

Chapter 25

Public Procurement

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25.1 Introduction: Public procurement as a constitutional principle

With the coming into effect of the Interim Constitution, government procurement was elevated to the status of constitutional principle.¹ This position was confirmed in the Final Constitution.² However, it is not only the status of government procurement

1 See s 187 of the Constitution of the Republic of South Africa Act 200 of 1993, which came into effect on 27 April 1994 ('Interim Constitution' or 'IC').

2 See s 217 of the Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

that has changed since 1994. Whereas the overwhelmingly dominant factor determining the identity of the successful bidder for government contracts before 1994 was price, a number of factors must be taken into account under the new dispensation. Although price is probably still the most important factor,³ it is not necessarily decisive. Government procurement has been identified as a crucial tool to achieve economic redress for historically disadvantaged persons and the 'empowerment' component of a bid for government contracts is an important factor in determining its likelihood of success.⁴

Not only the factors taken into account in awarding government contracts have changed since procurement became a constitutional issue. The principles applicable to the mechanisms and procedures used to make such awards have also become more complex and nuanced. Fairness, equity, transparency, competitiveness and cost-effectiveness all govern the procurement process, and the award of any government contract can be challenged on the basis that the procedure followed was in violation of those principles.⁵

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Before 1994, government procurement was regulated by national and provincial legislation. The State Tender Board Act⁶ governed procurement at national and provincial levels, and various provincial ordinances, dealing with local government in their respective provinces, regulated contracting for goods and services at municipal level. The plethora of statutory provisions regulating procurement in the various spheres of government has been supplemented (and replaced) to some extent to

3 See for example *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others* 1999 (1) SA 324 (CKH), 351G-H, [1997] 4 All SA 363 (CKH) ('*Cash Paymaster Services*'); *SA Post Office Ltd v Chairperson of Western Cape Provincial Tender Board & Others* 2001 (2) SA 675 (C), 686-7, 2001 (5) BCLR 500 (C).

4 This policy position is clear from recent proposed legislation, the Broad Based Black Economic Empowerment Bill, voted on by the National Assembly on 20 August 2003 as B27B-2003. Section 9 permits the Minister of Trade and Industry to issue codes of practice by notice in the *Government Gazette* on broad-based black economic empowerment (the definition of which includes, *inter alia*, 'preferential procurement'). These codes may include 'qualification criteria for preferential purposes for procurement and other economic activities' (sub-s 9(b)). Section 10 of the Bill provides that every organ of state must take into account and, as far as is reasonably possible, apply any relevant code of practice issued in terms of the Bill in, *inter alia*, 'developing and implementing a preferential procurement policy' (sub-s 10(b)).

5 Although the South African legal system is unusual in entrenching the principles of public procurement in the Constitution, the emphasis that FC s 217 places on principles such as transparency, fairness and competitiveness is consistent with international best practice. A number of regional and international initiatives on public procurement reform are aimed at achieving these same goals. See, for example, the World Trade Organisation (WTO) plurilateral Agreement on Government Procurement (to which South Africa is not a party), the latest version of which came into force on 1 January 1996; also the United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services ('the UNCITRAL Model Law'), and the Common Market for Southern and Eastern Africa (COMESA) public procurement project. With regard to the latter, see S Karangizi 'Regional Procurement Reform Initiative' (2003), a paper presented at the Joint WTO/World Bank regional workshop on procurement reforms and transparency in public procurement for Anglophone African countries in January 2003. Karangizi's paper is available from the WTO website, www.wto.org (use links from 'Government Procurement' page).

6 Act 68 of 1968.

take account of the constitutionalisation of public procurement.⁷ There is, however, no single, comprehensive public procurement statute.⁸

It is important to note that a number of constitutional provisions, other than the procurement clause itself, are applicable to government tender processes and the adjudication of public procurement disputes. In particular, the right to just administrative action has been applied in several cases to evaluate the conduct of an organ of state in adjudicating a particular tender.

In this chapter, we will begin with an analysis of the constitutional procurement provisions and, in particular, the five principles of fair, equitable, transparent, competitive and cost-effective procurement. We will then discuss the legal position relating to preferential procurement under both the Constitution and the relevant legislation. This discussion will be followed by an examination of tender boards, municipal procurement, public-private partnerships and the right to just administrative action in the context of procurement. Finally, we will briefly deal with the remedies for non-compliance with the relevant rules of administrative and constitutional law.

25.2 The constitutional procurement provisions

(a) Interim Constitution

The constitutional regulation of public procurement was first provided for in s 187

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of the Interim Constitution.⁹ This section envisaged the creation of a legislative framework for government procurement. It required the enactment of national and provincial legislation providing for the appointment of independent and impartial

7 Most notably by the Preferential Procurement Policy Framework Act 5 of 2000 (the 'PPPFA'), which is mandated by FC s 217, but also by ss 38 and 51 of the Public Finance Management Act 1 of 1999 (the 'Public Finance Management Act'), as well as Treasury Regulation 16 promulgated in terms of the Public Finance Management Act (which relates to public-private partnerships), s 10G(5) of the Local Government Transition Act 209 of 1993 (the 'LGTA'), and in respect of municipal service delivery, chapter 8 of the Local Government: Municipal Systems Act 32 of 2000 (the 'Systems Act').

8 The lack of clear legal rules or a generic public procurement law, regulating all aspects of the topic, has been identified as an obstacle to a strong and well-functioning procurement system. See R R Hunja 'Obstacles to Public Procurement Reform in Developing Countries' (2003), a paper presented at the Joint WTO/World Bank regional workshop, available from the website www.wto.org. Other such obstacles identified by Hunja include the absence of 'an institutional arrangement that ensures consistency in overall policy formulation and implementation [and a] professional cadre of staff that implements and manages the procurement function'. Ibid at 2.

9 IC s 187, headed 'procurement administration', 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.

(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.'

tender boards to deal with the procurement of goods and services for any level of government. Section 187(2) added the proviso that the tendering system established in this manner must be fair, public and competitive and that tender boards must, on request, give reasons for their decisions to interested parties. Subsections (3) and (4) then specified that no person may improperly interfere with the decisions and operations of the tender boards and that all decisions of tender boards must be recorded.

The obligation to ensure fair, public and competitive tendering contained in this provision primarily amounted to a directive to the national and provincial legislatures to enact suitable tendering legislation.¹⁰ At a national level, tenders continued to be governed by the State Tender Board Act, as amended. In addition, pursuant to the constitutional command in s 187, provincial legislation was enacted to regulate the functions of provincial tender boards.¹¹

(b) Final Constitution

Section 187 of the Interim Constitution was replaced by s 217 of the Final Constitution. FC s 217 provides as follows:

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

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Subsection (1) sets out a general requirement that public procurement must comply with certain fundamental principles. Subsections (2) and (3), in turn, stipulate that these principles do not prevent a public body from implementing a preferential procurement policy in terms of national legislation.

The transitional arrangements of the Constitution provide that the national legislation envisaged in subsection (3) must be enacted within three years of the Constitution coming into effect, but that this did not prevent the implementation of a preferential procurement policy under subsection (2) before that date.¹² The

10 See *Olitzki Property Holdings v State Tender Board & Another* 2001 (3) SA 1247 (SCA), 2001 (8) BCLR 779 (SCA) ('*Olitzki Property Holdings*') at paras 17-22.

11 See, for example, the Provincial Tender Board Act (Eastern Cape) 2 of 1994; the Tender Board Act 2 of 1994 (Free State); the Western Cape Provincial Tender Board Law 8 of 1994; and the Gauteng Provincial Tender Board Act 2 of 1994.

12 FC item 21(4) of Schedule 6.

legislation enacted in terms of s 217(3) is the Preferential Procurement Policy Framework Act (PPPFA). It came into effect on 3 February 2000.¹³

(c) Application of s 217

Section 217(1) applies to organs of state 'in the national, provincial or local sphere of government' and 'any other institution identified in national legislation'. The interpretation of these phrases is fundamental to the application of s 217. We will consider each of them in turn.

(i) 'Organs of state in the national, provincial or local sphere of government'

There are two aspects to the phrase, 'organ of state in the national, provincial or local sphere of government'. The entity or functionary must be (a) an organ of state; and (b) in a sphere of government. While we suggest that a broad approach should be adopted in respect of the former, this may not necessarily be the case for the latter.

The term 'organ of state' is defined in s 239 of the Constitution as:

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

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There are therefore three categories of organs of state: (a) state departments in any sphere of government (which would include, for example, the Department of Defence and a municipality);¹⁴ (b) functionaries or institutions exercising a constitutional power or performing a constitutional function (for example, the Auditor-General and the Independent Electoral Commission);¹⁵ and (c) functionaries or institutions 'exercising a public power or performing a public function in terms of any legislation'. The latter category extends the scope of organs of state to entities such as the Financial Services Board, the South African Broadcasting Corporation Limited and other bodies exercising public power or performing public functions in

13 It should be noted that the Parliamentary Select Committee on Finance held public hearings during September 2003 on the effectiveness of the PPPFA, as a result of which a statement was made on behalf of the Cabinet that 'Cabinet examined the issue of procurement reform in line with the objectives of the Public Finance Management Act as well as the Broad Based Black Economic Empowerment Strategy and legislation. A new broad policy proposal was adopted, which includes devolution of responsibility and accountability to accounting officers and/or authorities, uniformity of interpretation across all spheres and minimum reporting requirements. The PPPFA will be revised accordingly'.

14 See *Metro Projects CC & Another v Klerksdorp Local Municipality*, unreported judgment of the Supreme Court of Appeal, case no. 602/2002 (22 September 2003) at para 11 ('*Metro Projects*') (Court held that a municipality is obliged to comply with FC s 217).

