMA Regulations provide that the supply chain management system must provide for at least demand-, acquisition-, logistic-, disposal- and risk management and the regular assessment of supply chain performance. (PFMA Regulation 16A.3.2(d); MFMA Regulation 9 and par 5.3.3 and 5.3.4 above).</p>
		<p>24. The MFMA and MFMA Regulations deal with the treatment of unsolicited bids. (MFMA s 113; MFMA Regulation 37 and par 5.3.4 above).</p>
		<p>25. Contract management is specifically provided for in section 116 of the MFMA .</p>

#### 6.5.4 Conclusion on effectiveness

From an analysis of the three public procurement regimes it can be concluded that all three regimes endeavour to achieve effectiveness throughout the procurement process. Although there are differences in detail, the essential provisions to ensure an effective public procurement system are present in all

three regimes. The South African regime, however, specifically addresses contract management and how to deal with unsolicited bids which is not the case with either the Model Law or the GPA. In the South African regime, supply chain management policies must provide for demand-, acquisition-, logistic-, disposal- and risk management and the regular assessment of supply chain performance. The GPA and the Model Law do not contain such provisions. They do, however, have specific provisions with regard to the use of language, the extension of the deadlines in the procurement process, how to deal with abnormally low tenders, the clarification of tenders and the refusal to award tenders should it be in the public interest not to do so which are not contained in the South African regime. The GPA also specifically allows for measures to protect public morals, public order, or public safety; to protect human, animal or plant life or health; to protect intellectual property; and measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour. These last mentioned measures are typical of international trade instruments to ensure state parties are not unnecessarily restricted in addressing the mentioned issues domestically.

By allowing procuring entities to determine their own supply chain management policies the South African system may on the one hand tend towards ineffectiveness because of a lack of standardisation, but on the other hand be more effective in that the procuring entities can adapt their policies to best suit their own circumstances. The proper implementation of the other principles discussed in this chapter will also ensure effectiveness.

For a public procurement regime to be effective the analysis above shows that it must provide for the following:

- the publication and accessibility of the laws, regulations, administrative rulings, directives and judicial decisions relating to public procurement;
- the timeous advertisement of procurement opportunities with sufficient information as to the nature of such opportunities, the applicable criteria and the advertisement of the eventual award;

- the keeping of a record of the proceedings, which record may be kept by electronic means, and must include the content of the proceedings;
- the setting of realistic time frames, taking into account the circumstances of the procuring entity, the tenderer and the public at large;
- the provision of transparent and accessible pre-qualification criteria for potential tenderers, which criteria must ensure the ability of the potential tenderer to successfully perform the contract;
- the use of objective technical and quality characteristics using standardised symbols, terminology, features and requirements for specifications, drawings, plans and designs;
- the provision of performance-based criteria that are objectively quantifiable and have been accorded relative weights;
- the provision of flexible procurement methods whilst ensuring that such flexibility is not misused;
- the provision of access to information with due regard to the possible confidentiality of parts of such information.;
- the modification of tenders by the procuring entity in prescribed circumstances;
- the possibility of clarification of tenders by the procuring entity on request;
- the possibility of correcting minor and unintentional errors, correcting arithmetical errors, and ensuring that substance and not form determines the outcome of the procurement;
- the framing of provisions on how to deal with abnormally low tenders;
- the framing of contract management procedures to come into play after the award of the tender.

The principle of effectiveness is adequately addressed by all three regimes throughout the procurement process. The South African regime, however, as against the Model Law and the GPA, specifically provides for contract management, demand-, acquisition-, logistic-, disposal- and risk management and the regular assessment of supply chain performance. The GPA and Model Law do, however, have specific provisions regulating the extension of

deadlines in the procurement process, which are not contained in the South African regime. The GPA also specifically allows for measures to protect public morals, public order, and public safety; to protect human, animal or plant life or health; to protect intellectual property; and measures relating to the goods or services of persons with disabilities, philanthropic institutions, or prison labour.

## **6.6 Transparency**

### *6.6.1 Introduction*

In this context transparency generally refers to openness and a free flow of information. In public procurement it implies that information should be generally accessible and available at all stages of the procurement process. The information should include the detail of procurement opportunities, the criteria to be applied to the tender, the applicable rules and practices, and decisions and the reasons therefore, and should be accessible and available to all interested parties.<sup>175</sup>

This is one of the most important principles in the public procurement process, as is evident from the detailed provisions in both the Model Law and GPA designed to ensure transparency throughout the procurement process. This principle should also lead to or at least enhance the implementation of the other principles. The requirement of access to information forms a core element of transparency. As this requirement is so integral to transparency it will be discussed as part of the requirement of transparency.

### *6.6.2 Comparison*

Transparency is one of the objectives which are pertinently recognised in the preamble of the Model Law. The importance of this principle for the Model Law is evident from the further research done on transparency. Once again, transparency is needed throughout the procurement process and does the Model Law address transparency at all stages of the public procurement process. One of the core elements of transparency is access of tenderers to

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<sup>175</sup> See par 5.3.2(d).

information relevant to the procurement. This relates to the legal aspects of the procurement regime itself, the procurement opportunities, the requirements for participation, the criteria for award of the tender, the criteria and specifications relating to the subject matter of the procurement and the outcome of the tender.

The essential provisions of the Model Law that ensure transparency provide: that the laws, regulations, administrative rulings and directives be accessible and systematically maintained;<sup>176</sup> that at the beginning of the fiscal year information of forthcoming procurement be published;<sup>177</sup> that invitations to tender or invitations to pre-qualify be published in local and international newspapers and in an official government publication in a language used in international trade;<sup>178</sup> for the minimum content to be set out in the tender documentation;<sup>179</sup> that the criteria and procedures to assess the qualifications of tenderers be set out in the tender documentation;<sup>180</sup> that the criteria and specifications relating to the subject of the procurement be set out fully in the tender documentation;<sup>181</sup> that all suppliers be informed of clarifications to and modifications of tenders;<sup>182</sup> for all tenders to be opened at the time and place specified, the right to be present and the announcement of the names of tenderers and their tender prices;<sup>183</sup> for the minimum information that has to be retained in the record of proceedings;<sup>184</sup> that a decision to reject a tender and the grounds therefore be recorded and the tenderer be notified;<sup>185</sup> for the outcome of the tender awards to be published;<sup>186</sup> and, for the rejection of a tender in the case of bribery or similar conduct, the reasons therefore to be recorded and the supplier to be informed thereof.<sup>187</sup>

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<sup>176</sup> Art 5 and Revised Model Law art 5(2).

<sup>177</sup> Revised Model Law, art 5(3).

<sup>178</sup> Art 24.

<sup>179</sup> Art 25.

<sup>180</sup> Art 6.

<sup>181</sup> Art 16.

<sup>182</sup> Art 28.

<sup>183</sup> Art 33.

<sup>184</sup> Art 11.

<sup>185</sup> Art 12, Revised Model Law art 12*bis*(3).

<sup>186</sup> Art 14.

<sup>187</sup> Art 14 and 15.

The Model Law does not exclude the use of electronic communication, the use of which will assist in the dissemination of information. Save that the above provisions of the Model Law will ensure transparency in the domestic sphere, it is apparent that transparency in the international sphere is also sought. The essential elements to ensure transparency are the dissemination of information, access thereto, minimum information that must be provided and retained, the provision of reasons and anti bribery measures.

In its preamble, the GPA recognises the importance of transparency of the laws, regulations, procedures and practices that relate to public procurement. The purpose hereof is to ensure that the suppliers of the parties to the GPA will not be excluded from partaking in international public procurement because of a lack of knowledge of the applicable laws, procedures and practices. In the Revised GPA emphasis is also put on the avoiding of conflicts of interest and corrupt practices, in accordance with international instruments, such as the United Nations Convention Against Corruption.

The essential provisions of the GPA ensuring transparency provide: that the laws, regulations, judicial decisions, administrative rulings of general application, and procedures regarding government procurement must be published in such a manner as to enable other parties and suppliers to become acquainted with them;<sup>188</sup> that notices of intended procurement,<sup>189</sup> and a summary notice of the procurement<sup>190</sup> must be published, and that State Parties are encouraged to publish a notice of planned procurement for the fiscal year;<sup>191</sup> for the publishing

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<sup>188</sup> Art XIX. In terms of the Revised GPA (art VII.1) State Parties must promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clauses mandated by law or regulation and incorporated by reference in notices and tender documentation, and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public. Explanations of the laws, regulations, judicial decisions and administrative rulings must be provided on request.

<sup>189</sup> Art VII.2 prescribes in detail what need to be included in such notice and that it must also be done by electronic means.

<sup>190</sup> Art VII.3 The information must include the subject-matter of the procurement; the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and, the address from which documents relating to the procurement may be requested.

<sup>191</sup> Revised GPA art VII.

of invitations to participate in the procurement proceedings;<sup>192</sup> that any conditions for participation in tendering procedures be published in adequate time to enable interested suppliers to initiate and complete the qualification procedures;<sup>193</sup> that all the information necessary to permit suppliers to submit responsive tenders be included in the tender documentation;<sup>194</sup> that in the case of the amendment of tenders notice thereof must be given and the same circulation awarded thereto as the original documents upon which the amendment was based;<sup>195</sup> that any significant information given to one supplier be simultaneously given to all other suppliers in adequate time to permit them to consider such information and to respond thereto;<sup>196</sup> that tenders be received and opened under procedures and conditions guaranteeing the regularity thereof;<sup>197</sup> for the retention of procurement documentation;<sup>198</sup> for reasons why a tender was not selected, the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer to be provided on request by an unsuccessful tenderer;<sup>199</sup> for measures to ensure transparency, accessibility and availability of information after the award of the tender;<sup>200</sup> and, that a conflict of interest and corrupt practices be avoided.<sup>201</sup>

The use of electronic communication is recognised in the GPA and Revised GPA as an important means to disseminate information. In essence transparency is ensured by the wide dissemination of information, access to and availability of information, the provision of sufficient information in tender

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<sup>192</sup> Art IX. In terms of the Revised GPA, art VII, the notice of procurement, must be widely disseminated and remain readily accessible to the public, at least until the expiration of the time period indicated in the notice. It must also be accessible by electronic means free of charge.

<sup>193</sup> Art VIII.

<sup>194</sup> Art XII; Revised GPA art X:7.

<sup>195</sup> Art IX.10; Revised GPA art X:11.

<sup>196</sup> Art IX.10; Revised GPA art X:11.

<sup>197</sup> Art XIII.3; Revised GPA art XII.

<sup>198</sup> ArtXX.4.

<sup>199</sup> Art XVIII; Revised GPA art XVI:1.

<sup>200</sup> Art XVIII; Revised GPA art XVI:1 It includes a provision that within 72 days after making an award, a notice to that effect must be published. On request from a supplier an entity has to give an explanation of its procurement practices and procedures, provide pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end or why it was not selected. On request pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer must be provided to an unsuccessful tenderer.

<sup>201</sup> Revised GPA art V.4.

documentation to ensure effective participation by suppliers, the provision of reasons for decisions on request and the avoidance of a conflict of interest and corrupt practices.

The South African Constitution refers in section 217 to transparency as a constitutional imperative in public procurement. Save for this provision, the preamble to the Constitution refers to the values of accountability, responsiveness and openness. Section 33 of the Constitution provides for the right of access to information, which right is given content to in PAIA. Because of the history of the past the principle of transparency is deemed as one of the foundational principles for a democratic non racial South Africa. Section 33 of the Constitution and PAIA are also applicable to public procurement and forms part of the public procurement regime, albeit indirectly as part of general constitutional principles and general legislation.

The essential provisions relating to transparency in public procurement provides the following: for the advertisement of tenders in at least the Government Tender Bulletin for a minimum of 21 days before the closing date for submissions;<sup>202</sup> for bid documentation to include evaluation and adjudication criteria;<sup>203</sup> for open and transparent prequalification processes;<sup>204</sup> for the inclusion of evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA and the BBBEEA, in the tender documentation;<sup>205</sup> that the reasons for any deviations or minor rectifications of tenders be recorded and reported;<sup>206</sup> for the opening, registering and recording of bids in the presence of interested persons and that the names of tenderers and their tender prices be read out if practical;<sup>207</sup> for a record of proceedings in the case of review;<sup>208</sup> that the awards of tenders be

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<sup>202</sup> PFMA Reg 16A6.3(c). MFMA Reg 22(1)(a) provides for the publication of invitations to tender through public advertisement in newspapers commonly circulating locally, the website of the municipality or municipal entity, or in any other appropriate ways.

<sup>203</sup> PFMA Reg 16A6.3(b).

<sup>204</sup> MFMA s 112(e).

<sup>205</sup> PFMA Reg 16A6.3(b). MFMA Reg 27(2) provide for specifications to be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services, where possible to describe specifications in terms of performance required rather than in terms of descriptive characteristics for design, and to indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity.

<sup>206</sup> MFMA Reg 36(2).

<sup>207</sup> MFMA s 112(i) and MFMA Reg 23.

<sup>208</sup> Rule 53 of the Uniform Rules of Court.

published in the Government Tender Bulletin and the other media by means of which the tenders were advertised,<sup>209</sup> for an attendance or oversight process, by a neutral or independent observer appointed by the accounting officer, when this is appropriate for ensuring fairness and promoting transparency;<sup>210</sup> and, the review of administrative decisions.<sup>211</sup>

The aspect of transparency is central to not only the public procurement regime but also the new democratic dispensation in South Africa. The constitutional rights to access to information and to fair administrative action have a direct bearing on public procurement. The South African regime provides for transparency through all the stages of public procurement. It can be improved by providing that intended procurement be advertised at the beginning of each fiscal year and that all relevant information on public procurement, including laws, regulations, judicial and administrative decisions, standard forms of agreement and supply chain management policies be made accessible to interested parties. This can effectively be done through a dedicated website.

### 6.6.3 Essential provisions

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
1. In the Preamble to the Model Law it is stated that transparency is one of the objectives it wants to achieve in the procedures relating to public procurement. In the Guide to Enactment the identified objectives of the Model Law are maximising competition, according fair treatment to tenderers, and enhancing transparency and objectivity. (Par 3.1 above).	1. In its preamble the GPA recognises that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement. The Revised GPA in its preamble recognises the importance of transparent measures regarding government procurement, of carrying out procurement in a transparent and impartial manner, and of avoiding conflicts of	1. The preamble to the Constitution states that the Constitution is adopted, inter alia, to lay the foundations for a democratic and open society. It pertinently refers to the values of accountability, responsiveness and openness. (Constitution s 1). The principle of transparency is entrenched in section 33 of the Constitution, which provides for the right of access to

<sup>209</sup> PFMA Reg 16A6.3 (d).

<sup>210</sup> MFMA Reg 26(c).

<sup>211</sup> PAIA.

Model Law	GPA	South African law
	<p>interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption. (Par 4.1, 4.3.1 and 4.3.5 above).</p>	<p>information. This section is also applicable to and plays an important role in public procurement. The PAIA gives expression to this constitutional principle. Transparency is also one of the requirements of a public procurement system in terms of section 217 of the Constitution (<i>Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng (no 2)</i> 2003 6 SA 308 (W); <i>South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board</i> 2001 2 SA 675 (C) and par 5.3.2(d) above).</p>
<p>2. The text of the enacted law, the procurement regulations and all administrative rulings and directives of general application which relate to procurement covered by the enactment, and all amendments thereof, must be made accessible to the public. Such information must be systematically maintained in order to keep it up to date. In the revised Model Law it is provided that judicial decisions and administrative rulings with precedence value must also be made available to the public and be updated.</p>	<p>2. In terms of the GPA the laws, regulations, judicial decisions, administrative rulings of general application, and procedures regarding government procurement must be published in such a manner as to enable other parties and suppliers to become acquainted with them. In terms of the Revised GPA Parties must promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clauses mandated by law or regulation and incorporated by</p>	<p>2. South African legislation and law reports are generally available.</p>

Model Law	GPA	South African law
<p>(Art 5; Revised Model Law, art 5(2) and par 3.2.3 above).</p>	<p>reference in notices and tender documentation, and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public. Explanations of the laws, regulations, judicial decisions and administrative rulings must be provided on request. (Art XIX; Revised GPA art VI and par 4.3.5 above).</p>	
<p>3. At the beginning of the fiscal year procuring entities may publish information of the forthcoming expected procurement opportunities. (Revised Model Law, Art 5(3) and par 3.2.3 above).</p>	<p>3. The Revised GPA distinguishes between a notice of an intended procurement, a summary notice and a notice of planned procurement for the fiscal year. The latter is not obligatory. (Revised GPA art VII and par 4.3.5 above).</p>	
<p>4. The publishing of invitations to tender or invitations to pre-qualify in local and international newspapers and in an official government publication in a language used in international trade are provided for. (Art 24 and par 3.3.2 above).</p>	<p>4. Detailed provision is made in the GPA for the publishing of invitations to participate in the procurement proceedings. Specific provisions apply in the case of limited tendering. The invitation to participate in the procurement may take the form of a notice of proposed procurement and in certain instances the form of a notice regarding a qualification system. The information</p>	<p>4. Tenders must be advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure. (PFMA Regulations 16A6.3(c) and par 5.3.3 above). The MFMA Regulations provide for the publication of invitations to tender through public advertisement in newspapers commonly circulating locally, the website of the</p>

Model Law	GPA	South African law
	<p>that needs to be included is set out in detail.</p> <p>In terms of the Revised GPA, the notice of procurement, must be widely disseminated and remain readily accessible to the public, at least until the expiration of the time period indicated in the notice. It must also be accessible by electronic means free of charge. (Art IX; Revised GPA art VII:1 and par 4.3.5 above).</p>	<p>municipality or municipal entity, or in any other appropriate ways. (MFMA Regulations 22(1)(a) and par 5.3.4 above).</p>
<p>5. The minimum content to be included in the invitation to tender and in the tender documents is set out. (Art 25(1) and par 3.3.2 above).</p>	<p>5. The GPA provides with regard to qualification procedures for prospective tenderers that any conditions for participation in tendering procedures must be published in adequate time to enable interested suppliers to initiate and complete the qualification procedures; and, that any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them. (Art VIII and par 4.3.5 above).</p>	<p>5. The PFMA Regulations provide for bid documentation to include evaluation and adjudication criteria. (PFMA Regulation 16A6.3(b)). The MFMA provides that the supply chain management policies must prescribe bid documentation, advertising of and invitations for contracts. (MFMA s 112(g) and par 5.3.4 above).</p>
<p>6. The criteria and procedures that the</p>	<p>6. Any conditions for participation in</p>	<p>6. The evaluation and adjudication criteria,</p>

Model Law	GPA	South African law
<p>procuring entity may use to assess the qualifications of suppliers and contractors are specified. It is provided that the requirements should be set out in the tender documents and applied equally to all suppliers. (Art 6 and par 3.2.4 above).</p>	<p>tendering procedures must be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation in a particular procurement must be limited to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to undertake the relevant procurement. (Art VIII; Revised Model Law, Art VIII and par 4.3.5 above).</p>	<p>including the criteria prescribed in terms of the PPPFA and the BBBEEA, must be included in the tender documentation. (PFMA Regulations 16A6.3(b) and par 5.3.3 above). The MFMA provides that the supply chain management policies must prescribe open and transparent pre-qualification processes for tenders or other bids. (MFMA s 112(e) and par 5.3.4 above).</p>
<p>7. Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, must be set out in the tender documents. (Art 16 and par 3.2.9).</p>	<p>7. All information necessary to permit suppliers to submit responsive tenders must be included in the tender documentation. The Revised GPA adds that the information provided in the tender documentation must also enable tenderers to prepare responsive tenders. (Art XII; Revised GPA art X:7and par 4.3.5 above).</p>	<p>7. The MFMA Regulations provide for specifications to be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services, where possible to describe specifications in terms of performance required rather than in terms of descriptive characteristics for design, and to indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity. (MFMA Regulations 27(2) and par 5.3.4 above).</p>
<p>8. Clarifications to tenders and modifications thereof are</p>	<p>8. Provision is made in the GPA for amendments of tenders</p>	<p>8. The MFMA Regulations provide for the accounting officer to</p>

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>allowed provided that all suppliers and contractors must be informed of such clarifications and modifications in time to enable them to submit their tenders timeously. (Art 28 and par 3.3.2 above).</p>	<p>after publication but before the time set for opening or receipt of the tenders. This is on condition that the re-issued notice must be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement must simultaneously be given to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to the information provided. (Art IX.10; Revised GPA art X:11 and par 4.3.5 above).</p>	<p>record the reasons for any deviations or minor rectifications of tenders and to report them to the next meeting of the council, or board of directors in the case of a municipal entity, and to include them as a note to the annual financial statements. (MFMA Regulations 36(2) and par 5.3.4 above).</p>
<p>9. Tenders must be opened at the time and place specified. All tenderers have the right to be present at the opening. The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced and immediately recorded in the record of the tendering proceedings. (Art 33 and par 3.3.3 above).</p>	<p>9. Tenders must be received and opened under procedures and conditions guaranteeing the regularity thereof. Provision is made in both the GPA and Revised GPA for negotiations between the procuring entity and potential tenderers. (Art XIII.3; Revised GPA art XII and par 4.3.5 above).</p>	<p>9. The MFMA provides that the supply chain management policies must prescribe procedures and mechanisms which provide for the opening, registering and recording of bids in the presence of interested persons. (MFMA s 112(i) and par 5.3.4 above). The MFMA Regulations provide for tenders to be opened only in public, at the same time and as soon as possible after the period for the submission of tenders has expired, the right to request that the names</p>

Model Law	GPA	South African law
		<p>of the tenderers who submitted tenders in time must be read out and, if practical, also each tenderer's total tender price, to record in a register all tenders received in time, to make the register available for public inspection and to publish the entries in the register and the tender results on the website of the municipality or municipal entity. (MFMA Regulations 23 and par 5.3.4 above).</p>
<p>10. The minimum information that must be retained in the record of proceedings of all procurements is set out in detail. (Art 11 and par 3.2.6 above).</p>	<p>10. Documentation relating to all aspects of the process concerning procurements covered by the Agreement must be retained for three years. (Art XX.4 and par 4.3.5 above).</p>	<p>10. In the case of Review proceedings rule 53 of the Uniform Rules of Court provides for a record of the proceedings to be filed. The MFMA Regulations provide for proper record keeping. (MFMA Regulation 20(h)).</p>
<p>11. The decision of the procuring entity to reject a tender and the grounds for the decision must be recorded in the record of proceedings and promptly communicated to the tenderer. Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations. (Art 12, Revised Model Law art 12<i>bis</i>(3) and par 3.2.7 above).</p>	<p>11. On request pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer must be provided to an unsuccessful tenderer. (Art XVIII; Revised GPA art XVI:1)</p>	<p>11. PAJA provides for reasons for administrative decisions to be given. (Par 5.3.6 and 5.3.7 above).</p>

Model Law	GPA	South African law
<p>12. The outcome of tender awards must be published. The rejection of a tender based on bribery or similar conduct, and the reasons therefore have to be recorded in the record of the procurement proceedings and communicated to the supplier or contractor. (Art 14 and 15 and par 3.2.8).</p>	<p>12. The GPA includes specific measures to ensure transparency and the availability and accessibility of information with regard to the tender process after the award of the tender. They include a provision that within 72 days after making an award, a notice to that effect must be published. On request from a supplier an entity has to give an explanation of its procurement practices and procedures, provide pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end or why it was not selected. On request pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer must be provided to an unsuccessful tenderer. (Art XVIII; Revised GPA art XVI:1 and par 4.3.5 above).</p>	<p>12. The awards of tenders must be published in the Government Tender Bulletin and the other media by means of which the tenders were advertised. (PFMA Regulation 16A6.3 (d) and par 5.3.3 above).</p>
<p>13. The use of electronic media is not excluded. (Par 3.3.2 above).</p>	<p>13. Provision is made for the use of electronic media to disseminate information. (Revised GPA art V:3, VII:1 and VII.4 and par 4.3.5 above).</p>	<p>13. The Electronic Communication and Transaction Act 25 of 2002 promotes the use of electronic communication including e-government</p>

Model Law	GPA	South African law
		services.
		14. The MFMA Regulations provide for an attendance or oversight process, by a neutral or independent observer appointed by the accounting officer, when this is appropriate for ensuring fairness and promoting transparency. (MFMA Regulation 26(c) and par 5.3.4 above).

