

# Green Paper on Public Sector Procurement Reform in South Africa

## An initiative of the Ministry of Finance and the Ministry of Public Works

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## **MESSAGE FROM THE MINISTER OF FINANCE**

As the largest buyer in the country, government has a responsibility to ensure that its procurement policy supports its overall economic objectives, and serves as an instrument for attaining those objectives.

One of the key elements in Government's strategy for employment creation and income generation is the promotion of small, medium and micro enterprises (SMME's). In the past, the tendering system favoured larger, established companies, and it was very difficult (if not impossible) for newly established businesses to enter the public tendering system.

Government therefore embarked on a reform process to make the tendering system more easily accessible to small, medium and micro enterprises. This process has resulted in a Green Paper on Public Procurement Reform.

At the same time, this Green Paper is a step towards greater policy co-ordination across the different levels and departments of government.

This Green Paper is a discussion document which contains various proposals aimed at achieving objectives of good governance, developing and utilising the country's human resources potential to the full, and encouraging a well developed and competitive business sector. It is being released so that anyone who so wishes can forward their comments to the Department.

I wish to record my appreciation to the Department of Public Works, and also to the World Bank for financial assistance and guidance with the reform process and preparation of this Green Paper.

[MR TREVOR A MANUEL](#), MP  
MINISTER OF FINANCE

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## **MESSAGE FROM THE MINISTER OF PUBLIC WORKS**

The development of this Green Paper represents a significant milestone in the transformation of public sector procurement in South Africa.

The appropriate orientation of public sector procurement would enable the State to use its purchasing power to attain specified socio-economic objectives. Within the South African context, public sector procurement can make a critical contribution to the transformation and democratisation of South African society. In striving for the above, Government must also ensure that such a procurement policy subscribes to international best practice and reinforces the principles of good governance.

This Green Paper attempts to address these issues, and proposes strategies that blend international best practise with South African specificities . The presentation of new concepts such as an affirmative procurement policy, life cycle costing, value for money and appropriate risk management strategies indicate Government's commitment to the development of a procurement system that responds to the needs of South African society.

The development of this Green Paper has also highlighted the creative potential that is unleashed when government departments operate in a collaborative fashion.

The proposals contained in this Paper have wide ranging and far reaching implications for all stakeholders engaging in the public sector procurement process. I therefore urge all interested parties to consider the issues raised in the Green Paper so that our collective inputs contribute to a procurement system that all South Africans can be proud of.

JEFF RADEBE, MP  
MINISTER OF PUBLIC WORKS

### **PROCUREMENT REFORM: THE PROCESS**

The process of procurement reform commenced with interaction within Government.

On 24 January 1995, a Government Forum comprising representatives from various State and Provincial user departments was established in order to arrive at a consensus position as to what restructuring is necessary and what is possible in the short and medium term.

Since the initiation of the procurement reform process, certain documents have been released which impact on the procurement reform proposals, and influence some of the recommendations. These include:

- The new constitution.
- Growth, Employment and Redistribution: a macro-economic strategy.
- National Small Business Enabling Act

The proposals which have been developed in this Green Paper have been based on aims and objectives which have been broadly agreed to by various National and Provincial organs of State. However, consultation with all stakeholders in the process is of primary concern to the Government and, as such, a Green Paper on procurement reform has been developed as a discussion document on the proposals and principles which underlie procurement reform.

The Government hopes that the release of its preliminary policy and principle statements will draw the constructive discussion and input of all stakeholders and interested parties in order to facilitate the development of the best possible procurement policy.

### **EXECUTIVE SUMMARY**

The Government of South Africa is committed to good governance and the elevation of previously marginalised communities. Total procurement by the different Organs of State is estimated at R56 billion. This amount calls for strict control through good financial governance.

The Constitution of our country prescribes that procurement for any organ of State should be dealt with through a system that is fair, competitive, transparent and cost effective. The Constitution also allows for the implementation of procurement policies providing for categories of preference in the allocation of contracts and the protection, or advancement, of persons, or categories of persons, disadvantaged by unfair discrimination. It is therefore clear that the public sector procurement system can be used to attain certain socio-economic objectives. This will, however, not be achieved without adhering to sound financial management, which inter alia includes the principles of value for money, good financial control, eliminating and countering corruption and ensuring that all contractors have a "good standing" insofar as their tax and service charge obligations are concerned.