15 See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*Langeberg*').

terms of legislation.¹⁶ This last category would seem to embrace regulatory bodies, universities and parastatals.¹⁷

Although there was some initial disagreement, our courts generally adopted the control test for determining whether an institution amounted to an organ of state under the Interim Constitution. According to this test, an institution that was not a state department was an organ of state if it fell under the control of the state.¹⁸ Nevertheless, in our view, the cases decided under the Interim Constitution are only of limited assistance in determining whether a body amounts to an organ of state for purposes of FC s 239. The reason for this is that, while the Interim Constitution defined an organ of state as 'any statutory body or functionary', the Final Constitution shifts the focus to the public nature of the function or power.¹⁹ Accordingly, the focus should now be on whether the function or power performed by the relevant entity is public in nature.²⁰

As noted above, s 217 does not simply refer to organs of state, but rather to organs of state 'in the national, provincial or local sphere of government'. There are three possible approaches to the interpretation of this wording. First, it may be argued that the phrase 'in the national, provincial or local sphere of

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government' does not qualify the meaning of organ of state and s 217 therefore applies to all organs of state contemplated in the s 239 definition.²¹ This approach is unattractive because it fails to give any meaning to the inclusion of the additional phrase. If the constitutional drafters had intended s 217 to apply to all organs of state, it could have excluded the additional phrase and simply referred to 'organs of state'. Second, it may be argued that s 217 only applies to those entities falling within paragraph (a) of the s 239 definition, i.e. departments of state or administration. This interpretation is consistent with the repetition of the phrase 'in

16 See *Nextcom (Pty) Limited v Funde NO & Others* 2000 (4) SA 491 (T), 503.

17 See, for example, *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC); and *Transnet Limited v Goodman Brothers (Pty) Limited* 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA) ('*Transnet Limited*').

18 See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62.

19 IC s 233(1)(x). See Y Burns *Administrative Law under the 1996 Constitution* (2nd Edition, 2003) 22-25; I M Rautenbach & E F T Malherbe *Constitutional Law* (1996) 299. See Klaaren & Penfold 'Access to Information' (supra) at 62-13 (a discussion on the meaning of exercising a public power or performing a public function in terms of legislation).

20 See Woolman 'Application' (supra) at 10-62 and Klaaren & Penfold 'Access to Information' (supra) at 62-13. A detailed discussion of the definition of organ of state for purposes of the Final Constitution falls beyond the scope of this chapter.

21 See *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W), 993-7, 1998 (8) BCLR 1024 ('*Goodman Brothers*'). Blieden J applied FC s 239 in assessing whether Transnet Limited qualifies as an organ of state for purposes of s 217. The learned judge simply enquired into whether Transnet amounted to an 'organ of state'. He failed to emphasise the additional wording 'in the national, provincial or local sphere of government'.

the national, provincial or local sphere of government' in both ss 217 and 239. Nevertheless, in our view, this approach is also unsatisfactory in that it fails to explain the reference to organ of state, as opposed to 'department of state or administration', in s 217(1). We would argue that the effect of the additional phrase is that the constitutional procurement provision applies to an organ of state falling within paragraph (a) of the s 239 definition, as well as any other organ of state which is controlled by the state in such a manner that it may be considered to fall within the national, provincial or local sphere of government.²²

Our preferred approach is also consistent with the decision of the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*. The Court held that the Independent Electoral Commission (IEC) is not an organ of state within the national sphere of government. The reasons for this included, amongst other things, that the IEC is independent of the state and is not subject to executive control.²³ In addition, this approach is consistent with the principal rationale for regulating public procurement, i.e. controlling the expenditure of public funds.²⁴

Accordingly, s 217 of the Constitution will only apply to an entity, other than a state department, which exercises a public power or public function in terms of legislation and is controlled by the state. A non-state entity that is not controlled by the state (for example, a law society or a financial exchange) would, therefore, not be obliged to comply with the Constitution's procurement provisions, despite the fact that it may amount to an organ of state.²⁵ Therefore, although the control

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test is no longer determinative of whether an entity amounts to an organ of state for purposes of the Constitution, this test remains important in deciding whether the constitutional procurement provision applies to that entity.²⁶

(ii) 'Any other institution identified in national legislation'

The second category of institutions to which s 217 applies is those 'identified in national legislation'. One approach to the interpretation of this phrase is that s 217 applies to any institution named in legislation for any purpose. This approach should be rejected. It leads to arbitrary results as to which institutions are bound by s 217 and has no regard to the underlying rationales for controlling public procurement.

The better approach is that the phrase 'identified in national legislation' means those entities identified in legislation as entities to which s 217(1) applies. The effect

22 *Goodman Brothers* (supra) essentially employs the control test discussed above.

23 *Langeberg* (supra) at paras 27 and 30.

24 This rationale, rather than the object of controlling the exercise of public power, means that it is not necessary for the procurement provisions to apply to all organs of state.

25 It should be noted that, to the extent that such a body performs a public function or exercises a public power in engaging in procurement activities, such activities may amount to administrative action and would then be reviewable on administrative law grounds under the Promotion of Administrative Justice Act 3 of 2000 (the 'AJA').

26 In this chapter, for the sake of convenience and despite the approach suggested here, we generally refer to entities to which FC s 217 applies as 'organs of state'.

of this is that s 217(1) applies to all entities governed by the Public Finance Management Act, which, amongst other things, repeats the procurement principles set out in the constitutional provision.²⁷

(iii) The meaning of the phrase 'contracts for goods or services'

Section 217 of the Constitution applies whenever an applicable entity 'contracts for goods or services'. This provision should be broadly read to include situations where an organ of state may have entered into procurement negotiations or put a contract out to tender, irrespective of whether such actions actually result in the conclusion of a contract.²⁸ If this were not the case, an organ of state would be free of the requirement to act in a fair, equitable, transparent, competitive and cost-effective manner unless a contract is actually concluded.

The phrase 'contracts for goods or services' should also be interpreted generously. It should apply to contracts for the provision of goods or services to the relevant body as well as contracts for the provision of goods or services on behalf of the body (i.e. the contracting-out or outsourcing of public functions).²⁹ For example, it would include a contract for the roll-out of anti-retroviral drugs on behalf of the Department of Health. Nevertheless, it would probably exclude

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contracts where the state is providing (rather than procuring) the goods or services or other forms of benefit.³⁰

25.3 The five principles

Section 217(1) of the Constitution provides that public procurement must be effected in accordance with a system which is 'fair, equitable, transparent, competitive and cost-effective'. This requirement is repeated in the Public Finance Management Act. A similar requirement is included in various provincial tender board statutes³¹ and in the Local Government Transition Act³² in relation to municipalities.

27 See ss 38(1)(a)(iii) and 51(1)(a)(iii) read with the Schedules to the Public Finance Management Act. It may also include entities identified in the PPPFA.

28 See *Transnet Limited* (supra) at 862: 'It may well be that the words "contracts for goods and services" must be given a wide meaning, similar to "negotiates for" etc.'

29 See *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) (on outsourcing agreements). See s 83 of the Systems Act, which reiterates the requirements of FC s 217 in relation to contracts for the provision of municipal services by a third-party service provider. See also the discussion on public-private partnerships at §25.7 below.

30 This interpretation is consistent with the heading of s 217, 'Procurement'. The heading indicates that it only applies where public bodies procure goods or services and not where they supply such goods or services (eg a contract between a public utility and the end-user or for the purchase of a state asset). In this regard, art 2 of the UNCITRAL Model Law defines 'procurement' as 'the acquisition' of goods, construction or services.

31 See, for example, ss 2(3) and 4(2) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994.

(a) The implications of the principles for public tenders

The extension of these principles is often difficult to discern. It will, therefore, sometimes be difficult to assess whether a particular procurement process complies with them. The most emphatic manner in which an organ of state can demonstrate compliance with these principles is through a public, transparent tender process in which all tenderers are treated fairly and equitably. A public tender is therefore the preferable means of engaging in public procurement.³³ Nevertheless, this does not mean that the use of a tender process is always required in order to comply with s 217(1).³⁴ In this regard, it is significant that, unlike s 187 of the Interim Constitution, s 217 does not make specific reference to a tender process (or tender boards), but simply provides that the system used

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when contracting for goods or services must be 'fair, equitable, transparent, competitive and cost-effective'.³⁵ If the drafters of the Final Constitution had intended that an organ of state must always follow a tendering process when procuring goods or services, s 217 would have been drafted in a manner that corresponds more closely with s 187 of the Interim Constitution.

A tender process will generally be the most effective way of complying with the principles of fairness, equitability and competitiveness. It may, however, undermine cost-effectiveness, particularly in relation to contracts that are of a relatively minor value. Accordingly, it appears that low-value contracts need not be put out to tender.³⁶ Nevertheless, an open tender or some comparable procedure should generally be followed in relation to contracts of a substantial value.

32 Section 10G(5) of the LGTA. See §25.6 below at p 25-26 for a more detailed discussion on local government procurement.

33 Some of the benefits of tender procedures are reflected in the following statement of Pickard JP in *Cash Paymaster Services* (supra) at 350:

Tender procedures, as we have come to know them over many years, have been the result of vast experience gained in the procuring of services and goods by government. They have evolved over a long period of time through trial and error and have crystallised into a procedure that has become vital to the very essence of effective government procurement. Strict rules have developed over the years in order to ensure that the system works effectively. The very essence of tender procedures may well be described as a procedure intended to ensure that government, before it procures goods or services, or enters into contracts for the procurement thereof, is assured that the proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended.

34 See D Pretorius 'The Defence of the Realm: Contract and Natural Justice' (2002) 119 *SALJ* 374, 396: '[S 217(1) of the Constitution] does not necessarily mean that the conclusion of each and every contract for goods and services by an organ of state must be preceded by a tender process. The circumstances of each case will dictate whether the requirements of s 217 demand that a tender process be conducted.'

35 For example, IC s 187 refers to 'the appointment of independent and impartial tender boards' (sub-s (1)); and a 'tendering system' (sub-s (2)).

36 In fact, the Preferential Procurement Regulations, published under Government Notice R275 in *Government Gazette* 22549 of 10 August 2001, contemplate that contracts of a value of less than R30 000 need not be put out to tender. In such cases an alternative procedure may include obtaining a limited number of quotations or using a list of preferred suppliers on a pre-announced or rotation basis.