#### 6.6.4 Conclusion on transparency

Transparency is one of the core requirements of the Model Law, the GPA and the South African regime. All of the regimes have detailed provisions ensuring transparency throughout the procurement process.

In the GPA and the Model Law it is specifically provided that notice of forthcoming or intended procurement must be given at the beginning of each fiscal year. No such provision exists in the South African regime. The South African regime provides for the possibility of an attendance and oversight process by a neutral observer if appropriate to ensure transparency.

Both the Model Law and the GPA specifically provide that the law, administrative rulings and procedures and directives relating to public procurement must be accessible. In South Africa also the above information is available with regard to public procurement. However, it would greatly assist potential tenderers, in particular foreign tenderers, if such information with regard to all procuring entities could be made available centrally. A dedicated website where all of the relevant information is accessible and kept up to date will greatly enhance the transparency of public procurement in South Africa.

Although there are differences in detail, transparency is ensured in all three regimes by

- requiring the availability and accessibility of the law, administrative rulings and procedures and directives relating to public procurement;
- requiring the publication of invitations to participate in tenders;
- providing that the qualification requirements for tenderers are to be specified;
- requiring that the specifications applicable to the subject matter of the procurement be set out;
- providing that the criteria for evaluating tenders be specified;
- providing that information on modifications or alterations to tenders be given;
- providing that the detail of the tender awards made be published;
- providing for the right to be present at the opening of tenders;
- providing for the obligation to keep a record of the proceedings;
- providing for reasons to be given for using other methods than an open tender; and
- providing for reasons for the award and rejection of a tender to be furnished.

It can safely be said that in all three regimes the principle of transparency is central to public procurement, and that adequate provision is made in all three regimes to ensure that transparency is achieved in public procurement. The South African regime could be improved by requiring that notice of forthcoming procurement opportunities should be given at the beginning of the fiscal year and by making relevant public procurement information more accessible and available. This could be done, for instance, by the use of dedicated websites or other electronic media, which should, in addition to the normal information on tenders and awards, include detail on the law, administrative rulings and procedures, and directives relating to public procurement.

## **6.7 Combating of abuse**

### *6.7.1 Introduction*

The principle of the combating of abuse entails that conflicts of interest, fraud and corruption must be avoided. This principle is supported by, and overlaps with, most of the principles referred to above, and is to an extent a function of

the above principles. Because of the vast amounts of money involved in public procurement, the scope of public procurement, the many opportunities for abuse and the prevalence of abuse, the principle of the combating of abuse in public procurement needs to be dealt with separately. Only the provisions which deal directly with the combating of abuse, and not all of the provisions supportive of this principle, will be dealt with. In particular, the principles of accountability, transparency and integrity assist in ensuring that abuse is combated. These principles are dealt with separately and will not be discussed here.

### *6.7.2 Comparison*

Save for the provisions that ensure transparency, the Model Law addresses the combating of abuse in public procurement in articles 6(6) and 15. The general principles of the law, in particular the criminal law, of the country enacting the Model Law will of course also address the combating of abuse.

Article 6(6) provides that a tenderer must be disqualified if any information provided by the tenderer regarding his qualifications is false. If the information is materially inaccurate or incomplete, the tenderer may be disqualified. It might be difficult to determine when information is false and when only inaccurate or incomplete. Art 15 provides that a tender has to be rejected if the tenderer offers, gives or agrees to give, directly or indirectly, a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement. The rejection of the tender and the reasons therefore have to be recorded and communicated to the supplier or contractor.

The GPA does not address the combating of abuse of public procurement at all. The Revised GPA in its preamble recognises the importance of avoiding conflicts of interest and corrupt practices, in public procurement, in accordance with applicable international instruments such as the United Nations Convention against Corruption. This is provided for in article V.4(b) which provides that public procurement must be conducted in a manner that avoids conflict of interests and that prevents corrupt practices. Article VIII.3 provides that tenderers may be excluded by a procuring entity on grounds

such as false declarations, final judgments in respect of serious crimes, professional misconduct, or acts or omissions that adversely reflect upon the commercial integrity of the supplier.

In the South African regime, section 217 of the Constitution does not specifically refer to the combating of abuse in public procurement. Such abuse will however undermine the constitutional imperatives of fairness, equitability, cost effectiveness, transparency and competitiveness, contained in section 217 of the Constitution.

The combating of abuse is specifically regulated in the public procurement regime. It provides: that the abuse of the supply chain management system should be avoided;<sup>212</sup> that supply chain management policies must provide for the exclusion of persons who were convicted for fraud or corruption during the previous five years, who wilfully neglected, reneged on or failed to comply with a government contract during the previous five years, or whose tax matters are not cleared by the South African Revenue Service;<sup>213</sup> that the supply chain management policies on local government level must provide for the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by councillors in contravention of the Code of Conduct for Councillors or municipal officials in contravention of the Code of Conduct for Municipal Staff Members;<sup>214</sup> that accounting officers and accounting authorities must take effective and appropriate steps to prevent irregular expenditure and losses resulting from criminal conduct;<sup>215</sup> for effective and appropriate steps to be taken by an official, trading entity or constitutional institution to prevent, within

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<sup>212</sup> PFMA Reg 16A9. This includes the combating of fraud and corruption and the rejection of tenders because of non-payment of taxes, the abuse of the system or the failure to perform on a previous contract.

<sup>213</sup> MFMA s 112(1)(l) and PFMA Reg 16A9.2.

<sup>214</sup> MFMA s 112(1)(n).

<sup>215</sup> PFMA s 38(1). On discovery of any irregular expenditure, procuring entities must immediately in writing report the particulars of the expenditure to the relevant treasury. They must further take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution that makes or permits an irregular expenditure.

that official's area of responsibility, any irregular expenditure;<sup>216</sup> for mechanisms to receive and attend to complaints to be established;<sup>217</sup> and, for disciplinary proceedings to be instituted against state officials for financial misconduct;<sup>218</sup>

Save for the above, the *Prevention and Combating of Corrupt Activities Act*<sup>219</sup> prescribes offences in respect of corrupt activities. It also contains specific provisions relating to public procurement. These include provisions that relate to the invitation, award and withdrawal of tenders.<sup>220</sup> The Act also makes it an offence for any public officer to acquire any private interest in a contract, agreement, or investment emanating from or connected with, or which is made on account of a public body in which he or she is employed. It further provides for a register of tender defaulters.<sup>221</sup>

The South African regime has much more detailed provisions to combat the abuse of the procurement system than both the Model Law and the GPA. Despite these provisions, abuse of public procurement in South Africa is rife. This is probably not because of lack of, or poor regulation, but rather because of a possible lack of political will to combat abuse, a lack of capacity and expertise in the civil service and a lack of proper implementation of the available provisions.

### 6.7.3 Essential provisions

Model Law	GPA	South African law
	1. In its preamble the Revised GPA recognises the importance of avoiding conflicts of interest and corrupt practices in accordance with	1. Although section 217 of the Constitution does not specifically refer to the combating of abuse, abuse of the public procurement process will undermine fairness,

<sup>216</sup> PFMA s 45(c).

<sup>217</sup> PFMA Reg 16A9.3 and MFMA s 32. The complaints relate to the non-compliance with the norms and standards of the supply chain management system. It also provides such mechanism should enable remedial action or legal action to be taken in the case of fraud, corruption or other criminal offences.

<sup>218</sup> PFMA s 81(1), PFMA s 83(1) and MFMA s 171 and 172.

<sup>219</sup> Act 12 of 2004.

<sup>220</sup> S 13.

<sup>221</sup> S 29.

Model Law	GPA	South African law
	<p>applicable international instruments such as the United Nations Convention against Corruption. It is specifically provided that the procurement must be conducted in a manner that avoids conflict of interest and prevents corrupt practices. (Revised GPA art V.4(b) and (c) and par 4.1 and 4.3.1 above).</p>	<p>equitability, cost effectiveness, transparency and competitiveness. (Par 5.3.2 above).</p>
<p>2. The Model Law provides that when assessing whether or not tenderers qualify to participate in a procurement process, a tenderer must be disqualified if any information provided by the tenderer regarding its qualifications is false. If such information is materially inaccurate or incomplete the tenderer may be disqualified. (Art 6(6) and par 3.2.4).</p>	<p>2. Procuring entities may exclude any tenderer on grounds such as false declarations, final judgments in respect of serious crimes, professional misconduct, or acts or omissions that adversely reflect upon the commercial integrity of the supplier. (Revised GPA Art VIII.3 and par 4.3.5 above).</p>	<p>2. The PFMA Regulations provide for the avoiding of abuse of the supply chain management system. This includes the combating of fraud and corruption and the rejection of tenders because of non-payment of taxes, the abuse of the system or the failure to perform on a previous contract. (PFMA Regulations 16A9). In terms of the MFMA the supply chain management policies on local government level must provide for the exclusion of persons who were convicted for fraud or corruption during the previous five years, who wilfully neglected, reneged on or failed to comply with a government contract during the previous five years, or whose tax matters are not cleared by the South African Revenue Service. (MFMA s 112(1)(l) and par 5.3.3 above).</p>
<p>3. A procuring entity</p>		<p>3. Tenders may be</p>

Model Law	GPA	South African law
<p>has to reject a tender if the tenderer offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority, a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such a rejection of the tender and the reasons therefore has to be recorded in the record of the procurement proceedings and communicated to the supplier or contractor. (Art 15 and par 3.2.8).</p>		<p>disregarded if the tenderer has abused the supply chain management system, committed fraud or other improper conduct or failed to perform on a previous contract. (PFMA Regulation 16A9.2 and par 5.3.3 above). In terms of the MFMA the supply chain management policies on local government level must provide for the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the <i>Municipal Systems Act</i>, or municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act. (MFMA s 112(1)(n) and par 5.3.4 above).</p>
		<p>4. In terms of the PFMA accounting officers and accounting authorities must take effective and appropriate steps to prevent irregular expenditure and losses resulting from criminal conduct. On discovery of any irregular expenditure, they must immediately in writing report the particulars of the</p>

Model Law	GPA	South African law
		<p>expenditure to the relevant treasury. They must further take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution that makes or permits an irregular expenditure. (PFMA s 38(1) and par 5.3.3 above).</p> <p>An official in a department, trading entity or constitutional institution must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure. (PFMA s 45(c) and par 5.3.3 above).</p> <p>A mechanism must be established to receive and attend to complaints of non-compliance with the norms and standards of the supply chain management system and to enable remedial action or legal action to be taken in the case of fraud, corruption or other criminal offences. (PFMA Regulations 16A9.3 and par 5.3.3 above).</p> <p>The MFMA has similar provisions. (MFMA s 32).</p>
		<p>5. In terms of chapter 10 of the PFMA, disciplinary proceedings for financial misconduct may be instituted against an accounting officer of a department or a</p>

Model Law	GPA	South African law
		<p>constitutional institution if that accounting officer wilfully or negligently makes or permits an irregular expenditure. (PFMA s 81(1) and par 5.3.3 above).            Similar provisions apply to accounting authorities. (PFMA s 83(1) and par 5.3.3 above).            The MFMA has similar provisions. (MFMA s 171 and 172).</p>
		<p>6. The PFMA Regulations and MFMA Regulations provide that reasonable steps to prevent abuse must be taken, allegations of abuse must be investigated, steps must be taken against officials for abuse of the system, and criminal conduct must be reported to the police, National Treasury's database must be checked for prohibited tenderers, the rejection of tenderers whose tax matters are not in order, and the rejection of tenders or cancellation of the contract if fraud or corruption were involved. (PFMA Regulation 16A9.1; MFMA Regulation 38 and par 5.3.3 and 5.3.4 above).</p>
		<p>7. The <i>Prevention and Combating of Corrupt Activities Act</i> 12 of 2004 in section 13 prescribes offences in respect of corrupt activities. It also contains specific provisions relating to public procurement. These include provisions</p>

Model Law	GPA	South African law
		<p>that relate to the invitation, award and withdrawal of tenders. The Act also makes it an offence for any public officer to acquire any private interest in a contract, agreement, or investment emanating from or connected with, or which is made on account of a public body in which he or she is employed. It further provides in section 29 for a register of tender defaulters. (Par 5.3.7(p) above).</p>

#### 6.7.4 Conclusion on the combating of abuse

The combating of abuse is not dealt with in either the Model Law or the GPA in much detail. This can be explained by the fact that fraud and corruption are probably left to be dealt with by the municipal laws of the individual countries. The provisions in the Model Law and the GPA that deal with the combating of abuse address mainly abuse by tenderers and not abuse by the officials involved in the tender process.

The South African procurement legislation and the regulations issued in terms of such legislation have detailed provisions which deal with the abuse of public procurement by either the tenderer or the officials involved in the procurement process. Provision is made to prevent irregular expenditure, to take disciplinary steps against officials, to deal with complaints by interested parties and to ensure that criminal conduct is reported to the police. There are further specific provisions relating to fraud and corruption in public procurement in the *Prevention and Combating of Corrupt Activities Act*.<sup>222</sup>

From the foregoing it can be concluded that at least the following must be provided for in a public procurement system to combat abuse:

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<sup>222</sup> Act 12 of 2004.

- the exclusion of tenders or tenderers in the case of:
  - false declarations;
  - final judgments in respect of serious crimes;
  - professional misconduct;
  - fraud;
  - corruption;
  - the non-payment of taxes;
  - abuse of the system;
  - the mal-performance of previous contracts; and
  - bribes or irregular inducements;
- steps to prevent irregular expenditure;
- mechanisms to receive and attend to complaints of non-compliance with the system;
- disciplinary proceedings against offending officials; and
- criminal sanctions where warranted.

The combating of abuse is addressed particularly well in the South African public procurement regime and if the regulations are properly implemented they should be effective.<sup>223</sup>

## **6.8 Avoidance of risk**

### *6.8.1 Introduction*

The myriad of circumstances that can potentially have a negative influence on public procurement and endanger the achievements of its main objective, namely value for money, can be identified as risks. The risks involved in public procurement are manifold and can relate to every aspect of the procurement process up to and including the final fulfilment of the contract. They include risks pertaining to the main role players, namely the state, the tenderer and the general public. The achievement of the other principles of public

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<sup>223</sup> Despite these detailed provision to combat abuse, fraud and corruption is rife in public procurement in South Africa. This is so probably because of a lack of the proper implementation of the existing provisions and not because of the inadequacy of such provisions.

procurement will minimise the risks involved. The main risks provided for in the different regimes will be addressed here.

### 6.8.2 Comparison

The Model Law does not identify the avoidance of risk as a separate and distinct aspect that need to be addressed in public procurement. There are however various provisions that ensure that risk is avoided.

The Model Law addresses the avoidance of risk, albeit indirectly, by providing: that the procuring entity is entitled to ascertain the qualifications of suppliers at any stage of the procurement proceedings;<sup>224</sup> that suppliers provide acceptable tender securities;<sup>225</sup> the rejection of abnormally low tenders;<sup>226</sup> and, for the disqualification of tenderers if any false, inaccurate or incomplete information is provided.<sup>227</sup>

As is the case with the Model Law the GPA does not specifically address the avoidance of risk as a distinct principle of public procurement. It is not surprising that the GPA does not deal therewith as it is an aspect that will probably not have any direct influence on discrimination against foreign suppliers or promotion of international trade. It nonetheless has provisions similar to that of the Model Law that indirectly address the avoidance of risk.

The GPA provides with regard to this aspect the following: that qualification procedures must relate to tenderers' capability to fulfil the contract;<sup>228</sup> that financial guarantees may be sought from tenderers; that in the case of

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<sup>224</sup> Art 6. The criteria for qualification can relate to a variety of requirements that a tenderer must comply with, such as: professional and technical qualifications; competence; financial resources; equipment and other physical facilities; managerial capability; experience and reputation; the personnel to perform the contract; legal capacity; financial means; fulfilment of obligations to the state regarding taxes and security contributions; and a clean criminal record.

<sup>225</sup> Art 32(1).

<sup>226</sup> Revised Model Law art 12*bis*.

<sup>227</sup> Art 6(6). In the case of false information the supplier must be disqualified and in the case of incorrect or misleading information the supplier may be disqualified.

<sup>228</sup> Art VIII(b). The Revised GPA art VIII:1 and VIII:2(d), provides that any condition for participation must be limited to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to undertake the relevant contract. It may require relevant prior experience where it is essential to meet the requirements of the procurement.

abnormally low tenders enquires may be made to ensure that the tenderer can comply with the conditions of participation and is capable of fulfilling the terms of the contract,<sup>229</sup> and, that suppliers may be excluded on the following grounds of bankruptcy, false declarations, significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts, final judgments in respect of serious crimes or other serious offences, professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier, or failure to pay taxes.<sup>230</sup>

The GPA has similar provisions with regard to the avoidance of risk as the Model Law. It does however go further by providing that suppliers may be excluded on the grounds of bankruptcy, significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts, final judgments in respect of serious crimes or other serious offences, professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier, or failure to pay taxes.

The South African regime does not provide for the principle of avoidance of risk in the Constitutional or applicable acts. In terms of both the PFMA Regulations<sup>231</sup> and Municipal Supply Chain Management Regulations,<sup>232</sup> however, procuring entities must provide for risk management in their supply chain policies. The former does not provide what has to be included in such policies. The latter provides that such policies must contain provisions for the identification, consideration and avoidance of potential risks.<sup>233</sup>

It is further specifically provided: that supply chain management policies on local government level must provide for screening processes and security clearances

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<sup>229</sup> Art XIII.4(a); Revised GPA art XV.6.

<sup>230</sup> Art VIII:3.

<sup>231</sup> PFMA Reg 16A4.3.

<sup>232</sup> MFMA Reg 41

<sup>233</sup> This includes the identification of risks on a case-by-case basis, the allocation of risks to the party best suited to manage such risks, acceptance of the cost of the risk where the cost of transferring the risk is greater than that of retaining it, the management of risks in a pro-active manner and the provision of adequate cover for residual risks, and the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.

for prospective tenderers for procurement above a prescribed value;<sup>234</sup> for tender security, insurance and/or performance guarantees to be provided by tenderers;<sup>235</sup> how to deal with unsolicited bids and the approval of tenders not recommended;<sup>236</sup> that it be ensured that tenders are not awarded to tenderers that appear on the list of persons prohibited from doing business with the public sector, have outstanding tax obligations, committed a corrupt or fraudulent act in competing for the particular contract, committed any corrupt or fraudulent act during the tender process or the execution of that contract, or if any official or other role player committed any corrupt or fraudulent act during the tender process or the execution of that contract that benefited that supplier;<sup>237</sup> for the compulsory disclosure of any conflicts of interests a tenderer might have in a specific tender and the barring of such a tenderer from participating;<sup>238</sup> and, for contract management and dispute settlement procedures.<sup>239</sup>

The South African regime puts much more emphasis on the avoidance of risk than either the Model Law and the GPA. It has detailed provisions for risk management. Not only are risks up to the award of the contract addressed, but also risks pertaining to the execution of the contract. In this regard the requirement that contract management should be provided for should, if properly implemented, ensure that a neglected stage of the procurement cycle<sup>240</sup> be addressed. Contrary to the Model Law and GPA, it also refers to the risks relating to corrupt officials and not only risks relating to tenderers. It is however to be expected that the GPA will not have detailed provisions on the avoidance of risk because of it being a multilateral agreement between state parties.

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<sup>234</sup> MFMA s 112(i)

<sup>235</sup> *The Guide for Accounting Officers /Authorities* issued by the SCM office of National Treasury in February 2004, and the *Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government*, issued by the same department in 2003, under reference 07-04/2003).

<sup>236</sup> MFMA s 113-114.

<sup>237</sup> PFMA Reg 16A9.1 and 16A9.2; MFMA Reg 38;

<sup>238</sup> MFMA s 112(j).

<sup>239</sup> MFMA s 112(p).

<sup>240</sup> This relates to the South African context. This is evident for instance in the many complaints with regard to for instance reconstruction and development houses that do not comply with building specifications.