The Government realises the importance of the small, medium and micro enterprises (SMME's) as part of the macro economic development of South Africa. In the past, the tendering system favoured the larger and more established businesses, and it was very difficult for any new and upcoming tenderer to enter into the public sector procurement system. The Ministries of Finance and Public Works embarked on the reform of the public sector procurement system to make the tendering system easily accessible to the SMME's. The emphasis is on the development and stimulation of the SMME sector and using the procurement system as an instrument to achieve certain socio-economic objectives without forfeiting the principles of good financial management.

### **Good Governance**

Proposals on good governance include aspects such as value for money, good financial control, countering corruption, meeting tax and service charge obligations and adhering to prescribed labour practices.

A National Procurement Framework needs to be drafted to establish uniformity in tender procedures, policies and control measures. Such a framework should be administered by a Procurement Compliance Office. It is the intention of the Procurement Compliance Office to be pro-active in nature and to establish preventative and control measures on a regular basis.

### **Socio-Economic Objectives**

Socio-economic objectives through the procurement system includes access to tendering information and the simplification of tender documents, breakout procurement, awarding of tenders in terms of a development objective mechanism, drafting of an affirmative SMME participation programme, promoting employment-intensive practices, affirming marginalised sectors of society in construction projects and the development of an affirmative procurement policy.

Other aspects which are dealt with, include inter alia international competition, stimulation of local economies, labour issues, guarantees and training. Emphasis is also laid upon the development of human resources.

The Green Paper, at this stage, contains proposals which should not be regarded as policy. The Green Paper is published for comments and the Ministries of Finance and Public Works welcome any comment, criticism or concern on the proposals made. The objective is to establish a public sector procurement system that will meet the

needs of the people of South Africa and will ensure development towards a better South Africa for all its citizens.

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## **1. INTRODUCTION**

### **1.1 Background**

The Government's aim is to transform the public procurement process in order to achieve its socio-economic objectives within the ambit of good governance.

The procurement system in South Africa needs to be changed in order to face the challenges presented by changes in both the local and international environments.

National, Provincial and Local government departments in South Africa have an enormous collective buying power. According to various analysts, the Total Consolidated General Government Procurement is estimated to amount to R56 billion for the 1995/96 financial year, at current prices.

This amount constitutes approximately 13% of Gross Domestic Product and represents some 30% of all government expenditure.

The estimated Consolidated General Government Procurement spending may be categorised as follows:

- Central Government R22 billion (39%)
- Provincial Government R25,5 billion (45%)
- Local Authorities R8,5 billion (16%)

Extra-budgetary institutions increase these amounts by a further R6 billion.

There are two components to this spending:

- Goods and services - which account for approximately R44 billion (79%)
- Capital assets - which account for an estimated R12 billion (21%)

Public sector procurement has a major impact on the South African macro economy, both in terms of consumption and investment spending. As such, public sector procurement can be used as a tool by government to achieve economic ideals, including certain socio-economic objectives. At the same time, an effective and efficient procurement system will permit government to deliver the quality and quantity of services demanded by its new constituency in accordance with Reconstruction and Development Programme principles and other policy objectives.



A fundamental requirement for any new procurement policy is that it should be in line with the national economic growth strategy with the acceptance that the country is now operating in a changed environment both locally and internationally.

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## **1.2 Procurement Reform**

The Ministry of Finance, in conjunction with the Ministry of Public Works , has drawn up this Green Paper on Procurement Reform to initiate the process of reform. The reformed procurement process needs to be responsive to the needs of government policy and needs to adopt best practices in all its activities.

This document makes a number of proposals for the reform of the procurement process. At the heart of these proposals are four key principles.

First it is a reality that previously the public tendering system favoured the established and larger businesses, and it was very difficult for any newcomer to enter into the public sector procurement system. The existence and importance of the small, medium and micro enterprises were ignored in the past. The Government realises the importance of this marginalised sector of the society and will use the procurement system to make the process easily accessible for the new and upcoming businesses and eliminate the injustices of the past. However, good value for money cannot and will not be negated. According to our Constitution, the procurement system must be fair, competitive, transparent and cost effective. Our Constitution also allows the implementation of categories of preference in the allocation of contracts, as well as the protection of advancement of persons, or categories of persons, disadvantaged by unfair discrimination. It is therefore clear that the advancement of marginalised sectors of society and achieving certain socio-economic objectives, can be included in the concept of whole life cost and value-for-money.