Alternatives to an open tender may include choosing from quotations submitted by a list of preferred bidders, which list has previously been compiled following an open and competitive bidding process. In such a case, it is important that both the compilation of the list of preferred bidders and the final choice of a particular service provider comply with the requirements of s 217(1).³⁷ In addition, it may be acceptable to deviate from an open tender procedure in certain exceptional circumstances, for example, where there is a sole supplier or where the goods or services must be urgently supplied.³⁸

(b) Fairness and equitability

The principles of fairness and equitability indicate that the procurement procedure must be procedurally fair. At a minimum, interested parties (including all tenderers) should be given a reasonable opportunity to make representations relating to the award of the relevant contract.³⁹ In addition, affected persons should be treated fairly and equally. For example, all tenderers should be furnished with the same information and should be given the same opportunity to make representations. These principles will also be undermined, and s 217 contravened, in circumstances where the decision-maker fails to avoid a conflict of

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interest or where the procurement procedure is tainted by actual bias or a reasonable suspicion of bias.⁴⁰ The observance of these principles also serves the principle of competitiveness, by placing tenderers on an equal footing.

An illustration of a procurement process that could be said to undermine fairness, equitability and competitiveness may be found in *Premier, Free State & Others v Firechem Free State (Pty) Limited*.⁴¹ In *Firechem*, the Supreme Court of Appeal struck down a contract for the provision of cleaning materials to the Free State Province on the basis that the contract finally concluded with the relevant provincial department differed from the terms of the invitation to tender and the letter of acceptance produced by the provincial tender board. The effect of this difference was to

37 Such a procedure of employing approved tenderers is contemplated in para 10 of the State Tender Board's General Conditions and Procedures (ST36).

38 Section 10G(5)(c) of the LGTA provides that a municipality may dispense with the calling of tenders in the case of an emergency or of a sole supplier. Article 22 of the UNCITRAL Model Law provides that a procuring entity may engage in 'single-source procurement' in a number of situations, including where the goods or services are only available from one supplier; the goods or services are urgently required; and procurement from a particular supplier is required for purposes of standardisation or compatibility (taking into account a number of specified factors).

39 This requirement of procedural fairness overlaps, to some extent, with the constitutional right to administrative action that is procedurally fair.

40 See J Klaaren and G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 31 63-31-64-32 ('Just Administrative Action') for a discussion of the rule against bias. The most extreme cases in which s 217 would be violated are on payment of a bribe, or a decision-maker having a financial or other interest in the award of the contract.

41 2000 (4) SA 413 (SCA), [2000] 3 All SA 247 (SCA) ('*Firechem*'). This case was not decided on the basis of the constitutional procurement provisions of the Interim Constitution as this was neither pleaded nor explored in evidence. *Ibid* at para 32.

undermine the fairness of the tender process. In holding that the contract was invalid, Schutz JA reasoned as follows:

[T]o 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 have had no chance to match, would be entirely subversive of a credible tender procedure. One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender.⁴²

Another example of a tender process that failed to comply with the fairness requirement is found in the recent decision of the Supreme Court of Appeal in *Metro Projects*. In this case, the court struck down the award of the tender on the grounds that a municipal official, who was involved in the tender adjudication process, had allowed the successful tenderer an opportunity to augment its tender. The augmented offer was first concealed from the committee that decided on the tender and was then represented as being the original tender offer. During the course of his judgment, Conradie JA stated as follows:

The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.⁴³

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(c) Transparency

The principle of transparency promotes openness and accountability. This important principle serves to encourage good decision-making in relation to procurement and combats the ever-present possibility of corruption in the adjudication of tenders and the awarding of contracts. In so doing, it instils public confidence in the procurement process.

In light of this constitutional principle of open procurement, it is difficult to justify the award of a contract by an organ of state in the absence of some form of public process. At the very least, the public should be notified that a public body intends negotiating a contract with a particular entity.⁴⁴ The case law also indicates that the principles of fairness and transparency require that reasons for the award (or non-award) of a tender should be furnished to unsuccessful tenderers.⁴⁵

42 Ibid at 429-30.

43 *Metro Projects* (supra) at para 14.

44 Except perhaps where compelling considerations, such as national security, militate against disclosing any issues relating to the proposed contract. This would only arise in highly exceptional circumstances.

45 See *Goodman Brothers* (supra). This tender process requirement reinforces to the administrative law requirement to furnish written reasons, in terms of FC s 33(2) and s 5 of the AJA. The requirement to furnish written reasons for tender decisions was expressly included in IC s 187(2).

(d) Competitiveness and cost-effectiveness

The principles of competitiveness and cost-effectiveness indicate that an organ of state should, while taking into account other factors, attempt to procure goods or services at the lowest possible cost. In other words, organs of state should strive to achieve value for money. For example, in *Grinaker LTA Limited & Another v Tender Board (Mpumalanga) & Others* ('Grinaker')⁴⁶ one of the bases on which the award of the tender for the rehabilitation and construction of a road was struck down was the considerable variance between the higher price of the successful tenderer and the lower price of the unsuccessful tenderer. During the course of his judgment, De Villiers J wrote:

The award by the first respondent of the tender to a tenderer who has not tendered the lowest price is contrary to the provisions of the guiding document and more particularly s 217(1) of the Constitution in that it results in a contract for services which is not competitive and cost-effective.⁴⁷

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(e) The principles should be taken as a whole

The principles set out in s 217(1) should be taken as a whole in deciding whether a particular procedure is consistent with the provisions of this section. In *South African Post Office Limited v Chairperson, Western Cape Provincial Tender Board & Others*,⁴⁸ the provincial tender board stipulated the criteria to be applied in the evaluation of the tender but did not stipulate the points weighting to be allocated to each criterion. The main reasons for this were to avoid price tampering and to discourage tenderers from concentrating on the criteria that carried greater weight at the expense of others. The court upheld this approach because, on the facts of the particular case, it resulted in the department procuring an efficient service at the most cost-effective price. The court came to this conclusion despite the fact that, taken in isolation, the disclosure of the points allocation would have increased the openness and transparency of the tender process.⁴⁹

25.4 Preferential procurement

(a) Introduction

46 [2002] 3 All SA 336, 356-7 (T) ('Grinaker').

47 Ibid at para 70. On cost-effectiveness, see *Cash Paymaster Services* (supra) at 351: 'The task of the tender board has always been and will always be primarily to ensure that government gets the best price and value for that which it pays. If that were not the prime purpose of the tender board and policy considerations were to override these considerations, the very purpose of the tender board is defeated and no tender board needs to exist.' It should, however, be noted that this view may now overstate the position, given that FC s 217 specifically envisages considerations other than price.

48 2001 (2) SA 675 (C), 2001 (5) BCLR 500 (C).

49 Ibid at 689. The court did emphasise that the system of procurement in this case was accessible, visible and subject to examination and inquiry as well as both open and transparent.

South Africa is not unique in permitting preferences in the allocation of government contracts for goods and services.⁵⁰ In general, international instruments regulating public procurement articulate such preferences as exceptions to the general rule of non-discrimination and restrict the freedom of member states to apply such preferences. The WTO Agreement on Government Procurement, for example, imposes limitations on the ability of parties to use procurement as a policy tool.⁵¹ It recognises, however, that 'developing countries' may have special needs as regards development, finance and trade. Article V of that Agreement provides for differential treatment of such countries and requires parties to take into account developing countries' needs to 'promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other

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sectors of the economy'.⁵² This provision serves as an exception to the main objective of the WTO agreement: to open up government business to international competition and ensure non-discrimination against foreign products or suppliers.⁵³

The design of the South African preferential procurement framework is located within the history of apartheid. It is aimed at redressing historical disadvantage and increasing opportunities for those previously prevented from actively participating in the country's mainstream economy.

(b) Preferential procurement in the Constitution

If the first leg of the constitutional procurement provision is the five principles described above, the second leg is that of preferential procurement.⁵⁴ While subsection 217(1) of the Constitution imposes an obligation on the institutions to which s 217 applies to comply with the five principles, subsections 217(2) and (3) permit (but do not oblige) those institutions to implement a preferential procurement policy.

Subsection 217(3) of the Constitution was amended during 2002.⁵⁵ The effect of this amendment is, in our view, to oblige those institutions which are bound by s 217 and which choose to implement a preferential procurement policy to do so in

50 For an examination of the use of public procurement as an instrument of social policy in Great Britain, and an evaluation of the extent to which European Community regulation and the WTO Agreement on Government Procurement restricts the ability of member states to apply differential treatment in procurement in order to benefit local suppliers, see S Arrowsmith 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *LQR* 235. Arrowsmith commences with the following statement: 'Governments have traditionally used their extensive powers of procurement to promote a variety of objectives unconnected with the immediate object of the procurement: these range from the protection and development of national industry, to social policy goals such as promotion of equal opportunities.'

51 *Ibid* at 248-252.

52 WTO Agreement on Government Procurement, art V: 1(b).

53 See the preamble to the WTO Agreement on Government Procurement.

54 Referred to in FC ss 217(2) and 217(3).

accordance with the constitutionally mandated PPPFA.⁵⁶ This amendment does not obligate every institution referred to in subsection 217(2) to implement a preferential procurement policy.

(c) The PPPFA

(i) Application of the PPPFA

The PPPFA applies to all organs of state as defined therein. Somewhat surprisingly, the definition of 'organ of state' in the PPPFA does not precisely mirror the

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definition contained in FC s 239, nor does it attempt to capture all those institutions that are bound by the five principles identified in subsection 217(1). The term 'organ of state' is defined in s 1(iii) of the PPPFA as meaning:

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
- (b) a municipality as contemplated in the Constitution;
- (c) a constitutional institution as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
- (d) Parliament;
- (e) a provincial legislature;
- (f) any other institution or category of institution included in the definition of 'organ of state' in s 239 of the Constitution and recognised by the Minister [of Finance] by notice in the *Government Gazette* as an institution to which this Act applies.

To date, the Minister of Finance has not published any notices in the *Government Gazette* purporting to apply the PPPFA to any institution. Therefore, at this stage, the PPPFA applies to a narrower group of entities than do the five principles, since municipal entities⁵⁷ and public entities⁵⁸ do not fall within the PPPFA definition of 'organ of state'.⁵⁹

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As regards the application of the PPPFA, it is important to note that s 3 of the Act provides that the Minister of Finance may, on request, exempt an organ of state (as defined in the PPPFA) from any of its provisions, if: '(a) it is in the interests of national security; (b) the likely tenderers are international suppliers; or (c) it is in the public

55 Subsection 217(3) was amended by the Constitution of the Republic of South Africa Second Amendment Act 61 of 2001 ('2001 Second Amendment Act'). Up to 26 April 2002, when the 2001 Second Amendment Act came into effect, s 217(3) read as follows: 'National legislation must prescribe a framework within which the policy referred to in subsection (2) *may* be implemented.' (Our emphasis.) This locution implied, by the use of the word 'may', that even if the institutions to which sub-s 217(2) applied did choose to apply a system of preferential procurement as contemplated therein, they would not be bound to apply it in accordance with the national legislation contemplated in sub-s 217(3). The 2001 Second Amendment Act substituted the word 'must' for 'may'.