6.8.3 Essential provisions

Model Law	GPA	South African law
		<p>1. In terms of the PFMA Regulations provision must be made for risk management. No details of what has to be included in such a policy is provided. (PFMA Regulation 16A4.3 and par 5.3.3 above) In the Municipal Supply Chain Management Regulations specific provision is made for risk management. Such policies must contain provisions for the identification, consideration and avoidance of potential risks. The risk management policy must provide for-</p> <ul style="list-style-type: none"> <li>• the identification of risks on a case-by-case basis;</li> <li>• the allocation of risks to the party best suited to manage such risks;</li> <li>• acceptance of the cost of the risk where the cost of transferring the risk is greater than that of retaining it;</li> <li>• the management of risks in a pro-active manner and the provision of adequate cover for residual risks; and</li> <li>• the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.</li> </ul> <p>(MFMA Regulations 41 and par 5.3.4 above).</p>
2. Provision is made	2. The GPA provides	2. The MFMA provides

Model Law	GPA	South African law
<p>for the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings. The criteria for qualification can relate to a variety of requirements that a tenderer must comply with, such as</p> <ul style="list-style-type: none"> <li>• professional and technical qualifications;</li> <li>• competence;</li> <li>• financial resources;</li> <li>• equipment and other physical facilities;</li> <li>• managerial capability;</li> <li>• experience and reputation;</li> <li>• the personnel to perform the contract;</li> <li>• legal capacity;</li> <li>• financial means;</li> <li>• fulfilment of obligations to the state regarding taxes and security contributions; and</li> <li>• a clean criminal record.</li> </ul> <p>(Art 6 and par 3.2.4 above).</p>	<p>that qualification procedures must relate to tenderers' capability to fulfil the contract in question. The Revised GPA provides that any condition for participation must be limited to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to undertake the relevant contract.. To determine whether or not a supplier satisfies the conditions for participation, a procuring entity must</p> <ul style="list-style-type: none"> <li>• evaluate the financial, commercial, and technical abilities of a supplier;</li> <li>• base its determination on the conditions specified; and</li> <li>• may require relevant prior experience where essential to meet the requirements of the procurement.</li> </ul> <p>(Art VIII(b); Revised GPA art VIII:1, VIII:2(d) and par 4.3.5 above).</p>	<p>that the supply chain management policies on local government level must provide for screening processes and security clearances for prospective tenderers for procurement above a prescribed value. (MFMA s 112(i) and par 5.3.4 above).</p>
<p>3. The procuring entity may require suppliers or contractors submitting tenders to provide a tender security, provided that the requirement shall</p>	<p>3. Financial guarantees may be sought from tenderers. (Art VIII(b) and par 4.3.5 above).</p>	<p>3. It is left to the procuring entities to determine if and what tender security, insurance or performance or similar guarantees must be provided by tenderers. (See <i>The Guide for</i></p>

Model Law	GPA	South African law
<p>apply to all such suppliers or contractors. It may stipulate that the security must be acceptable to it. (Art 32(1) and par 3.3.3 above).</p>		<p><i>Accounting Officers /Authorities</i> issued by the MFMA office of National Treasury in February 2004, and the <i>Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government</i>, issued by the same department in 2003, under reference 07-04/2003)</p>
<p>4. The Revised Model Law provides for the rejection of abnormally low tenders. It is still being considered if it should be included that this right must be referred to in the tender documents. Before such a rejection the procuring entity must in writing request from the tenderer details of the constituent elements of the tender that give rise to the concern that the tenderer may not be able to perform. (Revised Model Law art 12<i>bis</i> and par 3.2.7 above).</p>	<p>4. In the case of a tender which is abnormally lower than the other tenders submitted, the GPA provides that enquires may be made to ensure that the tenderer can comply with the conditions of participation and is capable of fulfilling the terms of the contract to be awarded. (Art XIII.4(a); Revised GPA art XV.6 and par 4.3.5 above).</p>	<p>4. Provision is made in the MFMA on how to deal with unsolicited bids, and the approval of tenders not recommended. (MFMA s 113-114 and par 5.3.4 above).</p>
<p>5. If any information provided by a tenderer regarding the qualifications of the tenderer is found to be false, such a tenderer must be disqualified. If the information is materially inaccurate or incomplete the tenderer may be disqualified. (Art 6(6) and par 3.2.4 above).</p>	<p>5. A supplier may be excluded on the following grounds</p> <ul style="list-style-type: none"> <li>• bankruptcy;</li> <li>• false declarations;</li> <li>• significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;</li> <li>• final judgments in</li> </ul>	<p>5. The PFMA Regulations and MFMA Regulations provide that prior to awarding any contract the accounting officer or accounting authority must ensure that, in terms of National Treasury's database, no recommended tenderer, or any of its directors, is listed as companies or persons prohibited from doing business with the public sector.</p>

Model Law	GPA	South African law
	<p>respect of serious crimes or other serious offences;</p> <ul style="list-style-type: none"> <li>• professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier; or</li> <li>• failure to pay taxes.</li> </ul> <p>(Art VIII:3 and par 4.3.5 above).</p>	<p>Any tender from a supplier who fails to provide written proof from the South African Revenue Service that that tenderer has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations must be rejected.</p> <p>If the recommended tenderer has committed a corrupt or fraudulent act in competing for the particular contract his tender must be rejected. A contract awarded to a tenderer which committed any corrupt or fraudulent act during the tender process or the execution of that contract must be cancelled.</p> <p>Likewise, if any official or other role player committed any corrupt or fraudulent act during the tender process or the execution of that contract that benefited that supplier, such a contract must be cancelled. (PFMA Regulation 16A9.1; MFMA Regulations 38 and par 5.3.3 and 5.3.4 above).</p>
		<p>6. If a tenderer or any of its directors abused the institution's supply chain management system, committed fraud or any other improper conduct in relation to the system, or failed to perform on any previous contract, such a tender may be disregarded and the relevant treasury is to be</p>

Model Law	GPA	South African law
		<p>informed of the abuse, fraud or mal-performance. (PFMA Regulation 16A9.2 and par 5.3.3 above).  The MFMA provides that the supply chain management policies on local government level must provide for compulsory disclosure of any conflicts of interests a tenderer might have in a specific tender and the barring of such a tenderer from participating. (MFMA s 112(j) and par 5.3.4 above).</p>
		<p>7. The MFMA provides that the supply chain management policies on local government level must provide for contract management and dispute settlement procedures. (MFMA s 112(p) and par 5.3.4 above).</p>

#### 6.8.4 Conclusion on the avoidance of risk

The avoidance of risks is dealt with in all three the regimes. Risk management is not as comprehensively dealt with in the Model Law and the GPA as in South African law. The provision of comprehensive risk management in public procurement, as envisaged in the PFMA Regulations and in particular the Municipal Supply Chain Management Regulations,<sup>241</sup> will assist to better achieve the other objectives of public procurement. In particular it is necessary to address

<sup>241</sup> GN 868 in GG 27636 of 30 May 2005. S41 provides for a risk management policy that must provide for –  
the identification of risks on a case-by-case basis;  
the allocation of risks to the party best suited to manage such risks;  
acceptance of the cost of the risk where the cost of transferring the risk is greater than that of retaining it;  
the management of risks in a pro-active manner and the provision of adequate cover for residual risks; and  
the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.

all aspects of risk in the procurement process, as well as risks relating to the conduct of both the state officials and the tenderer.

Risks relating to public procurement can be addressed in a procurement regime by providing for at least the following:

- the ascertainment by the procuring entity, at any stage of the procurement proceedings, of information relating to tenderers' professional and technical qualifications, competence, financial resources, equipment and other physical facilities, managerial capability, experience and reputation, and if the tenderer has the personnel to perform the contract, the necessary legal capacity, and the requisite financial means;
- that tenderers must fulfil their obligations to the state regarding taxes, security and similar contributions;
- that tenderers to have a clean criminal record;
- disqualification of a tenderer on the basis of bankruptcy, false declarations, provision of incorrect information, significant or persistent deficiencies in performance of any prior contract or contracts, convictions in respect of serious crimes or other serious offences, professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier, and abuse of the system by the supplier;
- tender security or financial guarantees;
- provisions on how to deal with unsolicited offers and abnormally low tenders;
- that the disclosure of conflicts of interest is compulsory;
- for specific risk management, including the identification of risks on a case-by-case basis; the allocation of risks to the party best suited to manage such risks; the acceptance of the cost of the risk where the cost of transferring the risk is greater than that of retaining it; the management of risks in a pro-active manner; the provision of adequate cover for residual risks; and the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.

The South African public procurement regime is more detailed than both the Model Law and the GPA with regard to its provisions addressing risks in public procurement. In this regard it is better equipped to deal with risks and risk management in public procurement than either the Model Law or the GPA, as specific provision must be made for risk management in the supply chain management policies of procuring entities.

## **6.9 Accountability**

### *6.9.1 Introduction*

Accountability entails that both the government officials and the suppliers participating in public procurement be held accountable for their actions relating to the public procurement process. The principle of accountability includes the requirement of the provision of effective remedies which offer appropriate redress in the case of unlawful actions.

The requirement of effective remedies will not be discussed as a separate principle but will be included under the principle of accountability. The principle of accountability is supported by and overlaps with the other principles discussed in this chapter. The emphasis in the discussion under this heading will fall on the provisions relating to review and challenge procedures. When dealing with accountability the three main role players, namely the state, the general public and the tenderer need to be taken into account.

The accountability of the state towards its citizens to ensure that the decision to embark on a particular public procurement is in the public's best interest is not addressed in this study. This issue will relate to a large extent to the question of whether the decision to make or not to make a particular procurement, or to prioritise such procurement, was the correct one.<sup>242</sup> Save for the generally accepted democratic processes, there are no provision for the involvement of local communities or the general public in decision making when deciding on the nature, priority, necessity or criteria of a particular

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<sup>242</sup> See the following interesting discussions on the review ability of the merits of a decision by government on the establishment of a academy at Camden England. Bailey 2009 *PPLR* 160-166; Henty 2009 *PPLR* 67-171. The case is reported as *Chandler v Camden LBC* [2009] EWHC 219 (Admin) (QBD (Admin)).

procurement. The need to involve local communities or the general public in such decision making and the accountability of decision makers, or the need for means other than democratic processes to hold such decision makers accountable, could be the subject of a further study.

The post-award accountability of the tenderer is in essence determined by the contract that is entered into between the procuring entity and the tenderer. The post-award accountability of the tenderer will be regulated mainly by the law of contract.<sup>243</sup> The criminal law and specific legislation may, however, also be applicable to tenderers, even prior to the award, depending on the circumstances.<sup>244</sup>

The general public and the tenderers clearly also have an interest in holding the procuring entity and government officials accountable for the proper implementation and functioning of the public procurement system. In practice this is usually ensured by tenderers, who are able to institute proceedings against the procuring entity, government officials and possibly other tenderers for alleged unlawful conduct.

The focus here will mainly be on the accountability of the procuring entity and the tenderers during the procurement process, through the challenge and review procedures. As the principle of the combating of abuse is dealt with separately, criminal sanctions are not dealt with under this principle.

### 6.9.2 *Comparison*

Chapter VI of the Model Law exclusively deals with the right to review. It provides that any supplier that claims to have suffered, or that may suffer, loss or injury, due to a breach of a duty imposed on the procuring entity, may seek review.<sup>245</sup> Review of prescribed decisions is not allowed.<sup>246</sup> Reviews should in

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<sup>243</sup> See par 2.4.1 above.

<sup>244</sup> See par 2.4.1 above.

<sup>245</sup> Art 52.

<sup>246</sup> Art 52(2) They are:

- (a) The selection of a method of procurement pursuant to articles 18 to 22;
- (b) The choice of a selection procedure pursuant to article 41(1);
- (c) The limitation of procurement proceedings in accordance with article 8 on the basis

the first instance be submitted to the procuring entity or approving entity itself and thereafter for either administrative or judicial review.<sup>247</sup> The enacting state has a choice to pay compensation for the loss or injury suffered because of unlawful action during the procurement process or to limit the payment of such compensation to any reasonable costs incurred by the supplier submitting the complaint.<sup>248</sup>

Many other provisions of the Model Law support the right to review. The essential provisions doing so provide: for the recording, accessibility and usability of any document, notification, decision and other information generated in the course of the procurement;<sup>249</sup> that the grounds for holding that a supplier does not pre-qualify be provided by the procuring entity;<sup>250</sup> that the name and address of each tenderer whose tender is opened and the tender price be communicated on request to tenderers that have submitted tenders and be recorded in the record of proceedings;<sup>251</sup> for the suspension of procurement proceedings pending review;<sup>252</sup> that all tenderers participating in the procurement proceedings be promptly informed of the submission of a complaint and of its substance;<sup>253</sup> that time frames be adhered to;<sup>254</sup> and, that the decision made by the procuring entity or review body be furnished to all parties to the review available to the general public.<sup>255</sup>

The Model Law caters for both administrative and judicial review to ensure different legal systems will be able to adapt the Model Law. Save for the aspects

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of nationality;

(d) A decision by the procuring entity under article 12 to reject all tenders, proposals, offers or quotations;

(e) A refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 48(2);

(f) An omission referred to in article 27(t) or article 38(s).

<sup>247</sup> Art 53 and art 54.

<sup>248</sup> Art 54(3)(f).

<sup>249</sup> Art 11. This includes the requirement that a record of the proceedings, in which prescribed information must be included, be kept and to whom it must be made available.

<sup>250</sup> Art 7.

<sup>251</sup> Art 33(3).

<sup>252</sup> Art 56.

<sup>253</sup> Art 55(1) In terms of art 55(2) they have the right to participate in the review proceedings.

<sup>254</sup> Art 54 and 56.

<sup>255</sup> Art 55(3).

provided for above it is left to the enacting state's municipal law to regulate the remedies available in cases of unlawful action in the procurement process.

As can be expected the GPA does not prescribe the specifics of challenge procedures as the municipal laws of the state parties differ. It does however provide for certain principles to be adhered to. In the case of an alleged breach of the GPA in the context of a procurement, the complaint should first be lodged with the procuring entity.<sup>256</sup> Each state party should provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged unlawful actions.<sup>257</sup> Such challenges must be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement. The members thereof must be secure from external influence.<sup>258</sup> The available challenge procedures should cater for rapid interim measures to correct breaches.<sup>259</sup> The compensation for the loss or damages suffered, may be limited to the costs for tender preparation and the challenge process.<sup>260</sup> Challenge procedures should be completed in a timely fashion.<sup>261</sup>

The provisions that are supportive of the above provide: for documentation, reports and data relating to all aspects of the procurement process to be retained for three years;<sup>262</sup> that the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end, or why it was not selected be provided by the procuring entity;<sup>263</sup> and, that all participating tenderers be promptly informed of award decisions.<sup>264</sup>

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<sup>256</sup> Art XX.

<sup>257</sup> Art XX.2.

<sup>258</sup> Art XX.6. It is further provided that: "A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that: (a) participants can be heard before an opinion is given or a decision is reached; (b) participants can be represented and accompanied; (c) participants shall have access to all proceedings; (d) proceedings can take place in public; (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions; (f) witnesses can be presented; (g) documents are disclosed to the review body."

<sup>259</sup> Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;

<sup>260</sup> Art XX.7(c).

<sup>261</sup> Art XX.8.

<sup>262</sup> Art XX.3; Revised GPA art XVI:3.

<sup>263</sup> Art XVIII.2.

<sup>264</sup> Art XVIII. After making an award, a notice to that effect must be published within 72 days.

The South African courts have on numerous occasions held that public procurement falls in the realm of administrative law. This entails that sections 32 and 33 of the Constitution and both PAIA and PAJA are applicable to public procurement. The constitutional entrenched rights to access to information and to just administrative action are therefore available in public procurement. Save for the right to review in terms of the administrative law the provisions of the law of contract, the law of delict and the criminal law are also available in public procurement. General remedies such as interdicts,<sup>265</sup> an order for payment of damages, specific performance and constitutional damages are, save for the remedies provided by the administrative law, available to parties to the procurement process.

Specific provisions in the South African public procurement regime that support the principle of accountability provide as follows: that awards of tenders be published in the *Government Tender Bulletin* and the media in which the tenders were originally advertised;<sup>266</sup> that mechanisms be established to address complaints with regard to alleged non-compliance with the prescribed norms and standards of the procurement process,<sup>267</sup> and that appropriate steps be taken against officials that do not comply with the procurement regime.<sup>268</sup>

The South African regime ensures accountability of both the tenderer and state officials participating in public procurement. There is however a need for a speedier resolution of disputes than the ordinary courts. Relief sought through the courts are notoriously slow and expensive.

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<sup>265</sup> Both mandatory and prohibitory interdicts.

<sup>266</sup> PFMA Reg 16A6.3.

<sup>267</sup> PFMA Reg 16A9.3; MFMA s 112(1)(p); MFMA Reg 49 and 50; The latter make special provision for objections and complaints to be lodged with the municipality or municipal entity within 14 days of the action, giving rise to the objection or complaint, and the resolution of disputes, objections, complaints and queries by an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity. Should the complaint not be resolved within 60 days it may be referred to the provincial treasury and, if still not resolved, to the National Treasury. The foregoing does not affect a person's right to approach a court of law for relief at any time.

<sup>268</sup> PFMA Reg 9(1) and Treasury Reg 16A9.1(b)(i).

### 6.9.3 Essential provisions

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>1. Any supplier or contractor that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed on the procuring entity by the Model Law has the right to review. However, review is not available with regard to certain aspects of or decisions in the procurement process. They are the selection of a method of procurement, the choice of a selection procedure, the limitation of procurement proceedings on the basis of nationality, a decision by the procuring entity to reject all tenders, proposals, offers or quotations, a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings, or an omission to refer, in the tender documents, to the provisions of the Model Law, procurement regulations and other laws and regulations directly pertinent to the procurement proceedings. In the Revised Model Law it is proposed that the latter provisions be deleted. (Art 52; Revised Model Law art 52(2) and par</p>	<p>1. In terms of the GPA, awards may be challenged. Challenges must be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement, the members of which must be secure from outside influence. Complaints must first be addressed to the procuring entity itself. Non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches must be in place and parties must make these generally available in writing. In terms of the Revised GPA each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure. The procedural rules for all challenges must be in writing and made generally available. Resolution of complaints through consultation between the procuring entity and tenderer must be encouraged by the Parties to the Revised GPA. Impartial and timely consideration to any complaint must be afforded by the procuring entity.</p>	<p>4. The PFMA Regulations provide that national and provincial treasuries have to establish mechanisms to address complaints with regard to alleged non-compliance with the prescribed norms and standards of the procurement process. It must be ensured that recommendations for remedial actions to be taken in the case of non-compliance, including criminal action to be taken in the case of corruption, fraud or other criminal offences, can be made. (PFMA Regulation 16A9.3 and par 5.3.3 above). The MFMA provides that the supply chain management policies on local government level must provide for procedures for dispute settlement. (MFMA s 112(1)(p) and par 5.3.4 above). The regulations issued in terms of the MFMA make special provision for objections and complaints to be lodged with the municipality or municipal entity within 14 days of the action, giving rise to the objection or complaint, and the resolution of disputes, objections, complaints and queries by an independent and</p>

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
3.6 above).	Consideration must be given in a manner that is not prejudicial to the tenderer's participation in ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure. (Art XIX and XX; Revised GPA art XVIII and par 4.3.7 above).	impartial person not directly involved in the supply chain management processes of the municipality or municipal entity. Should the complaint not be resolved within 60 days it may be referred to the provincial treasury and, if still not resolved, to the National Treasury. The foregoing does not affect a person's right to approach a court of law for relief at any time. (MFMA Regulations 49 and 50 and par 5.3.4 above).
2. Review is to be sought in the first instance from the procuring entity itself, in particular where the procurement contract is yet to be awarded. Secondly the option of review by a higher administrative organ of government is provided for. In the final instance, judicial review can be undertaken in terms of the state's national law. (Arts 54 and 57 and par 3.6.2 above).	2. Challenges must be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement, and the members of the review body must be secure from outside influence. (Art XX and par 4.3.7 above).	2. The PFMA Regulations and the MFMA provide for the supply chain management policies to establish mechanisms to address disputes and complaints. (PFMA Regulation 16A9.3 and MFMA s 112(1)(p)).
3. Any document, notification, decision and other information generated in the course of the procurement must be in a form that provides a record of the content of the information and that it is accessible so as to be usable for subsequent reference. This must be read with the	3. Documentation relating to all aspects of the procurement process must be retained for three years. The Revised GPA is broader and makes provision for the documentation and reports and data of tender procedures and awards to be maintained for three years.	3. The right of access to information held by the state and any information held by another person that is required for the exercise or protection of any rights, the right to administrative action that is lawful, reasonable and procedurally fair, and the right to be given written reasons for

Model Law	GPA	South African law
<p>requirement that a record of the procurement proceedings must be maintained. Detailed provision is made as to what is to be contained in the record of proceedings and to whom it can be made available. (Art 11 and par 3.2.6 above).</p>	<p>(Art XX.3; Revised GPA art XVI:3 and par 4.3.5 above).</p>	<p>administrative decisions are guaranteed in terms of sections 32 and 33 of the Constitution. The MFMA Regulations provide for proper record keeping. (S 32 and 33 of the Constitution; MFMA Regulation 20(h) and par 5.3.6, 5.3.7(b) and 5.3.7(c) above).</p>
<p>4. Provision is made for the procuring entity to notify tenderers if they had pre-qualified to participate in a particular procurement and must upon request by any member of the general public make available the names of all suppliers or contractors that have been pre-qualified. If so requested, the grounds for not having been pre-qualified must be provided by the procuring entity, but it need not specify the evidence or give the reasons for its finding that those grounds were present. (Art 7 and par 3.2.4 above).</p>	<p>4. On request from a tenderer an entity has to give an explanation of its procurement practices and procedures, provide pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end, or why it was not selected. An unsuccessful suppliers must, on request, be provided with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender. (Art XVIII.2; par 4.3.5 and 4.3.6 above).</p>	<p>4. In terms of the PFMA Regulations issued in terms of the PFMA, awards must be published in the <i>Government Tender Bulletin</i> and the media in which the tenders were originally advertised. (PFMA Regulations 16A6.3 and par 5.3.3 above).</p>
<p>5. The name and address of each tenderer whose tender is opened and the tender price must be communicated on request to tenderers that have submitted tenders and must be</p>		<p>5. Section 32 of the Constitution provides for the right to information held by the state and private bodies. In the latter instance it is limited to information required to exercise or protect the applicants'</p>

Model Law	GPA	South African law
<p>recorded in the record of proceedings. (Art 33(3) and par 3.3.3 above).</p>		<p>rights. PAIA gives effect to these constitutional rights. (Par 5.3.6, 5.3.7(b) and 5.3.7(c) above).</p>
<p>6. Provision is made for the suspension of the procurement proceedings pending a review. Time limits and exceptions thereto are also provided. Two options with regard to the award of compensation are provided for in the Model Law. In terms of the first option compensation is limited to any reasonable costs incurred and in terms of the second option compensation can include loss or injury suffered. It is for the enacting state to decide as a matter of policy which of the two options it wants to adopt. (Arts 54(3)(f) and 56 and par 3.6.3 above).</p>	<p>6. The GPA provides that time limits for initiating challenges may be prescribed. Challenge procedures must provide for rapid interim measures to correct breaches and to preserve commercial opportunities; an assessment and a possibility for a decision on the justification of the challenge; correction of the breach of the agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest. (Art XX.5 and XX.7; Revised GPA art XVIII:3 and XVIII:7 and par 4.3.7 above).</p>	<p>6. PAJA provides for review proceedings to be instituted within 180 days. (PAJA s 7(1)). The remedies available in terms of PAJA are set out in section 8. (Par 5.3.7(c) above).</p>
<p>7. All tenderers participating in the procurement proceedings must be promptly informed of the submission of a complaint and of its substance, which is to be submitted to the procuring entity or administrative review body. They have the right to participate in the review proceedings. The decision made by the procuring entity or review body must, within five days of the</p>		

Model Law	GPA	South African law
decision, be furnished to all parties to the review and be made available to the general public. (Art 55 and par 3.6.4 above).		
	8. Within 72 days after making an award, a notice to that effect must be published. The procuring entity must also promptly inform participating tenderers of the procuring entity's award decisions. (Art XVIII and par 4.3.6 above).	8. In terms of the PFMA Regulations issued in terms of the PFMA, awards must be published in the <i>Government Tender Bulletin</i> and the media in which the tenders were originally advertised. (PFMA Regulations 16A6.3 and par 5.3.3 above).

#### 6.9.4 Conclusion on accountability

Neither the Model Law nor the GPA replaces the municipal laws of a country that adopts the Model Law, or of the State Parties to the GPA. The detail of all of the available remedies and the effectiveness thereof will depend on the effectiveness of the legal system of each country. Both the Model Law and the GPA allow for the referral of any dispute to the procuring entity itself, administrative review, and judicial review. Of further importance are the provision of strict time frames and the availability of interim measures, which include the suspension of procurement proceedings. The award of damages may further be limited to the costs of tender preparation and the costs of litigation.