Secondly, one of the major objectives of the Government is to attain and maintain good governance. This includes good and sound financial control. With an estimated expenditure of approximately R56 billion on public sector procurement, good financial control is of the utmost importance. Decision making within national regulations and guidelines will be delegated to accounting officers who will be responsible and accountable for all procurement expenditure incurred within their line of responsibility.

Third, corruption will not be tolerated within the Government services and within the country as a whole. Within the public sector procurement system, emphasis will be placed upon measures to eliminate and counter any form of corruption.

Finally, any principal doing business with the public sector aims to make a profit. It cannot, under any circumstances, be justified that anyone doing business with the public sector should do so when he/she has not met his/her tax obligations. Contractors should at least have a status of "good standing" insofar as their tax and service charge obligations are concerned. This means that as part of financial control within public sector procurement, measures will be implemented to ensure that anyone doing business with an organ of State, has met his/her tax and service charge obligations.

In this Green Paper on Public Sector Procurement Reform, reform is dealt with under the following two headings, namely:

- Socio-economic objectives;
- Achieving good governance in procurement.

### **1.3 Vision**

To achieve the ideals of good governance and to address the changed environment, some fundamental institutional reform is necessary. There is a need to develop professionalism in departments by providing best practice guidance to enable departments to become more proficient in procurement and to provide organisational efficiency. To this end, the following issues are dealt with in the document:

- The need for value for money
- The need to eliminate corruption in Procurement Systems
- The need for contractors to have "good standing" insofar as their tax and service charge obligations are concerned
- Implementation of systems of control and accountability
- Uniformity in procedures, policies, documentation and contract options
- Effective monitoring and reporting

Institutional and economic reform lies at the root of the public procurement transformation process.

- Skills development of key procurement personnel
- Specific areas of procurement excellence such as Information Technology (IT)
- Value for money improvements
- Integrated procurement processes to focus on whole life costs and benefits
- Total Quality Management (TQM)
- Bench-marking procedures and performance to world class standards
- Networking of procurement departments (information sharing)

The implementation of the above will involve major cultural changes and considerable effort as is often necessary during a period of transition. The strategies and policies to be put in place should ensure that departments will be successful in managing this change and thereby develop the full potential that effective procurement can provide over the many areas of government activity.

The procurement system should become an instrument of government policy in the manner in which the public sector does business with the private sector.

There is in addition a challenge to stimulate economic growth by economically empowering previously marginalised sectors of our society. The Reconstruction and Development Programme's aims and ideals provide the ideological backdrop to proposals for transforming the process of public procurement.

### **1.4 Reform Objectives**

#### **1.4.1. Socio-economic objectives**

1. To seek value for money on behalf of all tax payers.
2. To eliminate corruption in the procurement process.
3. To make the public procurement process accessible to all by simplifying the process, and by encouraging fairness and transparency.
4. To encourage greater competition in the public procurement process through the creation of an enabling environment for small, medium and micro enterprises while retaining quality and standards.
5. To support participation of a broadened range of enterprises with appropriate inland revenue registration and acceptable labour practices in order to ensure sustainability.
6. To revise the concept of value-for-money in the procurement process in terms of the new objectives which are to be applied.
7. To set out targeting policies in order to create opportunities for the broadest possible participation in the public procurement process.
8. To increase the volume of work available to the poor and enhance the income generation of marginalised sectors of society.

#### **1.4.2. Good Governance**

1. To promote effective and efficient procurement practices and systems to enable government to timeously deliver the quantity and quality of services demanded by its constituents.
2. To achieve continuing improvement in value for money, based on whole life cost and quality.
3. To enhance the competitiveness of suppliers through the development of world class procurement systems and practices.
4. To ensure that control and accountability is maintained through comprehensive auditing.
5. To achieve a uniform procurement system with standardised tendering procedures, policies and contract documentation for implementation at national and regional level.
6. To ensure that public sector procurement complies with the provisions of the constitution.
7. To ensure consensus within government on the reform of the public procurement process, and to encourage the adoption of the reformed process by all public sector procurement agencies.