56 The PPPFA came into effect on 3 February 2000. It is one of the four pieces of legislation that Parliament was instructed to enact within three years of the date upon which the Final Constitution came into effect. The other three pieces of legislation are the AJA, the Promotion of Access to Information Act 2 of 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

interest'. It appears that the exemption provision is designed to operate on a case-by-case basis, so that a tendering authority will request an exemption from one or more provisions of the PPPFA in respect of a particular tender or tenders. This fits with the constitutional directive that 'national legislation must prescribe a framework'. The statutorily prescribed framework would be undermined if the Minister had unlimited powers to exempt organs of state from its provisions.⁶⁰

(ii) Preferential procurement policies

Section 2 of the PPPFA provides that an organ of state (as defined) must determine its preferential procurement policy and implement it within the framework established by the PPPFA. The question arises whether this provision obliges all organs of state (as defined) to determine and implement a preferential procurement

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- 57 Defined in s 1 of the Systems Act as '(a) a company, co-operative, trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of one or more municipalities, and includes, in the case of a company under such ownership control, any subsidiary of that company; or (b) a service utility'. 'Service utility' is also defined in s 1 of the Systems Act as 'a municipal entity established in terms of s 82(1)(c)' of the Systems Act. Note that the Local Government: Municipal Systems Amendment Bill, introduced in the National Assembly as B49-2003, proposes that the definitions of 'municipal entity' and 'service utility' be substantially amended. However, the notion of ownership control by the state remains in the new definitions.
- 58 Divided into 'national public entities' and 'provincial public entities', both of which are defined in s 1 of the Public Finance Management Act. 'National public entity' is defined as '(a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament'. 'National government business enterprise' is defined as 'an entity which (a) is a juristic person under the ownership control of the national executive; (b) has been assigned financial and operational authority to carry on a business activity; (c) as its principal business, provides goods or services in accordance with ordinary business principles; and (d) is financed fully or substantially from sources other than (i) the National Revenue Fund; or (ii) by way of a tax, levy or other statutory money'. The definitions of 'provincial public entity' and 'provincial government business enterprise' are equivalent, but with supervision and funding at provincial level.
- 59 The Parliamentary Monitoring Group minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee, held on 12 January 2000, to discuss the Preferential Procurement Policy Framework Bill, state as follows in regard to an amendment proposed by the co-chairperson, Ms B Hogan: 'Clause 1(iv) has changed making the definition of 'organ of state' very specific. Parastatals have been excluded at this stage. The reasoning is that due to privatisation, they have to operate with a commercial interest and this Act would put them at a disadvantage. Their exclusion will allow parastatals more flexibility with regard to deciding what their affirmative action programme will be. The Minister has the power to review this in the future and extend the application of this Bill. In response, Ms J Fubbs (ANC, Gauteng) concurred with this decision saying that the parastatals were involved with strategic development delivery and the country did not want to impede this delivery.' See <http://www.pmg.org.za>.
- 60 The Parliamentary Monitoring Group minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee held on 18 January 2000, record that a legal opinion of the State Law Advisor was presented to the members of the Committees, dealing with various aspects of the Preferential Procurement Policy Framework Bill including the constitutionality of the proposed ministerial power of exemption. The view of the State Law Advisor, which was accepted by the Committees, was that 'the exercise of such a power by the Minister could conceivably be construed as a form of subordinate legislation thus requiring parameters to be set by Parliament if it is not to be held to be unconstitutional'. The State Law Advisor's opinion referred to the decision of the Constitutional Court in *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC). For the minutes of that meeting and the State Law Advisor's opinion, see <http://www.pmg.org.za>.

policy, or whether, like subsections 217(2) and (3) of the Constitution, the PPPFA framework must be used only if an institution to which the Act applies, chooses to implement a preferential procurement policy. The wording of s 2 of the PPPFA is not completely clear in this regard. The latter interpretation is to be preferred because it gives effect to, but does not purport to go beyond, the ambit of the constitutional provision. However, it appears from the minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee held on 18 January 2000, at which the Preferential Procurement Policy Framework Bill was formally considered, read with the State Law Advisor's opinion presented at that meeting, that the intention of the drafters was to obligate every organ of state to determine and implement a preferential procurement policy that complies with the framework prescribed by the PPPFA.⁶¹

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(iii) Preference points system

The system of preferential procurement established by the PPPFA is based on the assumption that tenders are awarded according to the following process: an organ of state invites tenders by the issuing of documents; the tenders received are evaluated according to evaluation criteria stipulated in the tender documentation; and tenders are ranked by the allocation of points for each evaluation criterion. The total number of points that can be allocated is assumed to be one hundred.

The PPPFA establishes a dual-scale preference points system. The scale employed depends upon the value of the contract to be awarded. The rationale behind the dual-scale system is that in order to redress historical disadvantage through public procurement, the government will have to pay more than it would if price were the only criterion. In other words, there is an understanding that historically disadvantaged tenderers are unable to compete effectively for government contracts by offering the best price. However, in acknowledgement of the importance of cost-effectiveness as a factor in government procurement, the dual scale system allocates more preferential procurement points for contracts of low value, and fewer preferential procurement points for contracts of significant value.

Section 2 of the PPPFA thus provides that for contracts with a value above a prescribed amount,⁶² a maximum of 10 points may be allocated for 'specific goals' as set out in the PPPFA, with 90 points for price being allocated to the lowest acceptable tender. For contracts with a value equal to or below a prescribed amount,⁶³ a maximum of 20 points will be allocated for 'specific goals', with 80 points for price being allocated to the lowest acceptable tender.⁶⁴ The Regulations

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61 See the minutes of that meeting and the State Law Advisor's opinion at <http://www.pmg.org.za>.

62 The 90/10 preference points system applies to contracts with a value of more than R500 000 in terms of Regulation 4 of the regulations promulgated in terms of the PPPFA, published under GN R725 in GG 22549 of 10 August 2001 (the 'Regulations').

63 The 80/20 preference points system applies to contracts with a value equal to or above R30 000 but less than R500 000 in terms of Regulation 5.

64 Section 2(a) read with s 2(b) of the PPPFA.

to the PPPFA contain formulae for calculating the total number of points to be allocated to each tenderer.⁶⁵

(iv) Specific goals

According to s 2(d) of the PPPFA, '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 ('HDI'),⁶⁶ and the implementation of the programmes of the Reconstruction and Development Programme (RDP).⁶⁷ This provision is permissive rather than prescriptive. Therefore, other 'specific goals' (such as environmental best practice) could also be identified as worthy of preference points (up to a maximum of either 10 or 20 out of 100, depending on the value of the contract).⁶⁸

Even if it is correct that the 'specific goals' for which preference points may be allocated may include other goals or categories of preference, such goals would have to be accommodated within the 90/10 or the 80/20 preference points system. The inflexibility of this framework may place undesirable constraints on

65 Regulations 3(1), 4(1), 5(1) and 6(1).

66 Regulation 1(h) contains a definition of 'historically disadvantaged individual' that is arguably narrower than the description in the PPPFA of persons to whom preferences may be applied. The definition in the Regulations is as follows:

(h) 'Historically Disadvantaged Individual ('HDI') means a South African citizen —

- (i) 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, (Act No.110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) ('the Interim Constitution'); and/or
- (ii) who is female; and/or
- (iii) who has a disability:

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

We identify two major potential problems with this definition. The first is that it is framed in terms of individuals rather than groups of persons who/which have suffered historical disadvantage. This could have the result, for example, that a black man born in 1980 (ie too young to vote in 1994) would fall outside the definition because the reason he was unable to vote in 1994 was not because of the apartheid policy in place, but because of his age. The second potential problem is that certain of the qualifications contained in the definition may have unintended consequences. For example, a black Nigerian woman disabled from birth who became a South African citizen on 1 May 1994 will not qualify as an historically disadvantaged individual under this definition, whereas a white South African man disabled in 2002 will qualify as historically disadvantaged.

67 Section 2(d) of the PPPFA. The programmes of the Reconstruction and Development Programme are stated to be those published in *Government Gazette* 16085 of 23 November 1994.

68 This view is consistent with FC sub-s 217(2)(a), which refers to unspecified 'categories of preference in the allocation of contracts'. However, the Regulations do not contemplate any goals other than those listed in s 2(d) of the PPPFA attracting preference points. In this regard, see Regulations 3(2), 4(2), 5(2) and 6(2). To the extent that the goals contemplated in the Regulations are narrower than the framework created by the PPPFA, the applicable Regulations may be *ultra vires*. However if the Regulations are in this respect legally valid, the implications of this dual scale system are restrictive, in that they do not permit the allocation of preference points to any category of preference other than the attainment of HDI and RDP goals.

procuring bodies that want to allocate preference points to more than one specific goal.

In sum, it appears that the PPPFA contemplates that the only tender criteria that can be allocated points are: (a) price, and (b) specific goals (HDI goals, RDP goals and possibly other unspecified 'categories of preference').⁶⁹

(v) Other evaluation criteria

Despite the apparent restrictiveness of the points-allocation system contemplated by the PPPFA, a tender put out in terms of that Act could contain evaluation criteria or specifications other than price and specific goals, as long as these are not used to calculate the points to be awarded to a tenderer. These other criteria would operate at the level of a threshold inquiry, or as what are sometimes called 'qualification criteria'.

Indications of this more expansive qualitative analysis are found in the PPPFA definition of 'acceptable tender'⁷⁰ and in s 2(f) of the PPPFA. Section 2(f) provides that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in ss 2(d) (contracting with HDIs and/or implementing the programmes of the RDP) and 2(e) (goals specified in the invitation to submit a tender) justify the award to another tenderer.⁷¹

Commonly applied evaluation criteria, such as technical capability, would therefore fall — if the PPPFA regime is strictly applied — into the category of criteria or specifications to which points are not allocated. However, a failure to comply with such criteria could result in a tender not qualifying as an 'acceptable tender' and therefore not being evaluated for the purpose of awarding points.