It can be concluded that the important provisions required to ensure accountability are the following:

- that a record of the proceedings must be kept with easy access thereto;
- that written decisions with reasons for such decisions must be provided;
- that information must be available and accessible to tenderers and the public;

- that the confidentiality of information with regard to legitimate commercial interest, information which could inhibit fair competition, and information relating to matters of public interest must be ensured;
- that awards must be published and participating tenderers be notified thereof;
- that tenderers must be notified of review procedures and the opportunity to participate in such procedures;
- that strict timeframes must be adhered to;
- that disputes must in the first instance be referred to the procuring entity itself;
- that proceedings may be suspended during review proceedings;
- that a variety of remedies and corrective measures must be available to effectively address unlawful actions and resulting damages or loss; and
- that judicial review must still remain available despite the provision of other forms of review.

The table above and the associated discussions in earlier chapters show that the South African public procurement system complies with the principle of accountability in public procurement. In view of the high costs of litigation and the inevitable delays associated therewith, the establishment of a dedicated independent administrative review body for public procurement may enhance accountability in South Africa.<sup>269</sup> The effectiveness of such a body would be enhanced by providing for strict time frames and by providing for effective interim measures to be taken pending the finalisation of a dispute.

## **6.10 Fairness and equitability**

### *6.10.1 Introduction*

Fairness and equitability generally imply that people must be treated equally, impartially, justly and appropriately and that they must not be discriminated against.<sup>270</sup> In public procurement it refers in particular to procedural fairness

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<sup>269</sup> See par 5.5 above.

<sup>270</sup> See par 5.3.2(b).

and a flexible duty to act fairly and in accordance with justice. In the South African context equitability includes substantive equality.<sup>271</sup>

This principle is not pertinently dealt with in the GPA<sup>272</sup> but it is raised in the Model Law. The principle of fairness and equitability is closely related to the principle of integrity. It relates to fairness and equitability to all of the parties interested in the public procurement regime, namely the state, potential participants in the process, and the public at large, for whose benefit the procurement is done, and which ultimately pays therefore. This principle is largely a function of the other principles and at least overlaps or coincides with the other principles discussed in this chapter. It is analysed separately as it is a basic principle or objective of the law in general, and because it is also specifically dealt with in section 217 of the Constitution.

All of the principles discussed in this chapter, in varying degrees, contribute to a fair and equitable public procurement system. In principle all of the provisions should be fair and equitable towards all of the role players. As the interests of the different role players may coincide or be directly opposed it is necessary to ensure a balance between the interests of the different role players.

Only those provisions which are pertinent to fairness and equitability and which are not fully dealt with under the other principles will be discussed here. It must be kept in mind that there are three main interested groups involved in public procurement, namely the state, the potential tenderers and the public at large, whose tax money is at stake and in whose interest the procurement must take place. Fairness and equitability will apply to all three interested parties.

### 6.10.2 Comparison

The Model Law in its Guide to Enactment states that the Model Law will create an environment in which parties are confident of obtaining fair treatment. Fairness to all parties involved are envisaged in that it is also stated that it will

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<sup>271</sup> See par 5.3.2(b) and (c). Bolton *Law of Government Procurement* 50 also refers to the equal treatment of disparate groups in South Africa.

<sup>272</sup> Although it does not refer to this principle by name, there are adequate provisions in the GPA to ensure fairness and equitability.

create an environment in which the public can be assured that public funds are likely to be spent with accountability and responsibility and that the procuring entity obtain fair value. All the principles applicable to public procurement need to be adhered to in order to ensure fairness and equitability. In the case of the Model Law, which has as its purpose also to ensure international trade, fairness and equitability towards foreign suppliers forms an essential element of the regime.

There are certain provisions that are pertinent to fairness and equitability. These provisions provide: that the text of the enacted law, the procurement regulations and all administrative rulings and directives of general application, and all amendments thereof, must be made accessible to the public and be systematically maintained;<sup>273</sup> that the requirements with which tenderers must comply be set out in the tender documents, be objectively justifiable, applied equally to all suppliers, and the evaluation done in accordance with the set criteria only;<sup>274</sup> that the specifications, plans, drawings, designs and requirements be such that they do not create obstacles to participation, and be based on relevant objective technical and quality characteristics of the goods, construction or services;<sup>275</sup> that tenderers have the right to protect their intellectual property or trade secrets when providing information to the procuring entity;<sup>276</sup> for confidentiality of technical, price or other information of tenderers during negotiations between tenderers and the procuring entity;<sup>277</sup> that the procuring entity may correct purely arithmetical errors , that a tender containing minor deviations be regard as responsive and that errors or oversights capable of being corrected without influencing the substance of the tender be corrected;<sup>278</sup> for access to tender documentation with due regard to the need to keep certain information confidential;<sup>279</sup> for tenderers to fulfil their obligations, like the payment of taxes and social security contributions, to the state to enable

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<sup>273</sup> Art 5.

<sup>274</sup> Art 6.

<sup>275</sup> Art 16.

<sup>276</sup> Art 6(2)

<sup>277</sup> Art 49(3).

<sup>278</sup> Art 34.

<sup>279</sup> Art 11.

them to tender;<sup>280</sup> that information need not be disclosed if it would be contrary to law, impede law enforcement, not be in the public interest, or inhibit fair competition;<sup>281</sup> that the procuring entity may consider the effect that acceptance of a tender would have on state finances and policies;<sup>282</sup> for a margin of preference to be allowed for the benefit of domestic tenders;<sup>283</sup> and, for the rejection of abnormally low tenders.<sup>284</sup>

The Model Law strives to achieve a balance between the rights and interests of all parties. Despite its objective to promote international trade it does allow for collateral objectives to be achieved through public procurement and that developing countries may protect their economies against unbridled foreign competition.

The GPA does not pertinently refer to fairness or equitability as one of its objectives. From its provisions it is clear that it seeks to achieve fairness and equitability. In particular it endeavours to ensure participation by developing states through specific measures which take the specific circumstances of developing countries into account.

The essential provisions of the GPA that ensures fairness and equitability provides: that state parties must promptly publish any law, regulation, judicial decision, administrative ruling, standard contract clauses and procedures regarding procurement, and any modifications thereof, and provide an explanation thereof on request;<sup>285</sup> for documentation, information and explanations to be timeously provided;<sup>286</sup> that the conditions for participation be

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<sup>280</sup> Art 6(1)(iv).

<sup>281</sup> Art 11(3)(a).

<sup>282</sup> Art 34(4)(c), including the balance of payments position and foreign exchange reserves, the counter-trade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology, the development of managerial, scientific and operational skills and national defence and security considerations.

<sup>283</sup> Art 34(4)(d)

<sup>284</sup> Revised Model Law art 12*bis*

<sup>285</sup> Revised GPA art VI.

<sup>286</sup> Art VII. 2 and XII.3 and the Revised GPA art XVII provides for tender documentation to be forwarded at the request of any supplier entitled to participate and reasonable

published in adequate time to enable tenderers to participate therein and time limits not be used in order to prevent tenderers from participating in the process;<sup>287</sup> that the selection of tenderers to participate in the process must be done in a fair and non-discriminating way;<sup>288</sup> that technical specifications may be prepared, adopted, or applied to promote the conservation of natural resources or protect the environment;<sup>289</sup> for the modification of tenders;<sup>290</sup> for the treatment of tenderers in confidence and that confidential information which might impede law enforcement, might be contrary to the public interest or prejudice the commercial interest of particular enterprises, or which might prejudice fair competition between tenderers may not be revealed without permission from the party providing the information;<sup>291</sup> for the same opportunity to correct unintentional errors to be provided to all tenderers;<sup>292</sup> for the exclusion of tenderers on the basis of bankruptcy, false declarations, significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts, final judgments in respect of serious crimes or other serious offences, professional misconduct or acts or omissions that adversely reflect

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requests for explanations must be promptly replied to. Any reasonable request for relevant information submitted by a supplier participating in the tendering procedure must be adhered to on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract. Procuring entities may not provide information to tenderers in a way which will have the effect of precluding competition. Any information, including information on the characteristics and relative advantages of the successful tender, necessary to determine whether the procurement was conducted fairly, impartially and in accordance with the GPA, must promptly be provided on request.

<sup>287</sup> Art VIII. The tender documentation must be forwarded at the request of any supplier entitled to participate and reasonable requests for explanations must be promptly replied to. Any reasonable request for relevant information submitted by a supplier participating in the tendering procedure must be adhered to on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract. Procuring entities may not provide information to tenderers in a way which will have the effect of precluding competition. Any information, including information on the characteristics and relative advantages of the successful tender, necessary to determine whether the procurement was conducted fairly, impartially and in accordance with the GPA, must promptly be provided on request.

<sup>288</sup> Art X.1.

<sup>289</sup> Revised GPA art X.6.

<sup>290</sup> Art X.10; Revised GPA art X.11. Where, prior to the award of a contract, a procuring entity modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it must send all such modifications or amended or re-issued notice or tender documentation to all tenderers participating in the process in adequate time to allow such tenderers to modify and re-submit amended tenders.

<sup>291</sup> Art XIV.

<sup>292</sup> Revised GPA art XV.3.

upon the commercial integrity of the supplier, and failure to pay taxes;<sup>293</sup> for measures necessary to protect public morals, -order, or -safety; to protect human, animal or plant life or health; to protect intellectual property; or relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour;<sup>294</sup> the use of offsets only by developing countries;<sup>295</sup> how to deal with abnormally low tenders;<sup>296</sup> and, that if it is the public interest, not to award a tender.<sup>297</sup>

The GPA has similar provisions than the Model Law to ensure fairness and equitability. The Revised Model Law addresses important modern day issues like the protection of human, animal or plant life or health and the promotion of the conservation of natural resources and the protection of the environment.

The South African Constitution provides that the South African public procurement system must be fair and equitable.<sup>298</sup> This refers to both procedural fairness and substantive fairness. In view of the history of apartheid measures to rectify the inequalities of the past need to be taken to ensure substantial fairness and equitability.

The essential provisions that ensure fairness and equitability in the South African regime provide: for the public invitation of bids;<sup>299</sup> for detailed bid and evaluation criteria to be included in the documentation;<sup>300</sup> for confidentiality of information;<sup>301</sup> for the correction of obvious errors and the clarification of

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<sup>293</sup> Revised GPA art VIII.3

<sup>294</sup> Revised GPA art III.

<sup>295</sup> Art XVI; Revised GPA art III.

<sup>296</sup> Art XIII.4(a); Revised GPA art XV. 6. In the case of abnormally low tenders the procuring entity may seek information from the tenderer to ensure that it will be able to comply with the contract to be awarded.

<sup>297</sup> Art XIII.4(b)

<sup>298</sup> S 217.

<sup>299</sup> PFMA Reg 16A6.3 MFMA Reg 22.

<sup>300</sup> PFMA Reg 16A6.3(b) In terms of the MFMA Reg 21(b) and 27(2) specifications must be drafted in an unbiased manner; must take account of any accepted standards; where possible, must be described in terms of performance required; may not create trade barriers; may not make reference to any particular trademark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work; and must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity.

<sup>301</sup> Confidentiality of information is provided for in PAIA. These grounds are listed in chapter 4 of

tenders;<sup>302</sup> for the publishing of invitations to and award of tenders;<sup>303</sup> that the procurement system not be misused by either officials<sup>304</sup> or tenderers;<sup>305</sup> and, for the use of offsets, a margin of preference and for socio-economic factors to be taken into account in public procurement.<sup>306</sup>

The South African regime has similar provisions as the other two regimes to ensure fairness and equitability. A lot of emphasis is put on the achievement of substantive equitability and to rectify the injustices of the past through public procurement.

### 6.10.3 Essential provisions

The Model Law	GPA	The South African law
1. It is stated in the Guide to Enactment that the Model Law will create an environment in which the public is assured that public funds are likely to be spent with responsibility and accountability, ensuring that fair value is obtained in an		1. In terms of section 217 of the Constitution fairness and equitability are both Constitutional prescripts in the South African public procurement system. (Par 5.3.2(b) and (c)).

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Part 2 of PAIA. They relate to the protection of the privacy of natural persons; records of the SARS; commercial information of third parties; confidential information of third parties; the safety of individuals and the protection of property; police dockets in bail proceedings, law enforcement and legal proceedings; records privileged from production in legal proceedings; defence, security and international relations; the economic interest and financial welfare of the Republic and the commercial activities of organs of state; research information; operations of organs of state; frivolous or vexatious requests; and public interest.

<sup>302</sup> MFMA Reg 36. In *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) it was held with regard to minor deviations that what is of importance is substance and not form.

<sup>303</sup> PFMA Reg 16A6.3

<sup>304</sup> PFMA Reg 16A8 provides that an official, or other role player, must disclose any conflict of interest that may arise; treat all suppliers and potential suppliers equitably; not use this position for private gain or to improperly benefit another person; ensure that he does not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act; be scrupulous in his use of public property; and assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.

<sup>305</sup> PFMA Reg 16A9 provides that a tenderer who fails to provide written proof from the South African Revenue Service that it either has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations is barred from participating in the tender procedures. It further provides for tenders to be rejected and contracts to be cancelled in the case of fraud and corruption.

<sup>306</sup> S 217(2) of the Constitution, the PPPFA and the NIPP.

The Model Law	GPA	The South African law
<p>environment in which parties are confident of obtaining fair treatment. (Guide to Enactment par 8 and par 3.1 above).</p>		
<p>2. To enable the public at large to participate in public procurement, the Model Law provides that the text of the enacted law, the procurement regulations and all administrative rulings and directives of general application which relate to procurement covered by the enactment, and all amendments thereof, must be made accessible to the public. Such information must be systematically maintained in order to keep it up to date. (Art 5 and par 3.2.3 above).</p>	<p>2. State parties must promptly publish any law, regulation, judicial decision, administrative ruling, standard contract clauses and procedures regarding procurement, and any modifications thereof, and provide an explanation thereof on request. (Revised GPA art VI and par 4.3.5 above).</p>	<p>2. South African legislation and law reports are generally available and systematically maintained.</p>
<p>3. The requirements with which tenderers must comply must be set out in the tender documents and applied equally to all suppliers. The tenderers must be evaluated in accordance with the criteria, set out therein only. (Art 6 and par 3.2.4 above).</p>	<p>3. The conditions for participation in tendering procedures must be published in adequate time to enable tenderers to participate therein. The time required for and the process of qualifying suppliers may not be used in order to prevent tenderers from participating in the process. The selection of tenderers to participate in the process must be done in a fair and non-</p>	<p>3. The PFMA Regulations and the MFMA Regulations provide for the public invitation of bids. (PFMA Regulation 16A6.3 MFMA Regulation 22 and par 5.3.3 and 5.3.4 above).</p>

The Model Law	GPA	The South African law
	discriminating way. (Art VIII and X.1 and par 4.3.5 above).	
<p>4. The specifications, plans, drawings, designs and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, must be such that they do not create obstacles to participation. They must further be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. All criteria and requirements and procedures to qualify as a tenderer must be objectively justifiable. (Art 6(5) and 16 and par 3.2.9 above)</p>	<p>4. Technical specifications may be prepared, adopted, or applied to promote the conservation of natural resources or protect the environment. (Revised GPA art X.6 and par 4.3.5 above).</p>	<p>4. In terms of the PFMA Regulations bid documentation must include evaluation and adjudication criteria. (PFMA Regulation 16A6.3(b) and par 5.3.3 above). In terms of the MFMA Regulations specifications-</p> <ul style="list-style-type: none"> <li>(a) must be drafted in an unbiased manner;</li> <li>(b) must take account of any accepted standards</li> <li>(c) where possible, must be described in terms of performance required;</li> <li>(d) may not create trade barriers;</li> <li>(e) may not make reference to any particular trademark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work; and</li> <li>(f) must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity.</li> </ul> <p>(MFMA Regulations 21(b) and 27(2) and par 3.3.4</p>

The Model Law	GPA	The South African law
<p>5. Tenderers have the right to protect their intellectual property or trade secrets when providing information to the procuring entity. Confidentiality of technical, price or other information of tenderers during negotiations between tenderers and the procuring entity must be ensured. (Art 6 and 49(3) and par 3.6.4 above).</p>	<p>5. Tenders must be treated in confidence and information may not be supplied to assist other tenderers to adjust their tenders. Confidential information which might impede law enforcement, might be contrary to the public interest or prejudice the commercial interest of particular enterprises, or which might prejudice fair competition between tenderers may not be revealed without permission from the party providing the information. (Art XIV and par 4.3.5 above).</p>	<p>above).</p> <p>5. Confidentiality of information is provided for in PAIA. These grounds are listed in chapter 4 of Part 2 of PAIA. They relate to</p> <ul style="list-style-type: none"> <li>• the protection of the privacy of natural persons;</li> <li>• records of the SARS;</li> <li>• commercial information of third parties;</li> <li>• confidential information of third parties;</li> <li>• the safety of individuals and the protection of property;</li> <li>• police dockets in bail proceedings, law enforcement and legal proceedings;</li> <li>• records privileged from production in legal proceedings;</li> <li>• defence, security and international relations;</li> <li>• the economic interest and financial welfare of the Republic and the commercial activities of organs of state;</li> <li>• research information;</li> <li>• operations of organs of state;</li> <li>• frivolous or vexatious requests; and</li> <li>• public interest.</li> </ul> <p>(Par 5.3.7(a) above and PAIA s 26 - 46).</p>
<p>6. Detailed provision is made for access to tender information, or portions thereof, with due regard to the interest of tenderers that certain information</p>	<p>6. The tender documentation must be forwarded at the request of any supplier entitled to participate and reasonable requests for</p>	<p>6. In the PFMA Regulations issued in terms of the PFMA there is provision for the advertising of tenders in at least the <i>Government Tender Bulletin</i> for a</p>

The Model Law	GPA	The South African law
<p>be kept confidential. (Art 11 and par 3.2.6 above).</p>	<p>explanations must be promptly replied to. Any reasonable request for relevant information submitted by a supplier participating in the tendering procedure must be adhered to on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract. Procuring entities may not provide information to tenderers in a way which will have the effect of precluding competition. Any information, including information on the characteristics and relative advantages of the successful tender, necessary to determine whether the procurement was conducted fairly, impartially and in accordance with the GPA, must promptly be provided on request. (Art VII. 2 and XII.3; Revised GPA art XVII. 1 and par 4.3.5 above).</p>	<p>minimum period of 21 days before closure, and that the awards of tenders must be published in the <i>Government Tender Bulletin</i> and the other media by means of which the tenders were advertised. (PFMA Regulation 16A 6.3 and par 5.3.3 above).</p>
<p>7. The procuring entity may correct purely arithmetical errors that are discovered during the examination of tenders. It must give prompt notice of any such correction to the tenderer. Even if a tender</p>	<p>7. The same opportunity to correct unintentional errors of form in their tenders must be provided to all tenderers. (Revised GPA art XV.3 and par 4.3.5 above).</p>	<p>7. Obvious errors may be corrected and clarifications sought. The courts have held with regard to minor deviations that what is of importance is substance and not form. (<i>Metro Projects CC v Klerksdorp Local</i>)</p>

The Model Law	GPA	The South African law
<p>contains minor deviations, the procuring entity may regard it as responsive if they do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the tender documents.</p> <p>Such a tender may also be regarded as responsive if the errors or oversights are capable of being corrected without influencing the substance of the tender.</p> <p>Any such deviations must be quantified and appropriately taken account of in the evaluation and comparison of tenders. (Art 34 and par 3.3.3 above).</p>		<p><i>Municipality</i> 2004 1 SA 16 (SCA) par [13] and [14], MFMA Regulation 36 and par 5.3.2(b) and 5.3.4 above).</p>
<p>8. Fairness to the state is ensured <i>inter alia</i> in that tenderers need to fulfil their obligations, like the payment of taxes and social security contributions, to the state, to be able to qualify to tender. Despite the various provisions ensuring transparency, information need not be disclosed by a procuring entity if its disclosure would be contrary to law, impede law enforcement, not be in the public interest, or inhibit fair competition.</p>	<p>8. Tenderers may be excluded from participating in a tender on grounds such as bankruptcy, false declarations, significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts, final judgments in respect of serious crimes or other serious offences, professional misconduct or acts or omissions that adversely reflect upon the commercial</p>	<p>8. An official, or other role player, must disclose any conflict of interest that may arise; treat all suppliers and potential suppliers equitably; not use this position for private gain or to improperly benefit another person; ensure that he does not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act; be scrupulous in his use of public property; and assist accounting officers or accounting authorities in</p>

<b>The Model Law</b>	<b>GPA</b>	<b>The South African law</b>
<p>(Art 6(1)(iv) and 11(3)(a) and par 3.2.4 and 3.2.6 above).</p>	<p>integrity of the supplier, and failure to pay taxes. (Revised GPA art VIII.3 and par 4.3.5 above).</p>	<p>combating corruption and fraud in the supply chain management system. (PFMA Regulation 16A 8 and par 5.3.3 above). The PFMA Regulations further provide for the avoidance of abuse of the supply chain management system. This includes the provision that a tenderer who fails to provide written proof from the South African Revenue Service that it either has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations is barred from participating in the tender procedures. It further provides for tenders to be rejected and contracts to be cancelled in the case of fraud and corruption. (PFMA Regulation 16A9 and par 5.3.3 above). The MFMA specifically provides for the barring of tenderers from participating who were convicted for fraud or corruption during the past five years, who wilfully neglected, reneged on or failed to comply with a government contract during the past five years, or whose tax matters are not cleared by the South African Revenue Service. (MFMA s 112(1)(l) and par 5.3.4 above). The MFMA Regulations also provide for the combating of abuse. (MFMA Regulations 38).</p>
<p>9. In determining the</p>		<p>9. Section 217(2) of the</p>

The Model Law	GPA	The South African law
<p>lowest evaluated tender the procuring entity may consider the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves, the counter-trade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology, the development of managerial, scientific and operational skills and national defence and security considerations. (Art 34(4)(c) and par 3.3.3 above).</p>		<p>Constitution, the PPPFA and the NIPP specifically deal with socio-economic factors to be taken into account. (Par 5.3.8 above).</p>
	<p>10. The Revised GPA specifically provides for State Parties, despite any provision in the GPA, to take action or not to disclose information for the protection of their essential security or defence interests. State Parties may further impose or enforce measures necessary to protect</p>	

The Model Law	GPA	The South African law
	<p>public morals, order, or safety; to protect human, animal or plant life or health; to protect intellectual property; or relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.</p> <p>(Revised GPA art III and par 4.3.5 above).</p>	
<p>11. A procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings. (Art 34(4)(d) and par 3.3.3 above).</p>	<p>11. With the exception of developing countries offsets may not be sought in the qualification or selection of tenderers. The Revised GPA provides that procuring entities may not seek, take account of, impose, or enforce offsets. (Art XVI; Revised GPA art III and par 4.3.4 above).</p>	<p>11. Section 217(2) of the Constitution, the PPPFA and the NIPP allows for a margin of preference as well as offsets. (Par 5.3.8 above).</p>
<p>12. The Revised Model Law provides for the rejection of abnormally low tenders. (Revised Model Law art 12<i>bis</i> and par 3.2.7 above).</p>	<p>12. In the case of abnormally low tenders the procuring entity may seek information from the tenderer to ensure that it will be able to comply with the contract to be awarded. (Art XIII.4(a); Revised GPA art XV. 6 and par 4.3.5 above).</p>	
	<p>13. Procuring entities must promptly make available tender</p>	

The Model Law	GPA	The South African law
	<p>documentation to ensure that interested tenderers have sufficient time to submit responsive tenders. Where, prior to the award of a contract, a procuring entity modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it must send all such modifications or amended or re-issued notice or tender documentation to all tenderers participating in the process in adequate time to allow such tenderers to modify and re-submit amended tenders. (Art X.10; Revised GPA art X.11 and par 4.3.5).</p>	
	<p>14. The procuring entity may decide, if it is in the public interest, not to award the tender. (Art XIII.4(b) and par 4.3.5 above).</p>	

#### 6.10.4 Conclusion on fairness and equitability

Fairness and equitability are very broad concepts and the notion of what they are will often be a reflection of the norms, values and history of a particular country or society. The achievement of fairness and equitability will also depend on the particular circumstances. There are, however, certain provisions in any public procurement regime that will ensure the achievement of the generally accepted attributes of fairness and equitableness. It can be safely stated that in general all public procurement regimes seek to or ought to seek to be fair and equitable. To

achieve fairness and equitability in public procurement, all of the objectives and principles discussed in this chapter must in essence be complied with, as all of these different objectives or goals or principles have as their ultimate aim the achievement of fairness and equitability.