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## **2. ACHIEVING GOOD GOVERNANCE IN PROCUREMENT**

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In order to achieve the ideals of good governance and to address the changed environment, some fundamental institutional reform will have to be implemented; such reform needs to promote efficient and effective procurement systems and practices which enable government to deliver the required quality and quantity of service to its constituents.

The establishment of uniformity in procedures, policies, documentation and contract options and the implementation of sound systems of control and accountability need to form the cornerstone of institutional reform.

## 2.1. Objectives

1. To promote effective and efficient procurement practices and systems to enable government to timeously deliver the quantity and quality of services demanded by its constituents.
2. To achieve continuing improvement in value for money, based on whole life cost and quality.
3. To enhance the competitiveness of suppliers through the development of world class procurement systems and practices.
4. To ensure that control and accountability is maintained through comprehensive auditing .
5. To achieve a uniform procurement system with standardised tendering procedures, policies and contract documentation for implementation at national and regional level.
6. To ensure that public sector procurement complies with the provisions of the constitution.
7. To ensure consensus within government on the reform of the public procurement process, and to encourage the adoption of the reformed process by all public sector procurement agencies.

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## 2.2. MEETING THE CHALLENGES

### 2.2.1. Background

Government's overall strategy for procurement should be to achieve value for money and to develop world class procurement systems and practices.

The goal of continuous improvement in public sector procurement requires a clear lead and strong commitment through sound management practices. This, together with the basic values and principles governing public administration as enshrined in the constitution, provides a framework to develop sound organisational and

institutional arrangements that will result in a public procurement system which becomes more efficient and effective.

The function of government is to govern effectively by adopting best practice in all its activities, rather than to be reliant on consensus decisions, in order to ensure the long term success of its delivery programme. Clearly, the public must be encouraged to participate in policy making but thereafter the government must take responsibility and act in terms of its mandate.

From an international perspective, South Africa is now an acknowledged player in the global economy, although still recovering from the after effects of world isolation. To succeed, South African businesses need to be competitive in line with the rest of the world. In addition, the country is required to comply with international agreements, standards and procedures relating to procurement matters. International tendering will also require acceptable documentation and systems that are compatible world wide. Over and above this, the rules of accountability have taken on a double dimension with the trend towards international agreements laying down rules for public procurement: government officials may find themselves accountable for acts and omissions not only under their own national procurement regulations but also under international agreements guaranteeing fair and equal treatment of foreign participants in the procurement process.

Public procurement procedures in most countries are coming under international influence through the conditions attached by international funding agencies to procurement under their various loans and grants. Aid agencies generally reserve for themselves the right to review the procurement process for individual contracts as a condition for disbursement. Those same agencies are also paying more and more attention to public management in general. Watchwords such as 'governance' and 'implementation culture' have come to be associated with concern over the standard of public administration and with efforts to combat corruption.

Accordingly, the Government's overall strategy for procurement should be to achieve continuing improvement in value for money, based on whole life cost and quality, and to enhance the competitiveness of suppliers through the development of world class procurement systems and practices.

Success in the more open economic environment requires consistent and integrated policies.

World competitiveness nowadays depends as much on comparative advantage in the public policy area as it relies on technology, human resources and physical capital.

Government must play this clear policy co-ordination role.

### **2.2.2. Discussion**

Efficiency and effectiveness in public procurement is about setting new standards.

The quest for efficiency and effectiveness in public procurement is about setting new standards. An integrated approach of effective administration and the adoption of best practice principles form the underlying theme of good governance.

Organs of State should be best practice clients and intelligent customers. Amongst other things, they should be able to:

- Understand and clearly specify their requirements
- Choose between contract options
- Understand the supply market
- Identify and manage risk
- Manage changes to requirements
- Understand and apply the principles of targeted procurement
- Set and monitor targets in respect of development objectives
- Function in an ethical and transparent manner.

Important specific aspects involve the following:

*i. Training and skills development*

Little change will be achieved without adequate training. A structured programme to impart skills development and professionalism should therefore be introduced for those with procurement responsibilities.

Consultants specialising in the management of change processes should be appointed to advise certain organs of State on how to reshape their procurement organisation and processes. The intention is to use these organs of State as a pilot for others to adopt successful change programmes themselves.

Procurement staff will require a mix of three sorts of training, depending upon the degree to which they are involved in procurement.