This implied distinction between criteria to which points can be allocated, and those to which points may not be allocated, has the effect of turning all criteria other than price and 'specific goals' into so-called qualification criteria. This necessitates a two-stage or two-level process in order to award any tender that has both qualification criteria and points-criteria. The PPPFA does not explicitly distinguish between the various stages that could be involved in a tender process.

69 Some attempt to change this position is made in Regulation 8 which provides for evaluation on the basis of 'functionality' as well as price and the specified goals, and combines the points for price and functionality so that a maximum of 80 or 90 points may be allocated in respect of both, depending on the value of the contract. However, to the extent that Regulation 8 conflicts with s 2 of the PPPFA, it may be *ultra vires*. Also, the notion of evaluating functionality with price is not carried through into the formulae set out in Regulations 4, 5 and 6 for calculating the points for price.

70 'Acceptable tender' is defined as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. Therefore, technical capability and other criteria — such as environmental best practice - could arguably be qualification criteria for purposes of identifying compliant tenders, but may not be used in the process of ranking compliant tenders.

71 See *Grinaker* (supra) at paras 40-64.

Section 2 of the PPPFA goes on to provide that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.⁷² Furthermore, such goals must be measurable, quantifiable and monitored for compliance.⁷³

(vi) Remedies for non-compliance

As far as remedies for non-compliance with the provisions of the PPPFA are concerned, the PPPFA prescribes no consequences for organs of state that implement a preferential procurement policy other than in accordance with that Act.⁷⁴ With regard to the consequences of a contract being awarded on account of false information furnished by a tenderer in order to secure preference in terms of the PPPFA, s 2(g) provides that any such contract may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies that the organ of state may have.⁷⁵

(d) PPPFA Regulations

The PPPFA permits the Minister of Finance to make regulations in order to achieve the objects of the Act.⁷⁶ Regulations have now been promulgated.⁷⁷ The Regulations provide considerably more detail than the PPPFA itself, as to the manner in which the preferential procurement framework created by the primary legislation is intended to operate.

The Regulations apply to all organs of state as defined in the PPPFA. They provide that any such organ of state must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system that accords with the PPPFA and the Regulations. This requirement means that an organ of state can neither apply a preferential procurement system that is more generous to HDIs than that

72 PPPFA (supra) at s 2(e).

73 Ibid at s 2(2).

74 The accounting authority of a public entity is responsible for the compliance by the public entity with all legislation applicable to it in terms of s 51(1)(h) of the Public Finance Management Act, but the equivalent provision applying to the accounting officer of a department (s 38(1)(n) of the Public Finance Management Act) makes him or her responsible for ensuring compliance only with the Public Finance Management Act itself.

75 See also Regulation 15, discussed further below, which sets out a more extensive range of penalties that could be applied against a fraudulent tenderer to whom a contract is awarded. Penalties for tender offences have also been proposed in s 7 of the Prevention of Corruption Bill, introduced in the National Assembly as B19-2002.

76 Section 5 of the PPPFA, which provides as follows:

(1) The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) Draft regulations must be published for public comment in the *Government Gazette* and every *Provincial Gazette* before promulgation.

77 GN R725, GG 22549, 10 August 2001 (the 'Regulations').

established by the PPPFA and Regulations, nor may it apply a preferential procurement system that is different but equivalent to the system set

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out in the PPPFA and Regulations. In practice this requirement is fairly restrictive. Some organs of state are eager to promote the implementation of social and economic objectives (through the award of contracts to HDIs) to a greater extent than is permitted by the preference points system provided for in the PPPFA.

(i) Application of preference points system

As mentioned above in relation to the dual-scale preference points system, the Regulations prescribe that, in respect of contracts with a value equal to or above R30 000 and up to R500 000, the 80/20 preference points system must be used. The 80/20 preference points system permits a maximum of 20 points to be awarded to a tenderer for being an HDI (as defined in the Regulations) and/or sub-contracting with an HDI and/or achieving of the specified goals stipulated in the Regulations. A formula set out in the Regulations is applied to calculate the number of points for price, and these are added to the preference points to calculate the total points awarded to each tenderer.⁷⁸ Organs of state may apply the same formula to procurement with a value less than R30 000, if and when appropriate.⁷⁹

The Regulations also prescribe that in respect of contracts with a value above R500 000 the 90/10 preference points system must be used. The 90/10 preference points system permits a maximum of 10 points to be awarded to a tenderer for being an HDI and/or sub-contracting with an HDI and/or achieving any of the specified goals stipulated in the Regulations. Again, a formula is applied and the points scored for price are added to the points scored for the specified goals.⁸⁰

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78 To illustrate the application of the preference points system by hypothetical example: the Department of Health invites tenders for the provision of antiretroviral medication. X, an empowerment company, offers the medication for R10 million. Y, which has no empowerment component, offers the medication for R9 million. Y is the tenderer with the lowest price. The contract is worth more than R500 000 so the 90/10 preference points system applies. Regulation 4(1), titled 'The 90/10 preference point system', provides that the following formula must be used to calculate the points for price:

$$P_s = 90 (1 - ((P_t - P_{min}) / (P_t - P_{min}))) \text{ where}$$

P_s = points scored for price of tender under consideration

P_t = rand value of tender under consideration

P_{min} = rand value of lowest acceptable tender.

X gets $90 (1 - (10\,000\,000 - 9\,000\,000) / (10\,000\,000 - 9\,000\,000)) = 80$ points for price.

Y gets $90 (1 - (9\,000\,000 - 9\,000\,000) / (9\,000\,000 - 9\,000\,000)) = 90$ points for price.

Therefore, if X gets 10 out of 10 preference points (for achievement of the 'specific goals') and Y gets none, their scores will be equal. If X gets anything less than 10 preference points, Y will be the tenderer who scores the highest points. The PPPFA does not prescribe how to award a contract if the two tenderers with the highest scores get the same number of points.

79 Regulation 3.

80 Regulation 4.

The Regulations go on to provide that the same preference points systems must be used in respect of contracts for the sale and letting of assets.⁸¹ These provisions may be *ultra vires*, as the PPPFA does not purport to regulate contracts by organs of state for the sale and letting of assets, only contracts for the procurement or obtaining of goods and services.⁸²

An organ of state must, in the tender documents, stipulate the preference points system that will be applied in the adjudication of tenders.⁸³ Although the stipulation of the preference points system to be applied assists in achieving transparency, it could result in an onerous procedure. Regulation 10 goes on to provide that if, in the application of the 80/20 preference points system, for example, all tenders received exceed the value of R500 000, the tender must be cancelled and the organ of state must re-invite tenders and again stipulate the preference points system to be applied (and *vice versa* as regards the 90/10 preference points system).

The Regulations also provide that, notwithstanding other statements to the contrary in the Regulations,⁸⁴ a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points. This provision must be interpreted subject to s 2(f) of the PPPFA. Section 2(f) contemplates narrower grounds on which a contract may be awarded to a tenderer who did not score the highest points.⁸⁵

(ii) Permissible preferences

As stated above, the PPPFA contemplates preference points for contracting with HDIs or for implementing the programmes of the RDP. The Regulations also make provision for the 80/20 or 90/10 preference points systems to accommodate a preference for the procuring of locally manufactured products (although the precise manner in which such a preference must be accommodated is not prescribed). The intention to award preference points for local manufacturing and/or content must be specified in the tender document sent out by an organ of state.

(iii) Equity ownership as a peremptory preference

Despite the fact that the PPPFA states the specific goals in permissive rather than peremptory terms ('the specific goals may include'), Regulation 13 provides that preference points stipulated in respect of a tender *must* include preference points

81 See Regulations 5 and 6.

82 This reading is consistent with FC s 217. FC s 217, as discussed above, should be interpreted to relate to contracts in terms of which goods or services are supplied to an organ of state. The PPPFA, which provides that the maximum points for price are to be awarded to the 'lowest acceptable tender' (s 2), similarly appears to confine its ambit to the obtaining of goods and services by organs of state by means of tenders.

83 Regulation 7.

84 Regulations 3(4), 4(4), 5(4), 6(4) and 8(8) all provide that only the tender with the highest number of points may be selected.

85 See §25.4(c)(v) above.

for equity ownership by HDIs. Equity ownership is equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company's shares that are owned by individuals who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender. Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership. This prohibition is intended to minimise so-called window dressing by corporate entities to meet empowerment criteria. Preference points may not be awarded to public companies⁸⁶ and tertiary institutions. Equity claims for a trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the trust.⁸⁷ A consortium or joint venture may, based on the percentage of the contract value managed or executed by their HDI members, be entitled to equity ownership in respect of an HDI.

(iv) RDP goals

Regulation 17 provides that, over and above the awarding of preference points in favour of HDIs, certain activities may be regarded as a contribution towards achieving the goals of the RDP. These activities include but are not limited to the following:

- (a) the promotion of South African-owned enterprises;
- (b) the promotion of small, medium and micro-enterprises;
- (c) the creation of new jobs or the intensification of labour absorption;
- (d) the promotion of enterprises located in a specific province or region for work to be done or services to be rendered in that province or region;
- (e) the empowerment of the workforce by standardising the level of skill and knowledge of workers; and
- (f) the upliftment of communities through housing, transport, schools, infrastructure donations, charity organisations and other methods.

(v) Sub-contracting and penalties

A person awarded a contract as a result of a preference for contracting with, or providing equity ownership to, an HDI, may not sub-contract more than 25% of

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the value of the contract to a person who is not an HDI or who does not qualify for such preference.⁸⁸

Finally, the Regulations set out various penalties that must be applied by an organ of state upon detecting that a preference in terms of the Act and Regulations has been obtained on a fraudulent basis, or in the event that any of the specified goals

86 The rationale for this limitation is not entirely clear.

87 Again, the restrictions on trusts being awarded points for equity ownership are designed to minimise 'window-dressing'.

are not attained in the performance of the contract. The penalties embrace the recovery of all costs, losses and damages, cancellation of the contract, imposition of a financial penalty, and restricting the contractor from obtaining business from any organ of state for a period not exceeding 10 years.⁸⁹ As mentioned above, these penalties go further than those provided for in the PPPFA itself, particularly by including financial penalties and 'blacklisting'.