It must be kept in mind that the three main interested parties in public procurement are the state, the tenderer, and the general public. Their interests may coincide or be opposed. A balance must therefore be found between the different interests. The different objectives or principles of public procurement may also coincide or be opposed, depending on the circumstances. Similarly, a balance must be found between all of these objectives and principles.

The three regimes are comparable with regard to the principle of fairness and equity, and the South African regime compares favourably with the Model Law and the GPA. However, it is notable that in the Revised GPA, the protection of the environment and natural resources are accorded more prominence. As against the South African regime, both the Model Law and the GPA provide for the rejection of abnormally low tenders. The GPA also provides that tender documentation must be made available promptly, to ensure that tenderers have sufficient time to take part in the procurement process. It further provides that if amendments are made to tenders or tenders are reissued, notice thereof must be given to all of the participating tenderers in adequate time to allow them to participate. If it is in the public interest a tender need not be awarded. The South African regime will benefit if the latter provisions could be included in the South African regime.

Fairness and equitability are elevated to constitutional imperatives in the South African public procurement regime. This firstly emphasises the importance of these principles; secondly, it creates a safety net for all interested parties, who may seek relief from the courts should these principles not be achieved; and thirdly, it implies that not only the provisions themselves must be fair and equitable, but also the implementation of the provisions. It is left to the individual procuring entities to ensure fairness and equitability in their individual supply chain management policies. This allows them to provide for the particular

circumstances that exist in their contexts. In so doing they still have to comply with the general constitutional prescript of fairness and equitability. The downside of leaving the determination of the detailed provisions to the different entities is that there will be a lack of uniformity in the supply chain management policies of the different procuring entities.

There are a few provisions in the procurement regimes under discussion which are not fully dealt with under the other principles, that can be identified or emphasised and that will enhance fairness and equitability and ensure that a balance is achieved between the interests of the different role players. They are provisions that provide for

- the protection of confidentiality of information which, if disclosed, might impede law enforcement; essential security or defence interests; public morals, order, or safety; human, animal or plant life or health; or might prejudice fair competition between suppliers, might prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property, or might otherwise be contrary to the public interest;
- fair, objectively justifiable and non-discriminatory selection specifications and procedures to be used to evaluate tenders;
- criteria to be used to promote the conservation of natural resources and to protect the environment;
- the compulsory provision and publishing of information in adequate time, provided that it does not preclude competition;
- the opportunity for tenderers to correct unintentional errors;
- the possibility that, if in the public interest, procuring entities need not award a tender and may exclude abnormally low tenders;
- the possibility that arithmetical errors may be corrected and minor deviations that do not affect the substance of the tender may be allowed, thereby ensuring that substance and not form is evaluated;
- tenderers to fulfil their tax and socio-economic obligations to the state to be able to qualify to participate;

- the economic and socio-economic effect of a particular tender on the country to be taken into account, including providing for a margin of preference to be allowed.

The South African regime compares favourably with the Model Law and the GPA with regard to the principle of fairness and equitability. The South African regime would, however, benefit from the inclusion of provisions which provide:

- for the rejection of abnormally low tenders;
- that tender documentation must be made available promptly to ensure that tenderers have sufficient time to take part in the procurement process;
- that if amendments are made to tenders or tenders are reissued, notice thereof must be given to all participating tenderers in adequate time to allow them to participate; and
- that, if in the public interest, a tender need not be awarded.

More attention needs to be given to matters relating to the protection of the environment and the use of scarce resources.

## **6.11 Integrity**

### *6.11.1 Introduction*

Integrity in public procurement entails consistency and objectivity in the implementation of all of the applicable provisions to ensure their ability to achieve their objectives. As a holistic concept, it judges the quality of a system in terms of its ability to achieve its own goals.<sup>307</sup> The meaning of integrity will of course depend on particular circumstances.<sup>308</sup>

Integrity is referred to as an objective of public procurement in both the Model Law and the GPA, but the statement is not elaborated on. In public procurement the principle of integrity will include the incorporation of all of the principles referred to in this chapter as well as the proper implementation of

<sup>307</sup> MWOD 2009 *Integrity* [www.merriam-webster.com/](http://www.merriam-webster.com/).

<sup>308</sup> Integrity is also referred to as probity and is seen as part of anti-corruption measures in Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 37-38.

these principles. One of the essential elements of integrity is objectivity. As objectivity forms an integral part of integrity it is not dealt with as a separate principle. Objectivity need to be present through all of the stages of the procurement process and forms part of the principles already discussed. In addition to objectivity, integrity also demands ethical conduct from all role players. It is not only state officials who are responsible for the integrity of the regime but also the tenderers and the general public. The comparison below will therefore concentrate on the objectivity of the tender requirements, the objectivity of the award of the tender, and on ethical conduct. The provisions which ensure that the other objectives of public procurement are achieved are not repeated in this discussion.

#### *6.11.2 Comparison*

The Model Law does refer to the principle of integrity in its preamble where it states that it is desirable to promote the objective of integrity in public procurement. Integrity will create an environment where all the role players will have confidence in the procurement system. This will result in public funds being spent with responsibility and accountability, that fair value is obtained and parties are treated fairly. The principle of integrity is in essence the function of the proper implementation of all the other principles of public procurement.

Save for the provisions ensuring that the other principles of public procurement are complied with, the Model Law promotes the principle of integrity through the provisions that provide: that any requirement with regard to the qualification of suppliers must apply equally to all suppliers, only criteria prescribed in the Model Law may be used to qualify suppliers and the qualifications of suppliers should be evaluated in accordance with the prescribed criteria;<sup>309</sup> that drawings, designs, descriptions and requirements of goods and services must be based on objective technical and quality characteristics;<sup>310</sup> that should clarifications be

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<sup>309</sup> Art 6(3) and (4) and art 7(5). Art 6(5) provides that no discrimination between suppliers or categories of suppliers that is not objectively justifiable may be allowed when establishing criteria, procedures or requirements.

<sup>310</sup> Art 16. If possible there must be no requirement of or reference to a particular trademark, name, patent, design, type, specific origin or producer. Standardised features, requirements,

sought or a meeting with suppliers held, such clarifications and the minutes of such meeting should be communicated to all suppliers to whom tender documentation were supplied;<sup>311</sup> and, that for a tender to be regarded as responsive it must conform to all requirements and such tender may only be evaluated in terms of the procedure and criteria set out in the tender documentation.<sup>312</sup>

Integrity of the public procurement process is, save for the provisions relating to the other principles, in particular ensured through the equal treatment of suppliers, the provisions of objective criteria regarding the qualification of the tenderers as well as the subject matter of the procurement and the evaluation and award of the tender being based on the criteria set out in the tender documentation.

The GPA does not refer to integrity. The Revised GPA in its preamble states that the integrity and predictability of public procurement are essential to the proper functioning of public procurement and the multilateral trading system. The GPA makes ample provision for the other principles of public procurement to be achieved.

The provisions specific to the principle of integrity provide: that any conditions for participation in tendering procedures must be limited to conditions which are essential to ensure the tenderers' capability to fulfil the contract in question.<sup>313</sup> that Awards must be made in accordance with the criteria and essential requirements specified in the tender documentation.<sup>314</sup> Technical specifications must be drafted in terms of performance rather than design or descriptive characteristics;<sup>315</sup> that any reasonable request for information be

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symbols and terminology relating to the technical and quality characteristics of the goods, construction or services must be used.

<sup>311</sup> Art 28.

<sup>312</sup> Art 34.

<sup>313</sup> Art VIII(b).

<sup>314</sup> Art XIII.4(c).

<sup>315</sup> Art VI.2. They must be based on international or national standards or building codes. There must be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that

adhered to on condition that the requesting supplier does not gain an unfair advantage over other suppliers;<sup>316</sup> that awards be made in terms of the criteria specified in the tender documentation;<sup>317</sup> and, that in the course of negotiations the suppliers are not discriminated against.<sup>318</sup>

The provisions of the GPA that ensures integrity are similar to that of the Model Law.

In the South African regime, the objective of integrity is not referred to in either section 217 of the Constitution, nor the PFMA nor the MFMA. Section 195 of the Constitution, which is also applicable to public procurement, refers to elements of the principle of integrity. It provides that the public administration must be governed by principles which include a high standard of professional ethics, efficient, economic and effective use of resources, and the impartial provision of services.

The essential provisions that deal with the principle of integrity, not fully dealt with under the other principles, provide: for open and transparent prequalification processes;<sup>319</sup> for supply chain management policies to set out evaluation and adjudication criteria including criteria required by other legislation;<sup>320</sup> for bids to be evaluated in accordance with the specifications set out in the supply chain policies;<sup>321</sup> that obvious errors may be corrected and clarifications sought;<sup>322</sup> for

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words such as "or equivalent" are included in the tender documentation.

<sup>316</sup> Revised Model Law Art X.10(c)

<sup>317</sup> Art VIII.4(c)

<sup>318</sup> Art XIV.4 In the course of negotiations procuring entities must ensure that the elimination of participants must be done in accordance with the criteria set out in the notices and tender documentation; all modifications to the criteria and to the technical requirements must be transmitted in writing to all remaining participants in the negotiations; all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

<sup>319</sup> PFMA Reg 16A6.3; MFMA s 112(1)(e).

<sup>320</sup> PFMA Reg 16A6.3(b); MFMA Reg 21(b).

<sup>321</sup> PFMA Reg 16A3 and 16A6; MFMA Reg 28(1). MFMA Reg 27(2) provides that specifications must be drafted in an unbiased manner; must take account of any accepted standards and be described in terms of performance required rather than in terms of descriptive characteristics for design; may not make reference to any particular trademark, name, patent, design, type, specific origin or producer and must indicate each specific goal for which points may be awarded in terms of the points system set out

role players to comply with ethical standards,<sup>323</sup> for a code of conduct for supply chain management practitioners,<sup>324</sup>

The South African regime has similar provisions to that of the Model Law and the GPA that ensure integrity. It does however refer to ethical conduct of both the tenderers and the state officials that deal with tenders and makes provision for a code of conduct for supply chain management officials.

### 6.11.3 Essential requirements

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>1. In their preamble the Model Law and Revised Model Law state that it is desirable to promote the objective of integrity of and fairness and public confidence in the procurement process. It is explained in the Guide to Enactment that the Model Law will create an environment in which the public is assured that public funds are likely to be spent with responsibility and accountability, ensuring that fair value is obtained in an environment in which parties are confident of obtaining fair treatment. (Guide to Enactment par 8 and par 3.1 above).</p>	<p>1. In the Revised GPA it is stated in its preamble that the contracting states recognise that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies, and the functioning of the multilateral trading system. Once again this is the only reference to integrity in the GPA. (Par 4.1, 4.3.1 and 4.3.2 above). The Revised GPA provides that procurement must be conducted in a transparent and</p>	<p>1. Neither section 217 of the Constitution nor the PFMA nor the MFMA specifically refers to the objective of integrity. Section 195 of the Constitution provides that the public administration must be governed by principles which include a high standard of professional ethics, efficient, economic and effective use of resources, and the impartial provision of services. (Par 5.3.2 above).</p>

<sup>322</sup> in the supply chain management policy.  
<sup>322</sup> *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) par [13], MFMA Reg 36.

<sup>323</sup> PFMA Reg 16A8.1 and MFMA Regulations 46 provide for role players to comply with ethical standards in order to promote an environment where business can be conducted with integrity and in a fair and reasonable manner. Such ethical standards must be provided for in the supply chain management policies of the procuring entities.

<sup>324</sup> National Treasury Practice Note MFMA 4 of 2003 and *Local Government: Municipal Systems Act* 32 of 2000 schedule 2.

Model Law	GPA	South African law
	impartial manner that is consistent with the GPA, avoids conflicts of interest, and prevents corrupt practices. (Revised GPA art V.4 and par 4.1).	
<p>2. Any requirement with regard to the qualification of suppliers shall apply equally to all suppliers or contractors.</p> <p>A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in the Model Law.</p> <p>The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the prescribed qualification criteria and procedures. (Art 6(3) and (4)) and par 3.2.4 above).</p>	<p>2. Any conditions for participation in tendering procedures must be limited to conditions which are essential to ensure the tenderers' capability to fulfil the contract in question. (Art VIII(b) and par 4.3.5 above).</p>	<p>2. Supply Chain Management Policies must provide for open and transparent pre-qualification processes for tenders or other bids; (PFMA Regulations 16A6.3; MFMA s 112(1)(e) and par 5.3.3 and 5.3.4 above).</p>
<p>3. In reaching a decision with respect to the qualifications of each tenderer, the procuring entity shall apply only the criteria set forth in the pre-qualification documents. (Art 7(5) and par 3.2.4 above).</p>	<p>3. Awards must be made in accordance with the criteria and essential requirements specified in the tender documentation. (Art XIII.4(c) and par 4.3.5 above).</p>	<p>3. Supply Chain Management Policies must provide for competitive bidding processes in which only pre-qualified persons may participate. (PFMA Regulations 16A6.1; MFMA s 112(1)(f) and par 5.3.3 and 5.3.4 above).</p> <p>A bid evaluation committee must evaluate bids in accordance with the specifications and the points system as set out in the supply chain management policy. (MFMA Regulations</p>

Model Law	GPA	South African law
<p>4. Drawings, designs and requirements or descriptions of goods, construction or services must as far as possible be based on the relevant objective technical and quality characteristics of the goods, construction or services. If possible there must be no requirement of or reference to a particular trademark, name, patent, design, type, specific origin or producer. Standardised features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services must be used. (Art 16 and par 3.3.3 above).</p>	<p>4. Technical specifications must be drafted in terms of performance rather than design or descriptive characteristics. They must be based on international or national standards or building codes. There must be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as “or equivalent” are included in the tender documentation. (Art VI.2 and par 4.3.5 above).</p>	<p>28(1) and par 5.3.4 above).</p> <p>4. The supply chain management policies must include evaluation and adjudication criteria, including any criteria required by other applicable legislation. (PFMA Regulation 16A6.3(b); MFMA Regulation 21(b) and par 5.3.3 and 5.3.4 above). Specifications must be drafted in an unbiased manner; must take account of any accepted standards and be described in terms of performance required rather than in terms of descriptive characteristics for design; may not make reference to any particular trademark, name, patent, design, type, specific origin or producer and must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy. (MFMA Regulation 27(2) and par 5.3.4 above).</p>
<p>5. If clarifications are sought the procuring entity shall communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.</p>	<p>5. A procuring entity must reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not</p>	<p>5. Obvious errors may be corrected and clarifications sought. (<i>Metro Projects CC and Another v Klerksdorp Local Municipality and Others</i> 2004 1 SA 16 (SCA) par [13], MFMA</p>

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>If a meeting with tenderers is held the minutes shall be provided to all suppliers or contractors to which the procuring entity provided the solicitation documents. (Art 28 and par 3.3.3 above).</p>	<p>give that supplier an advantage over other suppliers. (Revised Model Law Art X.10(c) and par 4.3.5 above).</p>	<p>Regulation 36 and par 5.3.2(b) and 5.3.4 above).</p>
<p>6. A tender may be regarded as responsive only if it conforms to all of the requirements set forth in the tender solicitation documents. Tenders shall be evaluated and compared in accordance with the procedures and criteria set out in the solicitation documents only. (Art 34 and par 3.3.3 above).</p>	<p>6. Awards must be made in accordance with the criteria and essential requirements specified in the tender documentation. (Art VIII.4(c) and par 4.3.5 above).</p>	<p>6. A bid evaluation committee must evaluate bids in accordance with the specifications and the points system as set out in the supply chain management policy. (PFMA Regulations 16A3 and 16A6; MFMA Regulations 28(1) and par 5.3.3 and 5.3.4 above).</p>
	<p>7. Different suppliers may not be discriminated against in the course of negotiations. Procuring entities must ensure that the elimination of participants be done in accordance with the criteria set out in the notices and tender documentation; all modifications to the criteria and to the technical requirements must be transmitted in writing to all remaining participants in the negotiations; all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised</p>	

Model Law	GPA	South African law
	<p>requirements; and when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline. (Art XIV.4 and par 4.3.5 above).</p>	
		<p>8. Both the regulations issued in terms of the PFMA and the MFMA provide for role players to comply with ethical standards in order to promote an environment where business can be conducted with integrity and in a fair and reasonable manner. Such ethical standards must be provided for in the supply chain management policies of the procuring entities. (PFMA Regulations 16A8.1 and MFMA Regulations 46 and par 5.3.3 and 5.3.4 above). National Treasury has issued a supply chain management practice note which provides for a code of conduct for supply chain management practitioners. (Practice Note MFMA 4 of 2003).  <i>The Local Government: Municipal Systems Act 32 of 2000 provides in schedule 2 thereof for a code of conduct for Municipal staff members.</i></p>

Model Law	GPA	South African law
		(Par 5.3.3, 5.3.4 and 5.3.7 above. <i>Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape</i> 2001 4 SA 120 (C) (Recusal of tender board member)).

#### 6.11.4 Conclusion on the principle of integrity

To ensure the integrity of public procurement, the South African public procurement regime, as against the Model Law<sup>325</sup> and the GPA, provides that all role players should comply with ethical standards. There are detailed codes of conduct that have to be complied with. As against the Model Law and the South African regime, the GPA specifically provides that in case of negotiations with tenderers, it must be ensured that the elimination of participants takes place in accordance with the criteria set out in the tender documentation. All modifications of the tender must be sent to all of the remaining participants, who must be afforded the opportunity to submit tenders and, when applicable, final tenders in terms of a common deadline.

The achievement of all of the principles of public procurement discussed in this chapter will enhance the integrity of the public procurement process. Integrity is to a large extent the outcome of the proper and objective application of all of the specified principles. There needs to be a balance among all of the principles. However, it is not only the achievement of the principles but also the way in which they are achieved that influences the achievement of integrity. To ensure the integrity of public procurement it is necessary that all of the role players adhere to the rules of the game in an objective and ethical manner. This includes the state and its officials, the general public, and the tenderers. To ensure the integrity of the role players in public procurement it could be required that such role players undertake to adhere to a code of conduct enforcing ethical standards similar to that provided for in the Municipal Supply Chain Management

<sup>325</sup> The Working Group agreed upon the inclusion of a provision in the proposed new Model Law that provides that the procurement regulations shall include a code of conduct for officials. See art 4(2) A/CN.9/WG.1/WP.66/Add.1.

Regulations. Appropriate enforcement procedures and remedies in the case of breach of such a code of conduct would have to be developed. Before the objective of integrity in public procurement can really be attained, ethical conduct must become part of the norms of all role players.

The following are core requirements to ensure integrity:<sup>326</sup>

- objectivity at all stages of the procurement process;
- objectivity in the implementation of the principles and provisions of the system;
- all principles and interests must be appropriately balanced;
- ethical conduct by all role players;
- a code of conduct enforcing ethical standards for all role players;
- independent and impartial review procedures; and
- timeous and effective remedies.

The South African regime compares favourably with the other two regimes with regard to the principle of integrity. The South African requirement of ethical conduct by all role players and the provision of codes of conduct should in particular promote the principle of integrity. Similar provisions would benefit the other regimes.

### **6.12 Overall conclusion on the nine principles identified**

Although the Constitution does not pertinently refer to all nine of the principles identified, it is possible to accommodate, or read in, all nine of the principles, albeit indirectly, in the constitutional principles for public procurement. The constitutional principles applicable to public procurement are fairness, equitability, transparency, competitiveness and cost effectiveness. The nine principles identified in the Model Law and the GPA are economy or value for money, competitiveness, effectiveness, transparency, the combating of abuse, the avoidance of risk, accountability, fairness and equitability; and integrity. The constitutional principle of competitiveness and cost effectiveness implies that the principle of economy or value for money must be achieved. The broader principle

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<sup>326</sup> See par 6.11.3 above.

of effectiveness is implied in the constitutional principles of competitiveness and cost effectiveness. The principles of the combating of abuse, the avoidance of risk, accountability and integrity are to a large extent a function of the proper implementation of the other principles. For a system to be competitive and cost-effective, abuse must be combated and risks avoided. Fairness and equitability can be achieved only if role players are held accountable and if the integrity of the system is ensured. Compliance with the constitutional principles will ensure compliance, albeit indirectly, with all nine of the principles extracted from the Model Law and the GPA.

The Model Law and the GPA represent frameworks applicable to public procurement and allow for further regulations and other laws to supplement the Model Law and the GPA. The South African constitution provides certain imperatives to which public procurement must conform. The PFMA and the MFMA repeat the constitutional imperatives and provide for the procuring entities in all spheres of government to have a supply chain management policy which has to be in accordance with the constitutional imperatives. To varying degrees the PFMA and the MFMA add further provisions with which such supply chain management policies must comply. The PFMA Regulations and Municipal Supply Chain Regulations add to the detail that has to be included in such supply chain management policies. National Treasury has issued Supply Chain Management Practice notes which also regulate public procurement. There are differences between the detail provided in the PFMA and the PFMA Regulations issued in terms thereof, and the MFMA and the Supply Chain Regulations issued in terms thereof, although the general principles provided for are the same.

In general the Model Law provides more detailed provisions than the South African regime as to the practical requirements the procurement process has to comply with. The South African regime generally refers to the applicable principles whilst leaving it in the hands of the different procuring entities to work out the detail in their supply chain management policies. In theory this implies that there can be as many different supply chain management policies as procuring entities. On the one hand this has the advantage that every procuring entity is able to adapt its supply chain management policy to suit its

own particular circumstances and requirements; on the other hand it has the disadvantage that there will be a lack of standardisation of the different supply chain management policies, leading to potential misunderstandings, different interpretations, possible legal uncertainty, and different detail, like timeframes, with regard to the different stages of the procurement process.