- Basic procurement training
- Training in personal and general management skills
- More advanced training in specialist procurement skills

*ii. Partnering*

There should be a continuing emphasis on fair competition. However, it is acknowledged that competition must be coupled with constructive and co-operative relationships with suppliers. Accordingly, there is a great deal of current interest in partnering or partnership sourcing. The term refers to arrangements under which customers and suppliers decide to collaborate closely in order to deliver requirements such as cost reduction, improved quality or innovative solutions, rather than to conduct all their business at arms length.

*iii. Benchmarking*

Benchmarking is, increasingly, being recognised as a powerful tool to enhance performance, improve processes and act as a catalyst for change. Studies often reveal performance differences of several orders of magnitude which can be used to improve organisational efficiency in a motivating and rewarding manner. It can be used by organs of State, to compare their procurement processes and performance against the best there is to be found and to improve their own practices to match world class standards. As a result it aids and empowers employees to contribute to, and manage the change process with the added advantage of being able to constantly challenge the way things are done. However, best practice is not static and therefore development should be used as the basis for continuous improvement. Accordingly, benchmarking can play a significant role in strategy formulation, service delivery, process innovation and as a catalyst for change. In this way, departments can achieve a continuing, rather than static, programme of improvement.

#### *iv. Information-sharing and collaboration*

Collectively, procurement personnel in organs of State possess a great deal of knowledge and experience. Ensuring that this is fully shared within and between organs of State will be of major benefit to all. As few procurement problems are unique, solutions developed in isolation will, at best, involve duplication and, at worst, mean failure to secure the best available solution. Simple user-friendly information systems can be developed to facilitate active exchange of information.

#### *v. Co-operation with suppliers*

Relationships with suppliers should combine competition with co-operation. Government must attach the greatest importance to honesty, fairness and even-handedness in their relations with suppliers and to avoid conflicts of interest. To support ethical standards, the use of procurement procedures, which are proof against fraud and corruption should be of the highest importance. Tendering is burdensome, and costly for suppliers. Organs of State should seek to ease these burdens, in particular by avoiding lengthy and over-prescriptive specifications of requirements, by not asking suppliers to provide information unless it is absolutely necessary and, wherever justifiable, by inviting only a sufficient number of them to tender to provide genuine competition.

#### *vi. Change management*

Changes to requirements present a major management challenge. If poorly handled, they may lead to a significant increase in costs and a loss in quality of service. Where end-users put forward changes in requirements in the middle of a contract, the first task is to test carefully whether the new requirements are really necessary. They must understand clearly the cost and other implications of change. Organs of State should seek to establish relationships with suppliers in which both sides are willing to share the risks and potential benefits arising from changes and circumstances.

#### *vii. Constitutional Provisions*

A new procurement policy should comply and be consistent with the constitutional provisions. In this regard, the Constitution under the section on Procurement reinforces the principle of good governance and states: 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.

In addition, good governance is further reinforced under the section on public administration which emphasises the following principles:

- A high standard of professional ethics must be promoted and maintained
- Efficient, economic and effective use of resources must be promoted
- Public administration must be development oriented
- Services must be provided impartially, fairly, equitably and without bias
- Peoples' needs must be responded to, and the public must be encouraged to participate in policy-making
- Public administration must be accountable
- Transparency must be fostered by providing the public with timely, accessible and accurate information
- Good human-resource management and career-development practices to maximise human potential, must be cultivated
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation.

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Existing and future procurement procedures, including those relating to the purchase and sale of property, disposal of moveable assets and the procurement and sale of fixed assets needs to be reviewed to ensure compliance with the provision of the constitution.

#### *viii. Knowing the supply market*

Organs of State should not act in ways which damage competition, for instance by assisting the growth of monopolies or cartels. They should weigh the short term gain against the long term risk to both sides in situations where either party can become over dependent on the other. An active programme to encourage suppliers to enter new markets should be promoted.

Keeping the market informed about opportunities and briefing suppliers about procurement decisions can have a positive impact on future contracts. A good understanding of the supply market, can provide an opportunity to monitor and control quality.

The establishment of databases of suppliers, services providers and contractors, which cover the markets within which such firms are operating, will enable best practice choices to be made when procurement strategies are decided upon. This is particularly important when implementing socio-economic policies and developing partnerships with foreign firms.