25.5 The role of the tender boards

(a) Introduction

Tender boards currently exist at both a national and provincial level. At the national level, the State Tender Board is established in terms of the State Tender Board Act 86 of 1968.⁹⁰ In terms of this legislation, the Board is, amongst other things, empowered to procure supplies and services for the state and to invite offers and conclude agreements for this purpose.⁹¹

The State Tender Board Act was amended during 1987 (Act 18 of 1987) to provide for the establishment of regional tender boards.⁹² Regional tender boards were established in each of the then-existing provinces. In 1994, however, with the coming into effect of the Interim Constitution, provincial legislation was enacted in each of the new nine provinces and provided for the establishment of provincial tender boards as contemplated by s 187. In other words, the regional tender boards were replaced by provincial tender boards.⁹³

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(b) Powers of the State Tender Board

Section 13 of the State Tender Board Act authorises the Minister of Finance to make regulations in respect of its procedure and the procurement of supplies or services

88 Regulation 13(2). This Regulation may well have unintended consequences. It binds contractors who were awarded contracts as a result of HDI content, to a fairly restrictive sub-contracting regime, while permitting a non-HDI contractor to sub-contract freely to other non-HDIs. Another consequence is that in order for this provision to work in practice, the contractor will have to be informed of the causal link between his or her HDI credentials and the award of the contract — which assumes a measure of transparency in the process that may be practically difficult to achieve in every case.

89 Regulation 15.

90 Section 2.

91 Section 4(1).

92 In this regard, see s 2A of the State Tender Board Act. Section 2A provides that the Minister of Finance shall, on the recommendation of the [tender] board, establish regional tender boards in respect of such regions as the Minister may determine.

93 For example, s 2(2) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994 states that the powers exercised, for the procurement of supplies and services prior to the establishment of the Provincial Tender Board, by the Province — being the then Cape Province — or the government of any area which now forms part of the national territory — being the former homelands — are 'deemed to have been exercised or performed' by the Provincial Tender Board.

on behalf of the state. The most recent regulations promulgated in terms of this section provide that:

The Board may, subject to the applicable provisions of any Act of Parliament, issue directives to Government departments in regard to the procurement of supplies and services.⁹⁴

This provision does not mean that the Board has powers to determine government policy on procurement. The Board's powers are merely to adjudicate upon the tender process in an objective manner, applying the rules and criteria as laid down by the relevant government department. The relationship between government departments and the Board in the tender process is succinctly described by Pickard JP in *Cash Paymaster Services v Eastern Cape Province & Others*:

The function of the tender board in considering the tenders according to the rules laid down for it is not to prescribe or pre-empt the policy of government nor to determine what government needs and should or should not have. The task of the tender board is a simple one, namely to determine which tender is to be accepted, having regard to what government has laid down in its tender documents as the various criteria in regard to quality requirements, services and the like.⁹⁵

Directives that the Board issues regarding the procurement of supplies and services by government departments will, where applicable, be subject to the provisions of the PPPFA. Where a department follows a policy of preferential procurement in the tender process, the PPPFA requires that the framework of that Act must apply.⁹⁶ Consequently, the State Tender Board is enjoined to operate within this framework in coming to a decision regarding procurement for a government department.⁹⁷

Despite the involvement of government departments in the setting of rules and criteria for the procurement of supplies and services, the State Tender Board Act and regulations currently require, subject to limited exception,⁹⁸ that all tenders of the national government go through the Board. Regulation 2 states that 'subject

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to the provisions of any Act of Parliament, supplies and services for and on behalf of the State, shall be procured only through the Board.⁹⁹

The regulations promulgated in terms of the State Tender Board Act allow for circumstances in which government departments may contract with service providers without obtaining the prior consent of the Board.¹⁰⁰ One can imagine circumstances where, due to time constraints in providing a particular service, a government department cannot wait for the Board to convene so as to render its

94 Regulation 3(1) in GN R1237, GG 11382, of 1 July 1988.

95 *Cash Paymaster Services* (supra) at 351.

96 See s 2 of the PPPFA, and Regulation 2(2).

97 See *Grinaker* (supra) at 351.

98 Section 2 of the National Supplies Procurement Act 89 of 1970 stipulates that the Minister of Trade and Industry may, whenever he or she 'deems it necessary or expedient for the security of the Republic', without recourse to the State Tender Board, amongst other things, acquire or hire any goods or services on behalf of the state.

decision. These exceptions are narrowly prescribed and are subject to the Board's override powers to resile from the agreement.¹⁰¹

(c) The diminishing role of tender boards

The recent trend is to move away from tender boards and for government departments at national and provincial level to engage in procurement themselves under the Public Finance Management Act. At national level, reassignment of procurement decision-making powers has, to some extent, been achieved through delegations and directives from the State Tender Board. At provincial level, it has happened either through the repeal of provincial tender board legislation,¹⁰² or the delegation of certain procurement powers from the applicable tender board to the departments.¹⁰³ Cabinet's stated intention is that procurement will ultimately be

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regulated by the relevant government departments themselves under the Public Finance Management Act.¹⁰⁴

99 GN R1237 in GG 11382 of 1 July 1988. Similar provisions are contained in the relevant provincial tender legislation. For example, s 4(1) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994, provides that: '[T]he board shall have the sole power to procure supplies and services for the province, and, subject to the provisions of any other Act of the provincial legislature, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the province, and to dispose of movable provincial property . . .'. See also s 4(1) of the Tender Board Act (Free State) 2 of 1994.

100 In terms of Regulation 3(4), the Board may approve *ex post facto* any action of a government department exercising a power conferred upon the Board by the Act or regulations, provided the Board is satisfied that the action of the government department 'took place in circumstances of emergency or otherwise was in the best interests of the State and was done without negligence, provided that the State has not suffered any damage as a result thereof'.

101 Section 4(1)(eA) of the State Tender Board Act.

102 See, for example, the Gauteng Tender Board Repeal Act 2 of 2002. The Act repeals the Provincial Tender Board Act 2 of 1994 and creates a transitional provincial procurement body for the adjudication and awarding of term contracts and special projects.

103 For example, the KwaZulu-Natal Procurement Act 3 of 2001 gives effect to FC s 217 by establishing, within each department in the province, internal tender committees. In terms of s 28 of this Act, the accounting officer of a department and of the provincial parliament must establish, within their respective administrations, an internal tender committee comprising a single Tender Award Committee and one or more Tender Evaluation Committees. In addition, s 4 of the Act provides for the establishment of a Central Procurement Committee within the Department of Finance to adjudicate tenders where the value of the contract is above the delegated limit or where there is a dispute between a department's Tender Award Committee and its Tender Evaluation Committee. Provision is also made in s 19 for a Tender Appeals Tribunal and, in s 26, a Procurement Administration Office, which is required to report on the procurement practices within the provincial government.

104 See above for the Cabinet meeting of 17 September 2003. The decentralisation trend appears to be consistent with the objectives of the COMESA public procurement project. See Karangizi (*supra*). However, as Karangizi states, the decentralised procurement function that is part of the COMESA model is coupled with a 'centralised policy and monitoring function for public procurement; that body, which should not be operationally involved in procurement proceedings, may also conduct other activities to develop procurement capacity, promote proper implementation, and enforce applicable rules'. Karangizi (*supra*) at 9.

(d) Consequences of non-compliance

In the meantime, should the relevant tender legislation require tender board approval before a tender is awarded, the failure to obtain such approval would render the contract legally invalid. The Supreme Court of Appeal, in *Eastern Cape Provincial Government & Others v Contractprops 25 (Pty) Ltd*, reached just such a conclusion.¹⁰⁵ In *Contractprops*, the Department of Education, Culture and Sport in the Eastern Cape Province purported to enter into lease agreements without reference to the provincial tender board. This action contravened the Provincial Tender Board Act (Eastern Cape) 2 of 1994. The Supreme Court of Appeal held that the leases were invalid, irrespective of the harshness that a declaration of invalidity may cause to either the Department or the lessee.¹⁰⁶ Similarly, in *Premier, Free State & Others v Firechem Free State (Pty) Limited*, the Supreme Court of Appeal decided that a contract concluded with a government department, which subsequently subverts the role of the tender board by contradicting the terms of the tender board's approval, will be invalid.¹⁰⁷

25.6 Municipal procurement

(a) Applicability of constitutional procurement principles

Municipalities, as organs of state in the local sphere of government, are bound by s 217 of the Constitution. They are obliged to contract for goods and services in

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accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective'.¹⁰⁸ They are also bound by the PPPFA as they fall within that Act's definition of 'organ of state'.¹⁰⁹

105 2001 (4) SA 142 (SCA) ('*Contractprops*').

106 Ibid at para 9 (Marais JA): 'As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.'

107 2000 (4) SA 413 (SCA).

108 This obligation was captured in s 10G(5) of the LGTA, which obligates municipalities to award contracts for goods and services in accordance with the five principles, but also permits them to allocate preferences in accordance with national legislation. Section 10G(5) goes on to provide that a municipality may 'dispense with the calling of tenders in the case of an emergency or of a sole supplier or within such limits as may be prescribed by a national law.' Regulations have been promulgated in terms of this section of the LGTA providing for the circumstances in which a municipality may dispense with the calling of tenders. See GN R1224 in GG 19300 of 2 October 1998, as amended by GN R387 in GG 19886 of 26 March 1999, and further amended by GN R750 in GG 20172 of 11 June 1999.

109 Section 1 of the PPPFA.

A number of post-1994 statutes have been promulgated to give effect to the constitutional provisions relating to local government.¹¹⁰ The Systems Act permits the creation by municipalities of 'municipal entities'. Municipal entities, as mentioned above, are juristic persons established by and under the ownership control of a municipality or several municipalities.¹¹¹ These entities would fall within the constitutional definition of 'organ of state'.¹¹² They clearly fall within a sphere of government. They are thus probably bound by FC s 217. However, as we noted above, they are not yet bound by the PPPFA.¹¹³

Just as the Public Finance Management Act regulates government procurement at national and provincial level, the Municipal Finance Management Bill, 2002¹¹⁴ will, when it becomes an Act, require municipalities to maintain 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'. Municipal entities will be bound by the same principles.¹¹⁵ In sum, municipalities themselves are bound by both legs of constitutional procurement: the five principles and preferential procurement. Municipal entities, on the other hand, are at this stage bound only by the five principles. In terms of FC s 217, however, they would not be prevented from determining and implementing a preferential procurement policy.