Although the detail of the provisions of the three regimes differs, all three of the regimes address the essential elements of all nine of the principles identified as objectives of public procurement. The South African regime is also generally speaking in compliance with the constitutional principles set out in section 217 of the Constitution.

There are certain issues which are addressed in the South African regime but are not dealt with, or at least not dealt with to the same extent, in the Model Law and the GPA.

Firstly, the South African regime provides for contract management after the award to be addressed in the supply chain management policies. No detail of the essence of contract management is provided in any of the regimes.<sup>327</sup> This is a matter to which the law of contract will generally be applicable. However, the proper management of the contract awarded is important, especially in high-value, long-term and more complicated procurement. The implementation of the contract is an important phase of public procurement and if not properly managed might result in some of the objectives of public procurement not being achieved.

Secondly, the South African regime provides for risk management to be addressed in the supply chain management policies of the procuring entities. Risk management is not addressed in the other two regimes. Although risks are indirectly addressed by the proper provision for and implementation of the nine principles identified, pertinent risk management will enhance the achievement of the objectives.

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<sup>327</sup> The reason is probably because this issue is left to be dealt with by the ordinary laws of the different regimes, in particular the law of contract.

Thirdly, the South African regime ensures the integrity of the process to a greater extent than the Model Law and the GPA, by providing for a code of conduct to which state officials that deal with public procurement must adhere. Provision is made for disciplinary steps in the case of non-compliance with the applicable code. The codes in essence only regulate the conduct of state officials. Tenderers are major role players in the procurement process. To really achieve integrity, the ethical conduct not only of state officials needs to be ensured, but also that of the tenderers. It could be viable to develop a code of conduct for tenderers and make provision therein for proper sanctions should the code not be adhered to. The principle of integrity can only be fully achieved if all of the other principles of public procurement are properly implemented by all of the role players in an ethical way.

The Model Law and the GPA provide, in the case of disputes, for the possibility that the procuring entity itself should first deal with such dispute,<sup>328</sup> and then for the possibility of administrative review. Judicial review always remains available. In view of the necessity for a speedy resolution of disputes in the tender process, it could be viable for the South African regime to provide for the speedy resolution of procurement by referring the dispute to an independent administrative body. Although the South African legal system is comparable to other systems in the world, litigation is notoriously expensive and slow in South Africa. The existence of an independent administrative body which could exclusively deal with public procurement would enhance the principles of effectiveness, accountability and integrity.

Both the Model Law and the GPA provide for all the laws, regulations, directives, administrative rulings and judicial decisions pertaining to public procurement to be made available and systematically maintained. Although it cannot be said that this is not the case in South Africa,<sup>329</sup> it would greatly

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<sup>328</sup> The MSC Reg 49 and 50 provide for the possibility of referring a dispute to an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity.

<sup>329</sup> The website of National Treasury has some of the information available but could the accessibility and availability of information of the different procuring entities be improved by the use of a dedicated website. In particular the information of all the different procuring entities, including their supply chain management policies, invitations to tender

enhance transparency and effectiveness if a dedicated office at National Treasury were tasked to have available, update and maintain all of the laws, regulations, directives, administrative rulings, supply chain management policies and judicial decisions on public procurement. This could be done relatively easy through a dedicated website. This office could at the same time centrally publish all public procurement invitations, the resulting awards, and the forthcoming year's intended public procurements on such a website.

It can be concluded that all three public procurement regimes in general adequately provide in their public procurement systems for the achievement of all nine of the principles identified. However, no regime will be perfect and there will always be room for improvement. Circumstances also keep changing, which necessitate changes in public procurement. At present South Africa has a public procurement system which complies with all of the important objectives of public procurement and which is comparable, in some respects favourably so, with both the Model Law and the GPA.

## **6.13 Collateral objectives**

### **6.13.1 Introduction**

Although the primary function of public procurement is to obtain value for money in the procurement of goods and services, it is accepted that public procurement may be used by government as a means to further socio economic policies like job creation, industrialisation, green procurement and similar objectives.<sup>330</sup> The importance of the achievement of collateral objectives will differ from country to country and depend on the particular country's circumstances. It can be expected that in developing countries the need to use public procurement to achieve the socio-economic objectives of the government will be greater than in the case of developed countries. In South Africa the need to address the imbalances created by the apartheid policies of the past is part of the government's socio-economic objectives.

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and awards could be included in such a dedicated website that is systematically maintained and kept up to date.

<sup>330</sup> Arrowsmith "National and International Perspectives" 3; Arrowsmith *Public and Utilities Procurement* 6-7; Bolton 2007 *PPLR* 36-67; Watermeyer 2004 *PPLR* 30-55; Watermeyer 2000 *PPLR* 226-250; McCrudden "Social Policy Issues" 219.

### 6.13.2 Comparison

The Model Law acknowledges the need for collateral objectives to be achieved through public procurement. It provides for the possibility of excluding certain types of procurement from the application of the Model Law.<sup>331</sup> This can include as example vulnerable industries that need to be protected from competition. The possibility also exist to limit participation in procurement on the basis of nationality if so provided in the regulations issued in terms of the enacted law.<sup>332</sup> Provision is also made to allow for a margin of preference to be afforded to domestic suppliers or domestic produced goods.<sup>333</sup> The procuring entity may further take into account the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of the country.<sup>334</sup> Other factors that may be taken into account are counter-trade arrangements offered by tenderers, the extent of local content, including manufacture, labour and materials to be used, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills and similar factors provided for by the enacting state.<sup>335</sup>

The GPA in its preamble recognises the need to take into account the development, financial and trade needs of developing countries. State parties to the GPA can limit the scope of application of the GPA by excluding certain procuring entities from the applicability thereof and by setting monetary thresholds below which the GPA will not be applicable.<sup>336</sup> In the Revised GPA the possibility of transitional measures to protect developing countries from competition during this period exist. These measures include a price preference programme, the use of offsets, the phased-in addition of specific

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<sup>331</sup> Art 1(2)(b).

<sup>332</sup> Art 8(1).

<sup>333</sup> Art 34(4)(d).

<sup>334</sup> Art 34(4)(c)(iii).

<sup>335</sup> Art 39(4).

<sup>336</sup> Art I; Revised GPA art II.

entities or sectors and a threshold, below which international competition is excluded, that is higher than its permanent threshold.<sup>337</sup>

In principle, the GPA does not allow for the protection of domestic industries or suppliers against foreign competition. Particular provision is however made to accommodate developing and least developed countries. This is necessary to entice such states to enter into this multilateral agreement. The Revised GPA however allows a three year period for developing countries and a five year period for least developed countries to make use of the above transitional arrangements. It is doubted whether the three and five years respectively will be enough time for such countries to be able to compete with developed countries and hold their own in the open international market.

The South African Constitution<sup>338</sup> provides for collateral objectives to be achieved through public procurement. It provides for categories of preference to be allowed in the allocation of contracts and for the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination. To date the emphasis in public procurement has been on the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination.<sup>339</sup> The NIPP, although not incorporated into legislation, provides for the use of industrial participation obligations for foreigners who partake in certain procurement.

### 6.13.3 Essential provisions

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
1. Certain types of procurement, in the discretion of the state, may be excluded from the application of the Model Law.	1. In the preamble of both the GPA and the Revised GPA it is recognised that it is necessary to take into account the	1. Section 217(2) of the Constitution specifically provides for collateral objectives through procurement policies providing for categories

<sup>337</sup> Revised GPA art IV. Parties may further agree that the application of any specific obligation in the GPA may be delayed for a maximum of five years after its accession in the case of a least-developed country and a maximum of three years in the case of a developing country.

<sup>338</sup> S 217(2).

<sup>339</sup> The PPPFA provides a framework within which this can be done.

<b>Model Law</b>	<b>GPA</b>	<b>South African law</b>
<p>The procuring entity may on grounds specified in the procurement regulations or the provisions of law limit participation on the basis of nationality. (Art 1(2)(b); Art 8.1 and par 3.2.2 above).</p>	<p>development, financial and trade needs of developing countries, in particular the least-developed countries. Developing countries have the option to limit the scope and coverage of the GPA by excluding certain procuring entities from the application thereof and by setting a high threshold value. (Art I; Revised GPA art II and par 4.3.4 above).</p>	<p>of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. The PPPFA was enacted to provide a framework within which these collateral objectives could be achieved. (Par 5.3.8 above).</p>
<p>2. A margin of preference may be awarded for the benefit of tenders for construction by domestic contractors or for domestically produced goods or for domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings. Similar provisions apply in the case of procurement of services. (Art 34(4)(d); Art 39(4) and par 3.3.3 above).</p>	<p>2. The Revised GPA provides for transitional measures, including a price preference programme, an offset, the phased-in addition of specific entities or sectors and a threshold that is higher than its permanent threshold. Parties may further agree that the application of any specific obligation in the GPA may be delayed for a maximum of five years after its accession in the case of a least-developed country and a maximum of three years in the case of a developing country. (Revised GPA art IV and par 4.3.4 above).</p>	<p>2. The framework provided by the PPPFA requires that a preference point system must be followed. For contracts above R500 000 a maximum of 10 preference points may be awarded for specific goals. The lowest acceptable tender is awarded 90 points for price. Contracts below R500 000 may be awarded a maximum of 20 preference points for a specific goal and 80 points for price. These goals may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. It may further include implementing the programmes of the Reconstruction and Development Programme as published in <i>Government Gazette</i> no</p>

Model Law	GPA	South African law
		16085 dated 23. (PPPFA s 2 and par 5.3.8 above).
<p>3. When evaluating a tender the procuring entity may take into account the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of the country.</p> <p>It may further take into account any counter-trade arrangements offered by tenderers, the extent of local content, including manufacture, labour and materials to be used, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills and similar factors provided for by the enacting state. Similar provisions apply in the case of procurement of services.</p> <p>(Art 34(4)(c)(iii); art 39(4) and par 3.3.3 above).</p>		<p>3. The National Industrial Participation Program entails that in prescribed instances importers must undertake to invest in the Republic to be eligible to tender.</p> <p>All public purchases or lease agreements of goods, equipment or services with an imported content equal to or exceeding US\$10 million (or the equivalent thereof) are subject to an industrial participation obligation. The seller/supplier who incurs an industrial participation obligation will be required to participate in the South African economy as set out in the guidelines. The obligation is that such a seller or supplier must invest in commercial and industrial activities equal to or exceeding 30% of the value of the imported content, which must be fulfilled within seven years from the effective date of the Industrial Participation agreement.</p> <p>(Cabinet Memorandum 10/1996 and par 5.3.8 above).</p>

#### 6.13.4 Conclusion

The principle of using public procurement to achieve socio-economic objectives is widely recognised. The Model Law specifically allows for a margin of preference to be allowed and for criteria other than price to be used. Such criteria must be objective and quantifiable, be given a relative weight in the evaluation procedure, and be expressed in monetary terms wherever practicable. Factors that may be taken into account include:

- the balance of payments position and foreign exchange reserves of the country;
- any counter-trade arrangements offered by tenderers;
- the extent of local content, including manufacture, labour and materials to be used;
- the economic-development potential offered by tenders, including domestic investment or other business activity;
- the encouragement of employment;
- the reservation of certain production for domestic suppliers;
- the transfer of technology; and
- the development of managerial, scientific and operational skills.

The GPA does contain limited provisions to achieve socio-economic objectives. It is left to State Parties to negotiate the possibility of achieving these objectives through the exclusion of certain procuring entities from the application of the GPA and by providing for high threshold values when acceding to the GPA. The Revised GPA adopts a phased in approach in terms of which developing and least developed countries can postpone the application of a specific obligation for a period of three or five years respectively.

The South African Constitution specifically provides for socio-economic objectives to be achieved through public procurement. It includes provision for categories of preference to be allowed in the allocation of contracts and provision for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. It will also be possible to achieve socio-

economic objectives through the use of specific tender criteria.<sup>340</sup> The only legislation that has been enacted in terms section 217(2) of the Constitution is the PPPFA. This Act allows for a preference to be allowed to achieve certain goals. These goals may include<sup>341</sup> contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. They may include implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* no 16085 dated 23 November 1994. The goals relating to the Reconstruction and Development Programme are provided for in the regulations issued in terms of the PPPFA.<sup>342</sup> These goals must, however, be clearly specified.<sup>343</sup> No preferencing outside of the point system provided for in the Act is permitted.<sup>344</sup>

In view of the history of apartheid and the need to rectify the imbalances of the past, this is to be expected. There is a need to address other socio-economic objectives including environmental goals not provided for in the PPPFA. This needs to be done through similar legislation.

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<sup>340</sup> For example environmental performance criteria.

<sup>341</sup> S 2(1)(d).

<sup>342</sup> GN R725 published in GG 22549 of 10 August 2001. They are set out in reg 16(3):

- (a) The promotion of South African owned enterprises;  
The promotion of export-orientated production to create jobs;  
The promotion of SMMEs;  
The creation of new jobs or the intensification of labour absorption;  
The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;  
The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;  
The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;  
The promotion of enterprises located in rural areas;  
The empowerment of the work force by standardising the level of skill and knowledge of workers;  
The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and  
The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

<sup>343</sup> S 2(1)(d).

<sup>344</sup> See the decision of De Villiers J in *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T). Because of the need to address the imbalances created by the past policies of apartheid it will be difficult for South Africa to accede to the GPA in the short term.

The National Industrial Participation Programme is a further programme introduced by government to promote its socio-economic policies.<sup>345</sup> No enabling legislation for this programme exists. The regulations issued in terms of the PFMA do, however, provide that compliance with the National Industrial Participation Programme is a precondition before a tender can be evaluated.<sup>346</sup> This indirectly provides some legal basis for its existence. One would expect a proper legal basis to be provided for such an important and far-reaching programme in an enabling Act. In the case of defence procurement the *Armaments Corporation of South Africa, Limited, Act*<sup>347</sup> provides for the establishment of a defence industrial participation programme management system.

It must be kept in mind that the achievement of collateral objectives in public procurement does not exclude the application of the nine principles discussed hereinbefore. These principles still need to be applied in the achievement of the collateral objectives. How to achieve such a balance between the specific principles and the interaction among the different principles warrants a study of its own.

The South African public procurement regime provides adequately for the possibility of achieving government's socio-economic objectives, and in this regard it compares favourably with the Model Law and the GPA.

#### **6.14 Overall conclusion**

Despite the unique history, origins and nature of each of the three regimes, it was possible to extract nine principles essential for a well-functioning public procurement system that are common to all three regimes. The ultimate objectives of the three regimes may be divergent but the element common to all three regimes is that they endeavour to obtain value for money through a well-functioning public procurement system.

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<sup>345</sup> See par 5.3.8.1(c) above.

<sup>346</sup> Reg 16A10 provides that an accounting officer or accounting authority must obtain clearance for a recommended bidder from the Department of Trade and Industry, in respect of contracts which are subject to the National Industrial Participation Programme of that Department.

<sup>347</sup> Act 51 of 2003, s 4(1)(a) and 4(2)(j).

All three regimes in essence provide a framework for public procurement, a fact which made a comparison of the three divergent regimes viable. Each of the nine principles identified was either directly or indirectly incorporated in every one of the regimes. The essential provisions to ensure that the nine principles can be applied in practice are present in all three regimes. Although there are differences in detail with regard to most of the individual provisions contained in the different regimes, it was possible to identify the principle or principles underlying such provisions.

From the comparison between the regimes and the proposed amendments of both the Model Law and the GPA it was also clear that any public procurement regime needs to be continuously improved and adapted to changed circumstances. It must be improved to better achieve the principles identified, and adapted to take advantage of new technology like electronic communication, for instance. As could have been expected, the comparison showed that improvements could be made to the different regimes, that the underlying principles can be achieved by different provisions, and that despite differences in circumstances, it remains essential that the principles identified form the basis upon which such specific circumstances are provided for.

The achievement of socio-economic objectives forms an integral part of public procurement and the detail of what needs to be addressed will differ depending on the circumstances. It is possible to achieve socio-economic objectives in a balanced way without negating the principles applicable to public procurement. The nine principles must still form the foundations upon which public procurement is based, when it is used to achieve governments' secondary or collateral objectives.

## CHAPTER 7

### CONCLUSION

#### **7.1 Introduction**

The purpose or primary objective of this research was to determine whether or not the South African public procurement regime, within the framework set out in section 217(1) of the Constitution, complies with the internationally accepted objectives or principles of public procurement and how these objectives are balanced with the need for the government's socio-economic policies. The purpose was also to comment on possible shortcomings in the South African procurement regime and to provide suggestions on how these problems may best be addressed.<sup>1</sup>

In order to achieve the above, it was envisaged that the following had to be done:<sup>2</sup>

- the nature and scope of public procurement had to be determined;
- the pre- and post-constitutional public procurement regimes of South Africa had to be analysed and compared;
- the internationally accepted objectives or principles applicable to public procurement as contained in the Model Law and the GPA had to be determined;
- it had to be determined whether or not the South African public procurement regime complies with these internationally accepted objectives and principles through appropriate regulatory measures;
- it had to be determined what the internationally accepted objectives and principles for the achievement of socio-economic objectives through public procurement are, as contained in the Model Law and the GPA;
- it had to be determined whether or not the South African public procurement provisions regulating the achievement of socio-economic objectives comply with the principles and objectives identified; and

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<sup>1</sup> See ch 1 above.

<sup>2</sup> See par 1.2 above.

- it had to be determined how the South African provisions and practices need to be changed should the South African public procurement regime, within the framework set out in section 217 of the Constitution, including the achievement of its socio-economic objectives, not comply with the internationally accepted objectives and appropriate regulatory measures for attaining such objectives.

In order to achieve the above the research was divided into separate chapters. These chapters were not divided along the lines of the above exposition but for ease of the research as set out hereafter. The first chapter gave an introduction to the research question, the research methodology and the hypothesis. The public procurement phenomenon was discussed in the second chapter. The third and fourth chapters dealt with the Model Law and the GPA respectively. In the fifth chapter the South African public procurement regime was researched and a distinction was made between the pre-constitutional era and the post-constitutional era. The emphasis was on the post-constitutional era. A comparative analysis between the South African regime, the Model Law and the GPA was performed in Chapter 6.

In this last chapter the conclusions reached will be discussed. This discussion will take place under the following headings: the nature and scope of public procurement, with specific reference to the South African situation; the internationally accepted principles applicable to public procurement; an assessment of the extent to which the South African public procurement regime exemplifies those principles and objectives; and finally, some remarks and recommendations.

## **7.2 *The nature and scope of public procurement***

In order to fulfil their obligations to their citizens, all governments need goods and services. Governments can, generally speaking, obtain these goods and services either by “in-house” provision or by “out-sourcing”. The process of

governments' obtaining goods and services from private entities is referred to as government procurement or public procurement.<sup>3</sup>

Public procurement concerns at least three interest groups: firstly the government, which decides on and pays for the procurement; secondly the ordinary citizen, who as a taxpayer indirectly funds the activity and for whose benefit the goods and services are procured; and lastly private enterprise, which supplies the goods and services.<sup>4</sup> The economy and socio-economic well-being of the country at large is affected by public procurement and must be taken into consideration in public procurement. This is not only because it is in essence an economic activity and because of the sheer volume thereof, but also because it relates to the creation of infrastructure and the delivery of services, influences many sectors of industry, has a social impact, and is used as an instrument to further governments' socio-economic policies. Although the government has the obligation to serve the best interests of its citizens, including both the general public and the private suppliers, the narrower interest of the procuring entity itself, as a distinct party to this economic activity, can also be distinguished. The public's interest is twofold. Public procurement is funded with public money and it is the recipient of the benefits of the procurement. It can be stated that the function of public procurement is to serve the legitimate interests of the procuring entity, the general public and private enterprise, taking into account the economy and socio-economic needs of the country.<sup>5</sup>

In this process a broad distinction can be made between the pre-award, award and post-award stages of procurement. A more detailed delineation of the stages of the process can be modelled as follows:<sup>6</sup>

- the identification of the need for procurement;
- the compilation of tender requirements;
- the invitation to tender;

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<sup>3</sup> See par 2.1 above.

<sup>4</sup> See par 2.1 above.

<sup>5</sup> See par 2.1 and 2.3.1 above.

<sup>6</sup> See par 2.2.2 above.

- the submission and receipt of tenders;
- the processing and evaluation of the tender;
- the award of the tender;
- the review and challenge procedures; and
- the supervision of the execution of the tender.

The identification of the need for a particular procurement is generally not deemed to be part of the public procurement process.<sup>7</sup>

### *7.2.1 The scope of public procurement*

To understand the scope of public procurement it needs to be determined what is meant by the terms “goods and services”, “procurement” and “public”.

#### *(a) Goods and services*

In the South African context the term “goods” will include material and immaterial property and movable and immovable property. The term “services” relates to the provision of work, which can include any kind of work, and the provision of commodities as diverse as banking, transport, medical, and electronic services. It will sometimes be difficult to determine if the procurement relates to “goods” or to “services”. The widest possible interpretation should be given to both of these terms as the purpose of section 217 of the Constitution is to provide principles applicable to all government procurement and not to limit it by the use of the terms “goods” and “services”. The term “goods” and the term “services” are wide enough to include “works” or “construction” and there is therefore no need to make the further distinction made in the UK and the EU. Undoubtedly, a combination of goods and services must be included under the terms “goods” and “services”.<sup>8</sup>

#### *(b) Procurement*

The term “procurement” generally includes the acquisition of goods and services, material and immaterial property, and movable and immovable

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<sup>7</sup> See par 2.4.2.1 above.

<sup>8</sup> See par 2.1.1 above.

property.<sup>9</sup> In the South African context, section 217 of the Constitution refers to the fact that government “contracts for goods or services”. If one takes into consideration the purpose of regulating public procurement and the wording of the section as a whole, including the reference to a system which must be fair, transparent and cost effective, one is driven to the conclusion that section 217(1) applies to both the non-contractual and contractual phases of public procurement.<sup>10</sup>

Although section 217(1) does not directly refer to the sale or letting of goods and services by the state there can be no reason why procurement should not be interpreted to include such actions. In logic the principles of fairness, equity, transparency, competitiveness and cost-effectiveness should apply equally to those types of transactions. Both the PFMA and MFMA make these principles applicable to these transactions.<sup>11</sup>

As the state functions as a unit and no organ of the state is separate from the state, section 217 will not be applicable in direct transactions between organs of state. However, if an organ of state contracts for goods and services in the open market, section 217 ought to be applicable, irrespective of whether the contract is awarded to a private party or to another organ of state.<sup>12</sup>

(c) *Public*

The term “public” is used in referring to procurement by public bodies, or government, or organs of state as opposed to procurement by the private sector. Section 217 of the Constitution firstly refers to organs of state in the national, provincial or local spheres of government and secondly to any other institution identified in national legislation. Section 239(a) of the Constitution defines “organs of state” to mean any department of state or administration in the national, provincial or local spheres of government. The term “organ of state” has been interpreted by our courts to include a functionary and institutions that might not be part of government but which exercise powers

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<sup>9</sup> See par 2.2.1 above.

<sup>10</sup> See par 2.2.2 above.

<sup>11</sup> See par 2.2.2 above.