#### *ix. Integrated Procurement*



The procurement process must be seen as an integrated whole in order to maximise the opportunities for improving quality and reducing whole life costs. Organs of State need to look at the procurement process, from the initial identification of requirements to the point at which the acquisition reaches the end of its life. The procurement process should be broken down into logical steps that can be followed successfully with a minimum of management intervention and duplication.

Goods not wholly consumed in the course of use will have to be disposed of when they are no longer needed. Some assets may have a residual or resale value; for others there may be a cost, including an environmental cost, in respect of their disposal. All these factors should be taken into account in an integrated procurement process.

The concept of 'Total Cost of Ownership' must be introduced and emphasized. This cost takes into account all the costs including acquisition, personnel training, operation, maintenance, modification and disposal. As such, 'Total Cost of Ownership' should be used as a tool for decision making. With some acquisitions, particularly, capital assets, the greater part of the whole life cost is inevitably incurred after purchase. Procurement decision making must shift from 'Price Focus' to 'Total Cost Focus'.

#### *x. Purchasing Management*

Efficient performance of the purchasing management function can be of considerable benefit to the State by ensuring that the correct goods of the appropriate quality are purchased and received in the correct quantities, at the right time and at the right price. To ensure that the purchasing management function is effectively carried out, it has to be well managed, just like all the other management functions of good governance.

Purchasing management comprises the planning, organisation and co-ordination, as well as the direction and monitoring, of all the activities that are bound up with the procurement of goods. The most important purchasing management activities that have to be performed are:

- the selection of appropriate goods
- the determination of appropriate quality
- the determination of the quantities to be purchased
- inventory control
- the selection of the supplier
- the determination of purchase prices
- the timing of purchase delivery

Efficient purchasing ensures that 'out of stock' situations do not arise, that State finances are not unnecessarily tied up in large inventories, that the minimum amount of stock is written off or cleared and that good relations are maintained with suppliers. Careful management of this function makes it possible to obtain an optimum combination of price, quality, time, place and quantity.

High inventory levels can lead to additional costs and risks including those associated with storage. It is essential for procurement departments to establish optimum bin

levels. This can be achieved by utilising effective purchasing systems which embrace appropriate control systems.

#### *xi. Corruption*

Corruption is morally and economically damaging. It jeopardises the procurement process, is always unfair, and often criminal. It saps money from much needed development projects, and adversely affects their quality. Corruption, apart from permitting wasteful procurement to occur, undermines values of society, breeds cynicism and demeans the individuals involved. Accordingly, there should be continuing vigilance in the procurement system to prevent and to react to the blight of corruption.

In particular, strong action will be taken against practices such as ringforming, fronting, tax evasion, and fraudulent preference claims. Organs of State should either impose sanctions on contractors in the form of penalties or cancellation of contracts, or recover all costs, losses or damages incurred or sustained. Good financial control is dependent upon an honest and competent Public Service. Accordingly, accounting officers must be responsible and accountable for all expenditures incurred and strong action should be taken against civil servants who misuse their authority and are involved in corrupt practices.

#### *xii. Tax Morality*

A culture of tax morality needs to be developed amongst suppliers, service providers and contractors. All businesses have various tax, levy and service charge obligations; some meet these, others don't. Those businesses that fail to meet all these obligations, apart from denying organs of State revenue, have unfair competitive advantages over their competitors. This situation is unacceptable. It is imperative that measures be put in place to ensure that those who are participating in public sector procurement have "good standing" insofar as their tax and service charge obligations are concerned.

The reformed Procurement system should ensure that all suppliers, service providers and contractors declare in their tender submissions that they have fulfilled all their tax, service charge and levy obligations, or that arrangements have been made with the South Africa Revenue Service or relevant authorities to fulfill these obligations. Should it be found that the declaration is false, organs of State should, in addition to any other remedy they may have;

- cancel the contract and claim any damages which they may suffer by having to make less favourable arrangements after such cancellation; or
- impose severe penalties.

Information supplied in Tender documents should be disclosed to the South Africa Revenue Service or any other statutory body collecting taxes. Arrangements must be made with the South Africa Revenue Service to implement the necessary control measures.