(b) Municipal service provision

A critical and contentious issue for any municipality is when it should provide municipal services using its own staff and resources and when it should provide services through a separate entity, either in the public or in the private sector.

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Municipal service delivery is regulated by parts 2 and 3 of chapter 8 of the Systems Act. These provisions set out mechanisms for deciding whether and when to contract with a separate entity for the delivery of services.¹¹⁶

When a municipality contracts with another entity for that entity to provide municipal services on its behalf, the municipality is contracting for goods and/or services and will likely be bound by the constitutional procurement principles. It appears that the relevant provisions in the Systems Act have been drafted with FC s

110 Local Government: Municipal Structures Act 117 of 1998; the Systems Act; Local Government: Municipal Finance Management Bill.

111 See s 1 of the Systems Act.

112 See FC s 239 and §25.2(c)(i) above.

113 See §25.4(c)(i) above.

114 Introduced in the National Assembly as B1 - 2002 ('the MFMB').

115 Section 36(a)(iii) of the MFMB creates this obligation in respect of municipalities, whereas s 59(1)(a)(iii) of the MFMB does so in respect of municipal entities.

116 Part 2 of chapter 8 comprises ss 76 to 82, and part 3 of chapter 8 comprises ss 83 and 84. The Local Government: Municipal Systems Amendment Bill (supra) proposes substantial amendments to these parts of the Systems Act.

217 in mind. Provision is made in the Act for a deliberative process and for criteria to decide whether to provide the municipal service through an 'internal mechanism'¹¹⁷ or an 'external mechanism'.¹¹⁸ If an external mechanism is to be considered, a process of competitive bidding will be required unless certain pre-conditions are met.¹¹⁹

Municipal procurement is not merely subject to the Systems Act. A municipality will be obliged, in every case in which it contracts for goods and/or services, to ensure that such goods and/or services are procured in accordance with a system that complies with the five principles and the PPPFA and its Regulations.

There is provincial as well as national legislation — largely dating from the pre-1994 period - which regulates local government generally and which includes provisions on procurement by municipalities.¹²⁰ In general, the provincial ordinances provide for a competitive tender process when goods and/or services are required by a municipality. However, in emergencies or sole supplier situations, the municipality may dispense with a competitive process. Where there is a conflict between the national legislation (s 10G(5) of the LGTA or the Systems Act) and the provincial legislation regulating municipal procurement, resort should be had to FC ss 146 to 150. These sections deal with conflicts between national and provincial legislation.¹²¹

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25.7 Public-private partnerships

(a) Introduction

A number of transactions between organs of state (usually government departments) and private sector entities, with features typical of public-private partnerships (PPPs), were initiated or implemented before the Public Finance Management Act and the Treasury Regulations came into effect.¹²² However, PPPs have become increasingly prevalent as a mechanism whereby national and provincial government departments seek to achieve service delivery objectives in a manner that appropriately allocates risk, makes use of private sector resources and gives value for money.

117 Section 76(a) of the Systems Act.

118 Ibid at s 76(b).

119 Section 78 read with ss 80, 83 and 84 of the Systems Act. Since s 10G(5) of the LGTA, which also deals with municipal procurement, is still in operation, it must be read together with applicable provisions of the Systems Act.

120 See, for example, s 35 of Transvaal Ordinance 17 of 1939, ss 171 and 172 of the Cape Municipal Ordinance 20 of 1974, ss 185 to 189 of the Natal Local Authorities Ordinance 25 of 1974, and s 143 of the Orange Free State Local Government Ordinance 8 of 1962.

121 See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

122 The Public Finance Management Act came into effect on 1 April 2000. The Treasury Regulations were published in GG 22219 of 9 April 2001, and amended substantially by GN R740 in GG 23463 of 25 May 2002, with effect from 27 May 2002.

(b) Legislative framework

PPPs are not referred to in any primary legislation. Nevertheless, Regulation 16 of the Treasury Regulations defines the concept and regulates the implementation of PPPs.¹²³ 'Public-private partnership' is defined in Treasury Regulation 16.1 as follows:

. . . a commercial transaction between an institution and a private party in terms of which —

- (a) the private party either performs an institutional function on behalf of the institution for a specified or indefinite period; or acquires the use of state property for its own commercial purposes for a specified or indefinite period;
- (b) the private party receives a benefit for performing the function or by utilising state property, either by way of:
 - (i) compensation from a revenue fund;
 - (ii) charges or fees collected by the private party from users or customers of a service provided to them; or
 - (iii) combination of such compensation and such charges or fees.

The institutions to which Treasury Regulation 16 applies are government departments at national and provincial level, constitutional institutions as defined in the Public Finance Management Act and public entities listed in Schedules 3A, 3B, 3C and 3D of the Public Finance Management Act.¹²⁴

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(c) Applicability of constitutional procurement principles and procurement legislation

Where the private party to a PPP performs an 'institutional function' on behalf of an organ of state, in terms of a service delivery or PPP agreement, the procurement provisions in the Constitution may well be applicable.¹²⁵ Such a 'partnership' is a contract concluded by a government department for goods and/or services, even

123 A revised version of Treasury Regulation 16 was published for public comment under GN 1535 in GG 25605 of 24 October 2003.

124 The public entities listed in Schedule 3 to the Public Finance Management Act are all those other than the 'Major Public Entities' that are listed in Schedule 2 to the Public Finance Management Act. The major public entities listed in Schedule 2, may therefore enter into transactions identical to those regulated by Treasury Regulation 16 without complying with its provisions. Such transactions would likely, however, be subject to other statutory requirements, either in terms of the Public Finance Management Act (in particular s 51(1)(a)(iii) regarding the five principles) or sectoral legislation.

125 'Institutional function' is defined in Treasury Regulation 16.1 (as amended by General Notice 2012, published in *Government Gazette* 25229 dated 28 July 2003), as follows:

'(a) a service, task, assignment or other function that an institution performs —

- (i) in the public interest; or
 - (ii) on behalf of the public service generally; or
- (b) any part or component of, or any service, task, assignment or other function performed in support of, such a service, task, assignment or other function'.

though the PPP agreement may provide for the private party to deliver the goods or services to consumers on behalf of the government department (as opposed to delivering the goods or services to the government department for its own use).¹²⁶

PPPs that involve the use of state property for the private party's own commercial purposes, rather than the performance of an institutional function, are arguably not 'contracts for goods or services'. The principles of s 217 may not necessarily apply. On the other hand, the provisions of Treasury Regulation 16 will apply to the PPP. As described below, the application of Regulation 16 means that the principles of openness, transparency, fairness, competitiveness and cost-effectiveness (value for money and affordability) will, invariably, be part of the decision-making process. Since a competitive process is used, the PPPFA will also, generally, be applicable.

Treasury Regulation 16 provides for strict national or (where the institution concerned is a provincial institution and the National Treasury has delegated the appropriate powers to a provincial treasury in terms of s 10(1)(b) of the Public Finance Management Act) provincial treasury supervision of transactions that fall within the definition of PPP set out in the Regulation.

The Regulation provides for a series of national or provincial treasury approvals at specified points in the process of concluding a PPP. The first approval must be granted before commencement of the procurement phase (but after having undertaken a feasibility study) and may not be granted unless the relevant treasury is satisfied that the criteria of value for money, affordability and appropriate transfer of technical, operational and financial risk, have been

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met.¹²⁷ The criteria applicable to subsequent treasury approvals are in similar terms.¹²⁸

Although Treasury Regulation 16 prescribes certain elements of the procurement procedure for a PPP, the Regulation also states that a PPP agreement 'must be procured in accordance with applicable procurement legislation'.¹²⁹ Treasury Regulation 16 does not purport to regulate all aspects of PPP procurement. It must be determined on a case-by-case basis whether the PPPFA or any other legislation regulating procurement is also applicable. Since a tender process will be followed, the PPPFA will likely be applicable to most PPPs.

Treasury Regulation 16 requires that the procurement procedure must include an open and transparent pre-qualification process, a competitive bidding process in which only pre-qualified organisations may participate, and criteria for the

126 Treasury Regulation 16.12.1 provides that an agreement between an institution and a private party for the latter to perform an institutional function without accepting significant risks is not a PPP and must be dealt with as a 'procurement transaction'. However, in our view this does not detract from the fact that where a PPP does involve the procurement of goods or services by an organ of state, the constitutional procurement provisions will apply to the process of identifying the private party, as will the provisions of the PPPFA.

127 Treasury Regulation 16.3.2.

128 See Treasury Regulations 16.4.2, 16.6.1, 16.6.5 and 16.7.1.

129 Treasury Regulation 16.6.3.

evaluation of bids to identify the bid that represents the best value for money.¹³⁰ It further states that the procurement procedure may include a preference for categories of bidders, in terms of the relevant legislation, such as persons disadvantaged by unfair discrimination, provided that this does not compromise the value for money requirement.¹³¹ Treasury Regulation 16.6.7 provides that the procedure may also include incentives for recognising and rewarding genuine innovators in the case of unsolicited proposals. However, these incentives may not compromise the competitive bidding process.

While the oversight role of the applicable treasury, in relation to contracting by government departments, is essentially aimed at verifying the cost-effectiveness of the transaction, it can be seen from the above that the principles of competitiveness, transparency and fairness all assist in achieving this objective. The application of the principles encourages the widest range of bidders possible and is designed to instil confidence in the private sector in its dealings with government. The simultaneous applicability of preferential procurement legislation ensures that regard is also had to the government's job-creation and transformation objectives.

25.8 Procurement and the right to just administrative action

Section 33(1) of the Constitution provides that everyone has the right to lawful, reasonable and procedurally fair administrative action.¹³² The Promotion of Administrative Justice Act 3 of 2000 (AJA) was enacted to give effect to this constitutional right. The AJA, amongst other things, sets out the requirements

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for procedurally fair administrative action, gives effect to the right to written reasons and provides for the grounds on which administrative action can be judicially reviewed and set aside.