<sup>12</sup> See par 2.2.2 above.

which are considered to be of a public nature. The classification rests on an identification of the nature of the power exercised rather than the nature of the functionary or institution. However, in so far as certain functions of such institutions might not be subject to executive control at the national, provincial or local level, it can with regard to the performance of those functions not be said that that institution forms part of any sphere of government.<sup>13</sup>

Section 239(b) of the Constitution further defines “organ of state” firstly as any functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution. Secondly it defines it as any other functionary or institution exercising a public power or public function in terms of any legislation. It does not include a court or a judicial officer. In every particular situation the provisions of section 217, read with section 239 of the Constitution, must be interpreted to determine if section 217 is applicable.<sup>14</sup> The South African regime allows for flexibility in that any institution may by way of national legislation be identified to be subject to section 217 of the Constitution.<sup>15</sup>

As is the case in the Model Law and the GPA, the scope of public procurement in South Africa is very broad. This is in accordance with international practice.

### *7.2.2 The nature of public procurement*

#### *(a) Primary objective*

The objective of any procurement, which in essence is an economic activity, is to obtain the goods and services which are procured. This must be done in such a way that the best value for the money spent is obtained. In the case of public procurement the interests of government, the general public and private enterprise are at stake, taking into account the economy and socio-economic situation of the country. In the case of private enterprise the individual is free

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<sup>13</sup> See par 2.2.3 above

<sup>14</sup> See par 2.2.2 above.

<sup>15</sup> See par 2.2.2 above.

to procure goods and services for any reason at any price as long as the procurement falls within the provisions of the law.<sup>16</sup>

Section 217(1) of the Constitution requires a system which is fair, equitable, transparent, competitive and cost effective. These constitutional imperatives can also be broadly distinguished to relate firstly to the interest of the government to obtain value for money, secondly to the right of the public that public money is spent in an accountable and responsible way and lastly to the requirement of fairness towards entities contracting with the state. The requirements of competitiveness and cost effectiveness in particular relate to the economic objective of public procurement. The requirement of a system that is transparent, fair and equitable specifically relates to both the right of the public that public money be spent in an accountable and responsible way and to the demand for fairness towards entities contracting with the state. The interests of all of the role players are relevant throughout the procurement process. All of the principles referred to in section 217(1) of the Constitution are applicable throughout the procurement process, and a balance among all of the principles and interests of the role players should be maintained.<sup>17</sup>

*(b) Secondary objectives*

It is generally accepted that public procurement may be used by governments to achieve their socio-economic goals. In addition to direct procurement with the aim of achieving such a socio-economic goal, like the purchasing of medical supplies in order to be able to provide free medical services, socio-economic purposes may be served by allowing for a margin of preference in the awarding of contracts, requiring offsets from the successful tenderer, or prescribing direct criteria which relate to socio-economic aspects. Offsets may be a precondition for participation but may not be a criterion in the evaluation of the tender. These secondary objectives must be achieved within the broad primary objective of value for money and in accordance with the general principles applicable to public procurement.<sup>18</sup>

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<sup>16</sup> See par 2.3 above.

<sup>17</sup> See par 2.3.1.5 and 5.3.2 above.

<sup>18</sup> See par 2.3.2 above.

Sections 217(2) and (3) of the Constitution provide for the implementation of procurement policies that may allow categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination through national legislation. The PPPFA was enacted in accordance with the above constitutional provisions and provides for preferential procurement, in particular to enable the injustices of the past to be rectified through public procurement. The NIPP provides for offsets as a requirement for foreign tenderers to participate in the procurement process where the value of the procurement exceeds ten million rand. The principles contained in section 217(1) of the Constitution remain applicable to the procurement process when the procurement is utilised to achieve the government's socio-economic objectives.<sup>19</sup>

(c) *Public procurement compared with private procurement*

The difference between private and public procurement manifests itself largely in the applicability of public law, in particular administrative law, to public procurement. The public procurement process, in general, relates to administrative action. Private parties have freedom of contract and may run their affairs as they choose, of course within the boundaries of the law. The provisions of the Constitution, procuring entities' enabling legislation, other applicable legislation, and the common law limit the freedom of an organ of state to contract. It has to run its affairs, including public procurement, within the provisions of both the public and private law.<sup>20</sup>

Our courts have held that the public procurement process including the conduct of the process, the evaluation of the tender and the award of the contract is a form of administrative action. Factors which were held to be relevant to decide if an action constitutes "administrative action" are the nature of the power exercised, its subject matter, if it involves the exercise of a public duty, and how closely it is related to policy matters (which are not administrative action) as

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<sup>19</sup> See par 2.3.2.3 above.  
<sup>20</sup> See par 2.4 above.

opposed to the implementation of legislation (which will constitute administrative action).<sup>21</sup>

Quinot proposes that the choice as to which legal rules should apply to the commercial activity of the state must be made –

with open and direct reference to the substantive considerations that inform both the applicability and substance of the particular rules. Sustained, consistent and articulated reference to these considerations is the main difference between the proposed approach and the competing models, such as the current classification approach.<sup>22</sup>

This open-ended approach should not result in new substantive rules to determine whether the particular state action is a private law or public law action, but should remain flexible. More normative complexity can thus be introduced into the reasoning process.<sup>23</sup>

The main attraction of this approach is that it forces one to refer to the considerations that inform the regulatory measure, whether it be private law or administrative law. It provides a measure of open-endedness, which can ensure adaptability to new and unforeseen circumstances, whilst remaining true to the constitutional values. In the case of public procurement, these values include the requirements of fairness, equitability, transparency, competitiveness and cost effectiveness. The results of such an approach will probably not be drastically different from those of the present approach by the courts, but will make it unnecessary for the courts to classify a particular action as either private or administrative.<sup>24</sup>

The nature and scope of public procurement in South Africa is comparable with the position under the Model Law and the GPA.

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<sup>21</sup> See par 2.4.2.1 above.

<sup>22</sup> Quinot *Judicial Regulation* 505.

<sup>23</sup> See par 2.4.2.1 above.

<sup>24</sup> See par 2.4.2.1 above.

### **7.3 The pre- and post-Constitutional public procurement regimes of South Africa**

Prior to white settlement in South Africa forms of procurement amongst the different tribes inhabiting the country undoubtedly took place. They had no influence on the present public procurement law of South Africa.<sup>25</sup>

Public procurement developed slowly during the period of the VOC, the two English occupations and the Dutch rule at the Cape. Elements of competition and transparency were already present, in that tender procedures and simple forms of advertising were utilised. Public procurement gained momentum during the period from 1836, when new states were founded in the interior, namely Natal, Transvaal and Orange Free State, to 1910, when the Union of South Africa was established.

Although the public procurement regime was still relatively unsophisticated, the operation of important principles was already evident during this period. A differentiation was made with regard to the value of the procurement. A competitive method for procurement, namely tender procedure, was followed. A proper description of what was needed had to be made public by means of timeous advertisements. Tenders had to be delivered at the specified time and place in unopened envelopes. A proper record of the tender proceedings had to be kept. An evaluation with a recommendation had to be provided by the procuring entity to the final decision maker.<sup>26</sup>

The public procurement regime in place during the time of the Union (1910-1961) became more sophisticated. A distinction was made, based on the value of the intended procurement, between a formal and an informal procedure. Tenders had to be advertised. For tenders to be responsive they had to comply with the conditions set out, be delivered timeously at the appointed place in sealed envelopes, and be unqualified. Tenders had to be opened in public and the tender amounts read out upon the opening thereof. The procuring entity had to provide a report to the tender board stating its recommendations and its

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<sup>25</sup> See par 5.2.1 above.

<sup>26</sup> See par 5.2.2 above.

reasons therefore. If only one tender had been received it had to be certified that the rates were fair and reasonable. If a tender other than the lowest tender was recommended, the reasons therefore had to be stated. Provision was made for the blacklisting of suppliers and penalties if wrong information was given. Preference was given to local rather than foreign suppliers. Procurement was centralised in the hands of tender boards. The principles of efficiency, economy, transparency, competitiveness, the combating of abuse, and fairness and equitability were already in operation during this period of South Africa's procurement history.<sup>27</sup>

Although the laws relating to public procurement did not contain provisions directly discriminating against the black majority of the population, *de facto* discrimination existed. The black majority was in practice excluded from tendering in that they were restricted in their participation in the economic activities of the country, they were not members of the tender boards, they did not have any economic power, they had a lack of expertise, and they had a lack of resources. The ruling minority also distrusted the capabilities of the black majority.<sup>28</sup>

During the period when South Africa was a Republic, from 1961 to 1994 (when it became a constitutional state), the position with public procurement was similar to that when it was a Union. The powers of the State Tender Board were progressively centralised and strengthened. Public procurement of goods and services related to matters of state security became more secretive and reflected the then government's securocratic governance. The protection of the then government's ideology became so important that it created a separate, secretive regime for procurement which it believed to be of national importance. Because the government ignored public procurement principles like transparency, economy, competitiveness and accountability, it opened up the possibility for abuse of the system, in particular for the misuse of state funds to entrench and defend the then government's policies.<sup>29</sup>

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<sup>27</sup> See par 5.2.3 above.

<sup>28</sup> See par 5.2.3 above.

<sup>29</sup> See par 5.2.3 above.

Although South Africa already had a well-functioning system of administrative law in this period of its history, participants were, hampered in many respects when trying to exercise their rights because of inherent shortcomings in the law. There was no right to information held by the state, no right to being given reasons for administrative decisions, and the grounds for review were limited. This severely hampered recourse to the law by an injured or interested party.<sup>30</sup>

Economic power also became progressively more centralised in the hands of the white minority. Very little procurement by the state was obtained from the majority of the population of South Africa, something which required redress in the post-apartheid era.<sup>31</sup>

South Africa became a constitutional state on 27 April 1994. Procurement is specifically provided for in section 217 of the Constitution, which requires a public procurement system which is fair, equitable, transparent, competitive and cost-effective. It also makes provision for the implementation of a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Public procurement is now part of the supply chain management system in the national, provincial and local spheres of government. Decision making is decentralised and the award of tenders is left in the hands of committees appointed by the procuring entity.<sup>32</sup>

These constitutional imperatives have been embodied in a number of different pieces of legislation. In the case of national and provincial governments, the PFMA and the regulations issued in terms thereof provide for the practical implementation of these principles. The PFMA echoes the requirements of the Constitution. In essence it is a framework act which does not take the constitutional imperatives much further. In the regulations promulgated in terms

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<sup>30</sup> See par 5.2.3 above.

<sup>31</sup> See par 5.2.3 above.

<sup>32</sup> See par 5.2.4 above.

of the PFMA and the practice notes issued by the National Treasury, more detail is provided of what needs to be included in the supply chain management policies of the different procuring entities. However, it is still left to a large extent to the relevant entities to devise a procurement policy within the framework given by the Constitution, the PFMA, the regulations and the practice notes. On the one hand this leaves a lot of leeway for the different entities to determine the detail of their procurement policies and to adapt the policies to their specific circumstances and requirements. On the other hand it has led to a lack of uniformity which can be confusing to tenderers. This can also make it difficult for many prospective tenderers, especially smaller tenderers with fewer resources and foreign tenderers, to participate in the public procurement process.<sup>33</sup>

Public procurement in the local government sphere is regulated by the MFMA, the regulations issued in terms thereof, and the practice notes issued by the National Treasury. These provisions generally provide more detail of what needs to be incorporated in the supply chain management policies than the PFMA and the regulations promulgated in terms thereof. This should lead to a standardisation of some important aspects of the procurement process. Although there will still be great differences in the policies of the different procuring entities in the local government sphere, the general framework and a significant portion of the provisions with regard to important aspects of the procurement process should be similar.<sup>34</sup>

The PPPFA sets out the framework within which historically disadvantaged persons should be given preference in public procurement. Depending on the value of the procurement, a maximum of 10 or 20 points out of 100 is awarded for certain prescribed goals. These goals are limited and generally relate only to the injustices of the past. They are not broad and flexible enough to include all of the pressing socio-economic problems of South Africa. In particular, pressing problems like environmental and energy issues are not addressed. A further problem with the Act is that it may lead to an evaluation of tenders merely on the basis of the points system. This is

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<sup>33</sup> See par 5.2.4 above.

<sup>34</sup> See par 5.2.4 above.

especially so because of the mandatory provision in section 2 of the Act that the tenderer with the highest points must be awarded the tender. Although it is provided that the above is the case unless objective criteria exist which warrant a different decision, this qualification is not always understood or correctly applied by procuring entities. This is perhaps because of the fact that no indication of what such criteria could be is provided in the Act or the regulations. Another problem is the lack of capacity in procuring entities. The procurement regime, including the PPPFA, is not a simple one and one needs to have a fair knowledge of the principles involved and the applicable legislation and regulations to properly implement it.<sup>35</sup>

In addition to the above acts there exists a vast array of legislation and government policies which have an effect on public procurement. Many of these contain provisions relating to the secondary or collateral objectives of public procurement. These provisions have as their objective the correction of the imbalances created by the past policy of apartheid. These provisions are generally not aligned with the PPPFA and can create confusion and uncertainty.<sup>36</sup>

One of the programmes introduced by government to promote its socio-economic policies is the NIPP, which is based on the principle of using offsets in public procurement. In terms of the NIPP, in the case of foreigners participating in tenders exceeding ten million rand, industrial participation in the South African economy by such tenderers is a precondition, but not a factor, in the adjudication of tenders, unless all tenders are relatively close.<sup>37</sup>

Important positive differences between the pre- and post-constitutional procurement regimes can be identified. The most important is that public procurement has been given constitutional status. The constitutional imperatives of a fair, equitable, transparent, competitive and cost-effective system as provided for in section 217 of the Constitution are now applicable to

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<sup>35</sup> See par 5.2.4 above.

<sup>36</sup> See par 5.2.4 above.

<sup>37</sup> See par 5.2.4. above.

all public procurement. This serves as a safety net to ensure the integrity of the process. The administrative law now includes the right to access to information, the right to being given reasons, and just administrative action. Public procurement is also decentralised, and procuring entities are responsible for their own procurement, which must be done in terms of their supply chain management policies. Socio-economic goals are provided for in the Constitution and specific legislation.<sup>38</sup>

#### **7.4 The internationally accepted principles of public procurement**

##### *7.4.1 Introduction*

It is generally accepted that the primary objective of public procurement is an economic one, namely to obtain value for money. The objective of value for money in a narrow sense entails the procurement of the best product at the lowest price through the least expensive method of procurement. In a broader sense the term value for money must not be over simplified. It must be understood in all its nuances in the public procurement process. The interests of the three role players, namely government, the general public and the private suppliers, must be served during all of the stages of the procurement process and in the eventual outcome thereof, taking into account the economic and socio-economic realities of the country. This entails that a value judgment must be made.<sup>39</sup>

It is not practical or desirable to try to develop a more detailed definition for the objective of value for money. Firstly, it would not be possible to include all circumstances in such a definition. Secondly, a definition would probably limit the inherent flexibility needed to achieve a balance among all of the relevant interests and circumstances. On the other hand, it is undesirable to have only a vague idea of an objective like value for money as a basis for determining how public procurement should be conducted. This would allow for so much subjectivity that it might be possible to justify any particular procurement as representing value for money.<sup>40</sup>

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<sup>38</sup> See par 5.3.8.2 above.

<sup>39</sup> See par 2.3.1 and 2.3.1.5.6 above.

<sup>40</sup> See par 2.3.1 and 6.2 above.

The interests of all of the role players require not only that the outcome of the procurement should represent value for money, but that interests of all of the affected parties should be appropriately balanced and served throughout the procurement process. To best achieve this, the procurement system must comply with internationally accepted principles for public procurement from the initiation of the procurement process up to the completion of the contract. Such principles are also often referred to as the objectives, goals or requirements of public procurement. These principles are operationalised through specific provisions in the different public procurement systems.

All of these principles are interrelated, overlap, influence one another, and support or sometimes oppose one another, and often more than one principle can be served by the same provision or provisions contained in the procurement regime. It is also problematic to decide whether a specific principle, for instance the accessibility of information, should be regarded as a separate principle or should be classified under another principle, for instance that of transparency. The main function of the principles applicable to public procurement is to ensure that the primary objective of value for money is obtained, taking into account the interests of all of the role players in public procurement, as well as the economic and socio-economic realities of the country. This entails that the principles must be viewed from the perspective of the different role players and a balance achieved among the different interests in the prevailing circumstances.<sup>41</sup>

Although the primary function of public procurement is to obtain value for money in the procurement of goods and services, it is accepted that public procurement may be used by government as a means to further its socio-economic policies. Such policies can be very diverse and include objectives like job creation, industrialisation, the transfer of skills, the protection of local industries, labour-intensive practices, environmental protection and similar objectives. The importance of the achievement of collateral objectives will differ from country to country and depend on the particular country's circumstances. It can be expected that in developing countries the need to use public procurement to achieve the socio-economic objectives of the government will be greater than in

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<sup>41</sup> See par 6.2 above.

the case of developed countries.<sup>42</sup> When utilising public procurement to achieve socio-economic objectives, the principles generally applicable to public procurement remain applicable and due consideration should be given to these principles.<sup>43</sup>

#### *7.4.2 Principles identified with regard to the primary objective of public procurement*

The following broad principles applicable to public procurement, which are common to the Model Law and the GPA, can be extracted from the provisions of these instruments:<sup>44</sup>

- (a) Economy;
- (b) Competitiveness;
- (c) Effectiveness;
- (d) Transparency;
- (e) The combating of abuse;
- (f) The avoidance of risk;
- (g) Accountability;
- (h) Fairness and equitability; and
- (i) Integrity.

All of the above principles are relevant through all of the stages of public procurement. The principles must also be viewed from the perspective of the different role players. The economy of the country and its socio-economic situation need also be taken into account. The table marked “Annexure A” presents an overall matrix of the principles and stages of procurement as a simple exposition of the applicable principles.<sup>45</sup>

The principles specified are broad, and little will be gained by an attempt to define each of them precisely and in minute detail. However, there are certain provisions that can be extracted from the Model Law and the GPA which ensure that a particular principle is served. The essence of each principle as

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<sup>42</sup> See par 6.13.5 above.

<sup>43</sup> See par 5.3.8.2 above.

<sup>44</sup> See par 6.2 above.

<sup>45</sup> See par 6.2 above.

extracted from the provisions of the three public procurement regimes is set out for ease of reference in annexures “B” to “J” attached hereto.<sup>46</sup>

Annexures “A” to “J” can be used as matrices to determine what the essential principles are and what the essence of the provisions that need to be incorporated in a public procurement regime to serve these principles are. Similarly, they can be used to determine whether or not a supply chain management policy conforms to the generally accepted principles of public procurement. The matrices could also be useful to assist in evaluating whether or not a particular procurement has complied with all of the applicable principles. It should be remembered that the matrices are only tools and should be amended and refined to reflect changing circumstances and needs.<sup>47</sup>

All of these principles are reflected in the South African public procurement regime. Although the detail of the individual provisions relating to a specific principle may differ, the essence of the principles is present in all three regimes.<sup>48</sup>

#### *7.4.3 The internationally accepted secondary or collateral objectives and principles of public procurement*

Procuring entities have different options in the procurement process to achieve their socio-economic objectives. The first is the direct procurement of products or services, for instance houses, to address socio-economic objectives. Secondly, provision can be made in the criteria specified for tenderers and/or tenders for the achievement of collateral goals, for instance energy saving, or job creation. Thirdly, a margin of preference can be allowed to tenderers who comply with certain requirements. Lastly, the provision of prescribed offsets by tenderers can

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<sup>46</sup> See par 6.3.3; 6.4.3; 6.5.3; 6.6.3; 6.7.3; 6.8.3; 6.9.3; 6.10.3; and 6.11.3 respectively.

<sup>47</sup> As appears from the comparison in ch 6, the South African public procurement regime in essence complies with this matrix, and the exercise need not be repeated. In view of the fact that the supply chain management policies of procuring entities are quite voluminous (nearly 100 pages in the case of the City of Cape Town) it is not practical for purposes of this study to apply the matrix to a specific supply chain management policy. It is also not practical in this study to apply the matrix to a specific tender.

<sup>48</sup> See par 6.12 above.

also be a precondition to participate in the tender process. As offsets do not relate to the criteria of the subject matter of the procurement, they ought not to be a factor in the evaluation of tenders. In both the Model Law and the GPA the use of offsets is not generally allowed in public procurement, but exceptions are made with regard to developing countries. Criteria which relate to the collateral objectives to be achieved must be objective and quantifiable, be given a relative weight in the evaluation procedure, and be expressed in monetary terms wherever practicable.<sup>49</sup>

The most common aspects that are taken into account to achieve collateral objectives are set out in “Annexure K” hereto.<sup>50</sup>

The attached list is not exclusive and the aspects that are taken into account will differ from time to time and from country to country. In particular, pressing issues of the day can and ought to be addressed through public procurement. One such issue that already needs and will in future increasingly need attention is the issue of the environment. The achievement of the secondary objectives of public procurement does not exclude adherence to the general principles of public procurement as set out above. The socio-economic objectives must be achieved within the framework of a public procurement system that complies with the accepted principles applicable to public procurement.<sup>51</sup>

#### *7.4.4 Re-assessment of the criteria*

As indicated in Chapter 6 above, it is necessary to determine whether a better classification of the above objectives and principles can or should be made.

It is possible to reclassify some of the ideas contained in the principles of economy, competitiveness, effectiveness, transparency, the combating of abuse, the avoidance of risk, and accountability. The principles of competition and effectiveness could, for instance, readily be included in a broad interpretation of

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<sup>49</sup> See par 2.3.2 and 6.13.4 above.

<sup>50</sup> See par 6.13.4 above.

<sup>51</sup> See par 6.13.4 above.

the principle of economy. The combating of abuse could likewise form part of the principle of transparency. Some ideals that are presumably implicit in the identified principles could be labelled separately. “Objectivity” and “the provision of effective remedies” are instances of this and specific circumstances in a country may necessitate that further principles be developed, or that more emphasis be placed on one particular principle than on another.

As the above principles may overlap, are interdependent and interrelated, and may at times be either complementary or contradictory, it is necessary that they be properly balanced and that each be afforded the weight the particular circumstances require. This is also reflected in the further principle that the system must be fair and equitable. This principle serves as a safety-net to ensure that substantive fairness and equitability is ensured to all of the role players, taking into account the economic and socio-economic needs of the country.

The last principle is that of integrity. Integrity is to a large extent a function of the proper implementation of all of the above principles. However, it implies something more than just the mechanical implementation thereof. It connotes a normative or value-based implementation which demands the objective, predictable and ethical implementation of the principles. The principles of fairness and equitability and that of the integrity of the system add value to the other principles and need to be retained.

Although the achievement of collateral objectives can be brought home under a broad interpretation of value for money it is expedient to deal with it separately. There are certain issues peculiar to the achievement of socio-economic objectives that need to be raised separately.

Although the exposition of the specific principles is by no means perfect it serves its purpose and need not be amended. However, it should not become a straitjacket, and is there no reason why the above exposition can and should not be amended and refined for other purposes, depending on the circumstances. For purposes of this study the above principles do represent the

essential principles of public procurement. They are common to the Model Law and the GPA and present a workable matrix against which the South African public procurement regime, and other regimes, can be compared.