The fundamental question as to whether administrative law applies to a particular form of conduct is whether it amounts to administrative action. The AJA's definition of 'administrative action', when read with the definition of 'decision', essentially comprises six elements: (1) a decision of an administrative nature; (2) made in terms of an empowering provision; (3) not specifically excluded from the definition; (4) made by an organ of state or by another body exercising a public power or performing a public function; (5) that adversely affects rights; and (6) that has a direct, external legal effect.¹³³

A number of cases decided in recent years have held that the decision to call for, the adjudication of, and the granting of a tender (whether by a tender board or another public body) constitutes administrative action.¹³⁴ In *Transnet Limited v*

130 Ibid at 16.6.5.

131 Ibid at 16.6.7.

132 See, generally, Klaaren & Penfold 'Just Administrative Action' (supra), in relation to the right to just administrative action.

133 Section 1 of the AJA. See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-17.

Goodman Brothers,¹³⁵ the Supreme Court of Appeal held that the evaluation of a tender by Transnet Limited, in respect of the supply of long-service gold watches for employees, amounted to administrative action for purposes of the Constitution.

The consideration of a tender will amount to administrative action provided that the tender is adjudicated in the course of exercising a public function or performing a public power. In this regard, our courts have taken a broad approach to the circumstances in which the award of the tender is related to a public function. In *Transnet Limited*, the appellants argued that when Transnet invites tenders for the supply of locomotives, it acts administratively, but when it invites tenders for toilet paper or gold watches, it does not. With regard to the latter type of purchases it was argued that Transnet acts in a purely private, commercial capacity. This argument was rejected by the Supreme Court of Appeal. The tender for the supply of gold watches was held to amount to administrative action.¹³⁶ During the course of his separate concurring judgment, Olivier JA emphasised the use of public funds in reaching the conclusion that the adjudication of the tender amounted to administrative action:

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The power exercised by Transnet arose from the legislation under discussion [the Legal Succession to the South African Transport Services Act] and directly related to affairs not confined to the internal affairs of Transnet. Public funds and eventually State responsibility are involved.¹³⁷

In light of the fact that public procurement invariably involves the expenditure of public funds, it can be said that the award of a contract will be public in nature, provided that the purpose of the contract is incidental to the public powers of the body and is not confined to its internal affairs.¹³⁸

In our view, the AJA does not alter the position that the adjudication and award of a tender amounts to administrative action, notwithstanding the fact that one of the requirements for administrative action under the AJA is that the decision must 'adversely affect the rights of any person'.¹³⁹ In our view, 'affect' should be read to mean determine rather than deprive. In other words, administrative action includes decisions which determine one's rights, and not only those decisions which deprive

134 *Claude Neon Limited v Germiston City Council & Another* 1995 (3) SA 710 (W), 1995 (5) BCLR 554 (W); *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA); *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C), [1997] 2 All SA 608 (C); *ABBM Printing and Publishing (Pty) Ltd v Transnet Limited* 1997 (1) BCLR 1429 (W), 1998 (2) SA 109 (W), [1997] 4 All SA 94 (W); *Transnet Limited* (supra); *Olitzki Property Holdings* (supra). See also *Logbro Properties CC v Bedderson NO & Others* 2003 (2) SA 460 (SCA), [2003] 1 All SA 424 (SCA), and *Metro Projects* (supra).

135 *Transnet Limited* (supra).

136 *Ibid* at 871. As Schutz JA stated: 'I fail to see how such a distinction is to be drawn, particularly where, as in this case, the purchase of watches is clearly incidental to the exercise of Transnet's general powers. The gold watches are bought so that they may be used to secure the loyalty of employees, much as salaries are paid to secure their services.'

137 *Transnet Limited* (supra) at 867.

138 D M Pretorius 'The Defence of the Realm: Contract and Natural Justice' (2002) 119 *SALJ* 374, 395. *Transnet Limited* (supra) at 867, 871. The crucial question then becomes whether the contract procurement process affects the rights of interested parties.

one of a right.¹⁴⁰ Some support for this approach can be found in *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board*. In holding that the relevant decision amounted to administrative action, Borochowitz J said:¹⁴¹

[The Public Accountants' and Auditors'] Board's decision has plainly affected the rights and interests of the applicant. It has determined its rights.

If this is the case, a failure to award a tender will amount to administrative action. Such a decision will invariably determine the unsuccessful tenderer's rights (in the sense that the unsuccessful tenderer does not acquire rights it would have had if it had been granted the tender).¹⁴²

In relation to the specific right to administrative action that is procedurally fair, s 3 of the AJA provides that this right only applies where one's rights or legitimate expectations are materially and adversely affected by administrative action.¹⁴³ For the reasons discussed above, an unsuccessful tenderer would generally be able to rely on this right to procedurally fair administrative action. As De Villiers J stated in *Grinaker*:¹⁴⁴

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Bidders in a tender process are entitled to fair administrative action and have the legitimate expectation that their tender will be evaluated fairly, properly, justly and without bias.

An example of the application of the right to procedural fairness to the adjudication of a tender may be found in *Du Bois v Stompdrift-Kamanassie Besproeiingsraad*.¹⁴⁵ In *Du Bois*, a tender for a long lease of a picnic and camping site was not awarded based upon adverse reports relating to the applicant. The court held that the applicant had the right to procedural fairness. It should have been informed of the contents of the adverse reports and been given an opportunity to respond thereto. The decision not to accept the applicant's tender was therefore set aside. In the course of his judgment, Griesel J expressly rejected the argument that the right to procedural fairness cannot be applied to tender procedures because it would make the procedure cumbersome and unmanageable.¹⁴⁶

139 See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-20 — 63-22 for a detailed discussion of this requirement under the AJA and the constitutional difficulties that it raises.

140 Ibid at 63-21.

141 2001 (2) SA 980 (W), 997. See also *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at paras 101-110.

142 Provided that the other elements of the definition of administrative action are met.

143 See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-25-63-30 for a detailed discussion on the right to procedural fairness.

144 *Grinaker* (supra) at 348.

145 2002 (5) SA 186 (C). This case did not relate to the procurement of goods or services.

An additional implication of a tender process (or other procurement mechanism) amounting to administrative action is that the public body is required to furnish written reasons for the award of the tender to any person whose rights are adversely affected by such decision.¹⁴⁷ An unsuccessful tenderer will therefore invariably be entitled to written reasons for the rejection of its tender.¹⁴⁸

25.9 Remedies for non-compliance

(a) Introduction

A number of different remedies may flow from non-compliance with the constitutional and legislative requirements for public procurement. These remedies include a declaration of invalidity, the granting of an interdict and, in exceptional circumstances, the awarding of the contract or damages. We will briefly discuss each of these in turn.

(b) Invalidity

According to principles of administrative law and the constitutional principle of legality,¹⁴⁹ public procurement that fails to comply with the provisions of the Constitution or relevant legislation will be invalid and may be set aside by a court.¹⁵⁰

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A difficult issue which then arises is whether the entire procurement process should be set aside and new tenders called for or whether existing tenders already received by the relevant body should be reconsidered. The usual course would be to refer the decision back to the relevant body for reconsideration on the basis of the existing tenders.¹⁵¹ However, in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others*, the court held that new tenders were warranted because: (a) circumstances had changed since the original submission of tenders; (b) new directives had subsequently been issued regarding tenders; and (c) it appeared that the original tender document was deficient (in that it did not provide for the weight to be attached to the RDP factors).¹⁵²

146 Ibid at 195-6.

147 FC s 33(2) and s 5 of the AJA.

148 This conclusion is consistent with the approach of the court in *Grinaker* (supra) at 348.

149 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1999 (2) BCLR 151 (CC); and *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-39-63-41 for a discussion of the principle of legality.

150 See, for example, *Contractprops* (supra); *Grinaker* (supra); and *Metro Projects* (supra).

151 This was, for example, the approach in *Tecmed (Pty) Limited v Eastern Cape Provincial Tender Board & Others* 2001 (3) SA 735 (SCA), 742.

152 *Cash Paymaster Services* (supra) at 354.

(c) Interdict

In appropriate cases, and in accordance with the normal requirements relating to interdicts, a public body could be interdicted from engaging in unlawful procurement activities. For example, an unsuccessful tenderer may apply to interdict the conclusion of the contract pursuant to a defective procurement process.

(d) Award of the contract

If the award of the tender or the conclusion of the contract also amounts to administrative action, the court may, in exceptional circumstances, decide to award the tender to the unsuccessful applicant.¹⁵³ In *Grinaker*, the court held that such exceptional circumstances existed. It was clear to the court, that, on a proper application of the preference points system under the PPPFA, and other documents which were applicable in terms of the tender conditions, the tender board was obliged to award the contract to the applicant. The result of a reconsideration of the tender was, therefore, a foregone conclusion and the court thus ordered that the contract be awarded to the applicant.¹⁵⁴

(e) Damages

In *Olitzki Property Holdings*, it was argued that the effect of the procurement provision or the administrative justice clause of the Interim Constitution was to give an unsuccessful tenderer the right to claim damages for lost profit (i.e. the

OS 12-03, ch25-p36

profits it would have made had it been awarded the tender). This argument was rejected by the Supreme Court of Appeal, notwithstanding the fact that it was assumed, for purposes of argument, that the tender board had acted irregularly, unreasonably and arbitrarily and that the plaintiff would have been awarded the tender had a proper process been followed.¹⁵⁵

Although the constitutional claim for lost profits was rejected by the court in this case, the question as to whether an unsuccessful tenderer may be awarded damages for out-of-pocket expenses incurred in submitting or re-submitting the relevant tender was left open.¹⁵⁶ In our view, a public body should be liable in delict for foreseeable, wasted out-of-pocket expenses incurred by unsuccessful tenderers in relation to a tender process that is found to have been unlawful.¹⁵⁷

153 See s 8(1)(c)(i)(aa) of the AJA.

154 *Grinaker* (supra) at 361-2. The court stated that, in any event, 'the [tender board] has exhibited such bias and gross incompetence that it would be fair to both sides not to send the matter back to the [tender board]'. Ibid at 362.

155 It should be noted that this relief was sought on the basis of the particular circumstances of the case which, it was argued, resulted in no other satisfactory remedy being available to the plaintiff for breach of the relevant constitutional provisions.

156 *Olitzki Property Holdings* (supra) at 1267.

157 This conclusion is consistent with the holdings of recent cases that public bodies may be delictually liable for a failure properly to perform their functions. See, e.g. *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).