**7.5 *An evaluation of whether or not the South African public procurement regime complies with the internationally accepted primary objectives and principles of public procurement***

Reforms in public procurement started shortly after South Africa became a constitutional state. The main features of the reforms are the provision of constitutional principles applicable to public procurement; the creation of a single national legislative framework in terms of the PFMA and the MFMA, applicable to organs of state in the national, provincial and local spheres of government; and the creation of a supply chain management function that is fully integrated with the financial management processes in government, in which decisions on public procurement are decentralised to the procuring entities.<sup>52</sup>

The main objective of the South African public procurement regime and the principles of section 217 of the Constitution is to obtain value for money. This has been expressed by the courts in the notion that the most meritorious tender, taking all circumstances including the extent of compliance with the constitutional principles into account, should be awarded the contract. A broad and purposive interpretation of the constitutional principles of fairness, equitability, transparency, competitiveness and cost effectiveness will include all of the internationally accepted principles discussed above.<sup>53</sup>

The principle of economy can be included in or at least overlaps with the constitutional principles of competitiveness, cost effectiveness, transparency, fairness and equitability. The principle of the combating of abuse can be included under the constitutional principles of transparency, cost effectiveness, competition, and fairness and equitability. The principle of the avoidance of risk

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<sup>52</sup> See par 5.5 above.

<sup>53</sup> See par 5.3.1 above.

can be included under the constitutional principles of cost effectiveness, competition, and fairness and equitability. The principle of accountability can be included under or at least overlaps with the constitutional principles of fairness and equitability and transparency. As integrity is really a function of the proper application of all of these principles, this principle is by implication included in the constitutional principles.<sup>54</sup>

If regard is had to the provisions of the PFMA and the MFMA and the regulations and supply chain practice notes issued in terms of these two acts, it can be concluded that all of the international principles and, with a few exceptions, all of the essential provisions identified in annexures “A” to “J” hereto are addressed in the South African public procurement regime. Some suggestions can be made, based on the differences between the provisions of the three regimes, on how to improve the South African regime. This will be done with reference to each principle:

#### *7.5.1 Economy<sup>55</sup>*

The South African regime will benefit from specific provisions relating to how abnormally low tenders should be dealt with and the possibility of not awarding a tender if it is in the public interest not to do so. More detailed provisions on alternative methods of procurement could be included in the South African regime. This would ensure more conformity between the different procuring entities.

#### *7.5.2 Competition<sup>56</sup>*

The inclusion of provisions that specifically provide that the costs for participating in the procurement process and that the time frames with which tenderers must comply should not be used to exclude possible suppliers in the procurement process would benefit the South African regime.

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<sup>54</sup> See par 6.12 above.

<sup>55</sup> See par 6.3.3 above.

<sup>56</sup> See par 6.4.3 above.

### 7.5.3 Effectiveness<sup>57</sup>

It would benefit the South African regime to include specific provisions regulating:

- the use of language;
- the extension of the deadlines in the procurement process;
- the protection of public morals, public order, and public safety, and the protection of human, animal or plant life or health;
- the protection of intellectual property;
- the interests (relating to goods or services) of persons with disabilities, philanthropic institutions, or prison labour;
- the use of electronic communication for competitive bidding;<sup>58</sup> and
- the use of electronic communication to make available and accessible the different procurement policies, procedures, systems, court decisions, acts, regulations and administrative rulings applicable to each procuring entity.

### 7.5.4 Transparency<sup>59</sup>

Transparency in the South African regime could be improved by requiring that notice of forthcoming procurement opportunities should be given at the beginning of the fiscal year and by making relevant public procurement information more easily accessible and available. This could for instance be done by the use of dedicated websites or other electronic media which should, in addition to the normal information on tenders and awards, include detail on the different supply chain management policies, the law, administrative rulings and procedures and directives relating to public procurement.

### 7.5.5 The combating of abuse<sup>60</sup>

The South African regime has more detailed provisions to combat fraud and corruption and the abuse of the procurement system than both the Model Law

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<sup>57</sup> See par 6.5.3 above.

<sup>58</sup> For instance electronic reverse auctions.

<sup>59</sup> See par 6.6.3 above

<sup>60</sup> See par 6.7.3 above.

and the GPA. These provisions are sufficient to address these abuses if properly applied. The need here is not for improved legislative measures, but for improved practical application and implementation.

#### *7.5.6 The avoidance of risk<sup>61</sup>*

The South African public procurement regime is more detailed than both the Model Law and the GPA with regard to its provisions addressing risks in public procurement. The supply chain management policies of procuring entities must provide for

- the identification of risks on a case-by-case basis;
- the allocation of risks to the party best suited to manage such risks;
- the acceptance of the cost of the risk where the cost of transferring the risk is greater than that of retaining it;
- the management of risks in a pro-active manner and the provision of adequate cover for residual risks; and
- the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.

The above provisions are adequate to address the avoidance of risk in public procurement. The need is to properly implement and apply these provisions in practice.

#### *7.5.7 Accountability<sup>62</sup>*

In view of the high costs of litigation and the inevitable delays associated therewith in South Africa, the establishment of a dedicated, independent administrative review body for public procurement should further the principle of accountability in South Africa. The effectiveness of such a body would be ensured by providing for strict time frames with which the parties must comply and by providing for effective interim measures to be taken pending the finalisation of a dispute.

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<sup>61</sup> See par 6.8.3 above.

<sup>62</sup> See par 6.9.3 above.

### 7.5.8 *Fairness and equitability*<sup>63</sup>

The South African regime would benefit by the inclusion of provisions that provide:

- for the rejection of abnormally low tenders;
- that tender documentation must be made available promptly to ensure that tenderers have sufficient time to take part in the procurement process;
- that if amendments are made to tenders or tenders are reissued, notice thereof must be given to all participating tenderers in adequate time to allow them to participate; and
- that, if in the public interest, a tender need not be awarded.

Matters relating to the protection of the environment and the use of scarce resources need also to be dealt with in more detail.

### 7.5.9 *Integrity*<sup>64</sup>

To ensure the integrity of public procurement, the South African public procurement regime provides that all role players should comply with ethical standards. Detailed codes of conduct exist, and they have to be complied with.

In addition to the above, some general remarks can be made with regard to two further issues that should be addressed in the South African public procurement regime. The first is the differences in detail between the different supply chain management policies of the multitude of procuring entities. The second is the need for capacity and expertise within the different procuring entities.

Because of the system of decentralising public procurement and allowing each entity to develop its own supply chain management policy, a wide range of practices and procedures exists. Although the principle of decentralisation as

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<sup>63</sup> See par 6.10.3 above.

<sup>64</sup> See par 6.11.3 above.

such is not wrong, it could be tempered with more detailed provisions relating to the different stages in the procurement process, which would be applicable to all procuring entities in all spheres of government. Minimum norms and standards to promote uniformity in documentation, advertising, procurement methods, procurement criteria and the adjudication of tenders are essential to streamline the system and to make it more understandable and user-friendly for all involved. This would enhance transparency, efficiency, competition, fairness and equitability, and ensure better value for money.<sup>65</sup>

Some of the provisions relating to South African public procurement are complex. A thorough knowledge of the workings of government is needed to understand public procurement properly. The need to create enough expertise and capacity within the different procuring entities to implement these reforms is critical. The South African public procurement system is sophisticated and its standards compare favourably with international standards. Many of the problems experienced with public procurement in South Africa are probably because of the system not being implemented properly and not because of inherent shortcomings in the system itself.<sup>66</sup>

Although it cannot be said that the South African system is perfect, it does conform to international standards and is comparable with the Model Law and the GPA. This does not mean that there is no room for improvement but it does show that the necessary elements for a good and acceptable public procurement system are in place. The requirement that a risk and contract management policy should form part of the procurement policies of procuring entities, the requirement of ethical conduct, the provision of codes of conduct for supply chain management officials and tenderers, and the detailed provisions to combat abuse make the South African regime in these respects more advanced than both the Model Law and the GPA.

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<sup>65</sup> See par 5.4 and 5.5 above.

<sup>66</sup> See par 5.4 and 5.5 above and in particular the World Bank's CPAR on South Africa. World Bank Group 2009 *Assessment* [go.worldbank.org/](http://go.worldbank.org/).

## **7.6 Does the South African regime comply with the internationally accepted principles applicable to the secondary objectives for public procurement?**

Section 217(2) and (3) of the Constitution provides for the implementation of procurement policies that may allow categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination through national legislation. This was done through the PPPFA and the regulations issued in terms thereof. The other important programme that was implemented to promote the government's socio-economic policies was the NIPP. In addition to direct procurement for socio-economic purposes, the three methods in which socio-economic objectives are addressed in the Model Law and the GPA, namely the use of offsets, the awarding of a preference in the evaluation of a tender, and the inclusion of socio-economic criteria as part of the tender criteria, are utilised in South Africa.<sup>67</sup>

The PPPFA provides for a preference points system to be followed where either 10 or 20 points out of 100 are awarded for certain goals. However, it limits the goals to those pertaining to persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability and the implementation of programmes of the Reconstruction and Development Programme.<sup>68</sup> The balance of the points must be awarded for functionality and price. Although it is to be expected, taking the past apartheid policies of the country into account, that the main focus would be on redressing past injustices, other collateral objectives that ought to be addressed in public procurement, like job creation, industrial development, environmental sustainability, and energy saving are not adequately provided for.<sup>69</sup>

Further criticisms are that the Act is not easy to interpret. The definition of HDIs is problematic. The objective criteria referred to in section 2(1)(f) of the Act are not defined. The provision that the tender scoring the highest points must be appointed lacks flexibility. Too much emphasis is put on price whilst

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<sup>67</sup> See par 5.3.8 above.

<sup>68</sup> Particulars of the Reconstruction and Development Programme are published in the GG 16085 of 23 November 1994.

<sup>69</sup> See par 5.3.8.1(b) above.

value for money and merit (like whole-life costs, experience, efficiency, the transfer of technology, and training) should be accorded due weight.

There are discrepancies between the PPPFA and the regulations issued in terms thereof. Despite the Act not making provision therefore, the regulations stipulate that a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points. The regulations provide for the allowance of points for functionality and price whereas the Act refers only to price. It is also not clear in either the Act or regulations what the position is, should tenders be received that are above and below the threshold of R500 000. The fact that each department or institution is allowed to develop its own procurement policy leads to a vast array of different policies. It is clearly necessary to allow for individual circumstances, but more detailed guidelines which are generally applicable would serve to standardise many of the policies.<sup>70</sup>

The regulations are very rigid and promote the evaluation of tenders on points scored, without the necessary emphasis being placed on value for money in all its nuances or, as referred to by the courts, the most meritorious tender. The PPPFA and the regulations issued in terms of this Act are also not aligned with the other measures used to address the imbalances of the past, in particular the BBBEEA.<sup>71</sup>

The NIPP, which provides for offsets, is also problematic. With regard to non-defence and security procurement,<sup>72</sup> it is based on a cabinet memorandum. Provision for the implementation of this programme is not specifically made in legislation. It is referred to in the regulations issued in terms of the PFMA, which provides that clearance should be given by the department of Trade and Industry in terms of this programme before the tender is awarded. Although detail about the NIPP is provided on the website of the Department of Trade and Industry, the provisions of the NIPP are merely a policy.<sup>73</sup>

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<sup>70</sup> See par 5.3.8.1(b) above.

<sup>71</sup> See par 5.3.8.1(d) above.

<sup>72</sup> In the case of procurement of armament, provision is made in the *Armaments Corporation of South Africa, Limited*, Act 51 of 2003 to establish a defence industrial participation programme management system.

<sup>73</sup> See par 5.3.8.1(c) above.

Before South Africa became a constitutional state it would have been possible to argue that such a policy could be implemented as part of the State Prerogative. As South Africa is now a constitutional state all of the powers of government must be derived from the constitution. For the sake of good governance, transparency, just administrative action and legality, it is suggested that if government wishes to carry on with the programme, enabling legislation should be promulgated which specifically allows for the NIPP.<sup>74</sup>

The formal legal structure relating to the achievement of the socio-economic objectives of government and the primary objective of public procurement, as set out in the Constitution, are well balanced. The constitutional principles of competitiveness, effectiveness, transparency, fairness and equitability will still apply to the achievement of secondary objectives. Value for money must still be achieved in the ascertainment of the state's socio-economic objectives. The scope of the PPPFA is at this stage too limited and needs to be broadened by appropriate amendments to the PPPFA or by enacting specific legislation to address other collateral objectives not provided for in the Act. In particular, specific provision needs to be made to address collateral issues like environmental-friendly procurement, the use of scarce resources, energy-efficient procurement, the use of labour intensive methods, the transfer of skills and related issues.<sup>75</sup>

Despite the criticism set out above, the South African procurement system in principle complies with internationally accepted standards for the achievement of socio-economic objectives. The internationally accepted principles applicable to public procurement in general will still have to be adhered to in the public procurement process, even when it is used to achieve government's socio-economic objectives.

## **7.7 Conclusion**

No country can ever claim to have a perfect legal system or public procurement system. Circumstances, priorities, needs, cultures, norms, values and legal systems differ from country to country. Due deference must be given thereto

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<sup>74</sup> See par 3.3.8 above.

<sup>75</sup> See par 5.3.8.1(b) above.

when evaluating whether or not a public procurement system complies with the internationally accepted principles of public procurement. Circumstances also change over time and a system should be flexible enough to address such changed circumstances. The best system also does not ensure success. It must be properly implemented by a dedicated and professional staff component that has the necessary ethical values, knowledge, experience and capacity to do so. The political will to ensure good public procurement must also exist. The norms and values of society must also reflect this need.

The importance of public procurement in South Africa cannot be underestimated. Its importance will probably increase in future, in particular because of globalisation, climate change, energy shortages, and similar phenomena, as well as the need to address the socio-economic challenges particular to South Africa, like poverty, HIV-Aids and the imbalances brought about by the policies of apartheid. South Africa has a procurement regime in place which is comparable with international standards. To reap the full benefits of this good system it needs to be constantly measured, adapted to changing circumstances, and managed and implemented by a professional staff cadre. The proposals for the improvement of the South African public procurement system will further enhance the compliance of the system with the generally recognised international principles contained in the Model Law and the GPA.

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	Economy	Competitive-ness	Effectiveness	Transparency	Combating of abuse	Avoidance of risk	Accountability	Fairness and equitability	Integrity
Tender requirements with regard to the tenderer									
Tender requirements with regard to tender specifications									
Invitation to tender (time limits, documentation and similar issues)									
Submission of tenders									
Processing and evaluation of the tender									
Award of the tender									
Review and challenge procedures									
Supervision of the execution of the tender									

Assessment Matrix

### **The Principle of Economy**

In order to ensure the effective implementation of the principle of economy the following must be included in a public procurement regime:

- provision for open and competitive procedures like tender processes;
- provision for alternative procurement methods other than tender procedures;
- provision for objective criteria for the pre-qualification of tenderers based on the tenderer's ability to perform;
- provision for objective and quantifiable criteria for the evaluation and award of tenders;
- provision that substance and not form is adhered to;
- provision for the exclusion of tenders on the basis of fraud, corruption, mal-performance of previous contracts and bankruptcy, and non-compliance with tax obligations;
- provision for socio-economic factors to be taken into account; and
- provision for the award of the tender to the tenderer with the lowest price that conforms with all the criteria specified; or the most advantageous tender in terms of the criteria; or the most meritorious tender taking into account all of criteria and the principles applicable to public procurement.

### **The Principle of Competitiveness**

The principle of competitiveness can be ensured through:

- the use of open tender procedures as far as is practical;
- the availability of alternative methods of procurement should the circumstances so require;
- the provision and accessibility of relevant information;
- the proper advertisement of or invitation to participate in the procurement;
- the provision of full details of the pre-qualification requirements for tenderers, which may not be used to exclude possible tenderers;
- a comprehensive description of the goods and services to be procured, including all relevant technical and performance requirements, which may not be used to exclude possible tenderers;
- the disclosure of the evaluation criteria, which must be objective and quantifiable, and the relevant weight to be attached thereto, for the award of the tender;
- the setting of realistic time frames;
- the capping of fees and charges for documentation and information to the costs of the printing thereof;
- the prohibition of or at least the regulation of communications and negotiation between the procuring entity and tenderers on aspects relating to the substance of the tender; and
- the exclusion of tenders on the basis of fraud, corruption, mal-performance, bankruptcy, false declarations, failure to pay taxes and the abuse of the system.

### **The Principle of Effectiveness**

For a public procurement regime to be effective it must provide for the following:

- the publication and accessibility of the laws, regulations, administrative rulings, directives and judicial decisions relating to public procurement;
- the timeous advertisement of procurement opportunities with sufficient information as to the nature of such opportunities, the applicable criteria and the advertisement of the eventual award;
- the keeping of a record of proceedings. This includes the requirement that communications must provide a record of the content thereof, and should not exclude communications by electronic means;
- realistic time frames, taking into account the circumstances of the procuring entity, the tenderer and the public at large;
- transparent and accessible pre-qualification criteria for potential tenderers. The criteria must ensure the ability of the potential tenderer to successfully perform the contract;
- the drafting of objective technical and quality characteristics using standardised symbols, terminology, features and requirements for specifications, drawings, plans and designs;
- performance-based criteria that are objectively quantifiable, with a relative weight accorded to each criterion;
- flexible procurement methods whilst ensuring that such flexibility is not misused;
- access to information, with due regard to the possible confidentiality of parts of such information;
- the modification of tenders by the procuring entity in prescribed circumstances;
- the possibility of clarification of tenders by the procuring entity on request;

- the possibility of correcting minor and unintentional errors, of correcting arithmetical errors, and of ensuring that substance and not form determines the outcome of the procurement;
- provisions on how to deal with abnormally low tenders;
- contract management after the award of the tender.

### **The Principle of Transparency**

Transparency in public procurement can be ensured by:

- requiring publication of information about the law, administrative rulings and procedures and directives relating to public procurement;
- requiring publication of invitations to participate in tenders;
- providing that the qualification requirements for tenderers are specified;
- requiring that the specifications applicable to the subject matter of the procurement are set out;
- providing that the criteria for evaluating tenders are specified;
- providing that information on modifications or alterations to tenders is given;
- providing that the detail of the tender awards made is published;
- providing for the right to be present at the opening of tenders;
- providing for the obligation to keep a record of the proceedings;
- providing for reasons to be given for using other methods than an open tender; and
- providing for reasons for the award and rejection of a tender to be furnished.

### **The Principle of the Combating of Abuse**

At least the following must be provided for in a public procurement system to combat abuse:

- the exclusion of tenders or tenderers in the case of:
  - false declarations;
  - final judgments in respect of serious crimes;
  - professional misconduct;
  - fraud;
  - corruption;
  - the non-payment of taxes;
  - abuse of the system;
  - mal-performance of previous contracts; and
  - bribes or irregular inducements;
- steps to prevent irregular expenditure;
- mechanisms to receive and attend to complaints of non-compliance with the system;
- disciplinary procedures to be instituted against offending officials; and
- criminal sanctions to be instituted where warranted.

### **The Principle of Avoidance of Risks**

Risks relating to public procurement can be addressed in a procurement regime by providing for at least the following:

- the ascertainment by the procuring entity, at any stage of the procurement proceedings, of information relating to tenderers' professional and technical qualifications, competence, financial resources, equipment and other physical facilities, managerial capability, experience and reputation and if the tenderer has the personnel to perform the contract, its legal capacity and its financial means;
- that tenderers must fulfil their obligations to the state regarding taxes, security and similar contributions;
- for tenderers to have a clean criminal record;
- the disqualification of a tenderer on the basis of bankruptcy, false declarations, provision of incorrect information, significant or persistent deficiencies in performance of any prior contract or contracts, convictions in respect of serious crimes or other serious offences, professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier, and the abuse of the system;
- the requirement of tender security or financial guarantees;
- procedures on how to deal with unsolicited offers and abnormally low tenders;
- that the disclosure of conflicts of interest that tenderers may have in a specific contract is compulsory;
- a matrix for risk management which provides for the identification of risks on a case-by-case basis; the allocation of risks to the party best suited to manage such risks; the acceptance of the cost of the risk where the cost of transferring the risk is greater than that of retaining it; the management of risks in a pro-active manner; the provision of adequate cover for residual

risks; and the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.

### **The Principle of Accountability**

Important provisions in order to ensure accountability in a public procurement regime are the following:

- that a record of the proceedings must be kept with easy access thereto;
- that written decisions with reasons for such decisions must be provided;
- that information must be available and accessible to tenderers and the public;
- that the confidentiality of information with regard to legitimate commercial interest, information which could inhibit fair competition, and information relating to matters of public interest must be ensured;
- that awards must be published and participating tenderers be notified thereof;
- that tenderers must be notified of review procedures and the opportunity to participate in such procedures;
- that strict timeframes must be adhered to;
- that disputes must in the first instance be referred to the procuring entity itself;
- that proceedings may be suspended during review proceedings;
- that a variety of remedies and corrective measures must be available to effectively address unlawful actions and resulting damages or loss; and
- that judicial review must still remain available despite providing for other forms of review.

### **The Principle of Fairness and Equitability**

Provisions that will enhance fairness and equitability in public procurement are provisions that provide for:

- the protection of confidentiality of information which, if disclosed, might impede law enforcement; essential security or defence interests; public morals, order, or safety; human, animal or plant life or health; or might prejudice fair competition between suppliers; or might prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or might otherwise be contrary to the public interest;
- fair, objectively justifiable and non-discriminatory selection specifications and procedures to be used to evaluate tenders;
- criteria to be used to promote the conservation of natural resources and to protect the environment;
- the compulsory provision and publishing of information in adequate time, provided that it does not preclude competition;
- the opportunity for tenderers to correct unintentional errors;
- the possibility that if in the public interest, procuring entities need not award a tender and may exclude abnormally low tenders;
- the possibility that arithmetical errors may be corrected and minor deviations that do not affect the substance of the tender may be allowed, thereby ensuring that substance and not form is evaluated;
- the requirement that tenderers fulfil their tax and socio-economic obligations to the state in order to qualify to participate; and
- the consideration, in determining the relative value of tenders, of the economic and socio-economic effect of a particular tender on the country, including the making of allowance for a margin of preference.

### **The Principle of Integrity**

The following are core requirements to ensure integrity:

- objectivity at all stages of the procurement process;
- objectivity in the implementation of the principles and provisions of the system;
- the appropriate balancing of all principles and interests;
- ethical conduct by all role players;
- a code of conduct enforcing ethical standards for all role players;
- independent and impartial review procedures;
- timeous and effective remedies.

### **Collateral Objectives**

The most common aspects that are taken into account to achieve collateral objectives are:

- the balance of payments position and foreign exchange reserves of the country;
- any counter-trade arrangements offered by tenderers;
- the extent of local content, including manufacture, labour and materials to be used;
- the economic-development potential offered by tenders, including domestic investment or other business activities;
- the encouragement of employment;
- the reservation of certain production for domestic suppliers;
- the transfer of technology;
- the development of managerial, scientific and operational skills;
- the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas;
- the economic development of specific sectors of the economy;
- the support of industrial units that are wholly or substantially dependent on government procurement;
- environmental aspects; and
- economic development through regional or global arrangements among developing countries.