#### *xiii. Labour Practices*

All suppliers, service providers and contractors are compelled by law to comply with provisions of various pieces of legislation, such as the Labour Relations Act; the Workmen's Compensation Act; Unemployment Insurance Fund and Occupational Health and Safety Act. There is, however, a need to promote better practices in respect of human resource development, employment equity, health and safety, and conditions of employment amongst suppliers, service providers and contractors. Various studies have argued that there is a dividend in respect of productivity and efficiency associated with good employment practices. Those businesses who do not adhere to their labour obligations, apart from exploiting their employees, have unfair competitive advantages over their competitors. This situation is unacceptable. Measures need to be put in place to ensure that those who are participating in public sector procurement adhere to labour standards. Best employment practices need to be promoted and recognised.

### **2.2.3. Principles and proposals**

The strategy for procurement should be to achieve continuing improvement in value for money based on whole life cost and quality and to enhance the competitiveness of suppliers, through the development of world class professional procurement systems and practices. Within this strategy organs of State for their part, should do their best in all dealings with suppliers and potential suppliers:

- to preserve the highest standards of honesty, integrity, impartiality and objectivity;
- to be fair, efficient, firm and courteous;
- to achieve the highest professional standards in the award of contracts, so as to maximise value for money while conforming to international obligations;
- to provide clear specifications of requirements which encourage innovation and refer, where appropriate, to relevant technical and other standards;
- to make available as much information as suppliers need to respond to the tendering process, and to define and publicise procurement contact points;
- to manage the tendering process so as to avoid / minimise the burdens on suppliers, while preserving genuine competition and avoiding discrimination;
- to make available the broad criteria intended for the evaluation of tenders, to evaluate tenders objectively, and to notify the outcome promptly;
- within the bounds of commercial confidentiality, to debrief winners and losers on the outcome of the tendering process, so as to facilitate better performance on future occasions;
- to achieve the highest professional standards in the management of contracts;
- to pay promptly for work done in accordance with contracts made; and
- to respond promptly, courteously and efficiently to suggestions, enquiries and complaints.

Organs of State should look to suppliers, service providers and contractors in turn to observe similar standards of integrity, professionalism, co-operation, courtesy, competence and efficiency without compromising labour standards. Furthermore, such enterprises should be required to demonstrate "good standing" as far as all their tax, levy and service charge obligations are concerned as a prerequisite to doing business with organs of State. Failure to meet such obligations should be sufficient grounds for exclusion from participation in public sector procurement. All

procurement data bases reflecting contracting activities should be made accessible to officials of the Receiver of Revenue.

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## **2.3. UNIFORMITY IN TENDER PROCEDURES, POLICIES AND CONTROL MEASURES**

### **2.3.1 Description**

*Tender Boards in South Africa have the power to conclude agreements, invite offers, determine the manner in which, and the conditions under which, offers must be made; and to amend or cancel the concluded agreements.*

*Organs of the State may only procure goods and services under delegated authority from these Boards.*

*Internationally, departments are responsible for their own procurement and Tender Boards, if present, perform an advisory and policy role without being directly involved in the award of tenders.*

The present procurement system is maintained through a formal tendering system. Contracts are awarded by tender boards comprising government officials and non-government persons which are presently established in terms of National and Provincial Acts. The State Tender Board for example, enjoys certain powers in terms of the State Tender Board Act, including the power to conclude agreements, invite offers, determine the manner in which, and the conditions under which offers must be made, to inspect and test supplies and services offered and to amend or cancel the concluded agreements. The responsibility to appoint members to the State Tender Board rests with the Minister of Finance.

The establishment and purpose of Tender Boards is traditionally seen as an effort to ensure sound decision making in a fair and evenhanded manner and as a means to ensure that fraudulent practices are minimised. Their prime function should be the overseeing of procurement in order to ensure that the procurement of goods, services and works is conducted in a fair, equitable and transparent manner in accordance with the prevailing legislation and within the parameters of government policy. Tender Boards are, as such, concerned with the handling of tenders whereas consumer departments are concerned with the administration of contracts which have been awarded.

As the law stands at present, the State Tender Board Act does not supersede the Provincial Tender Board Acts. Provincial Tender Boards have the authority to determine their own conditions under which offers are to be made. It is therefore inevitable that this results in different tendering cultures occurring throughout the country and different interpretations of what constitutes procurement reform, affirmative action, stimulation of local economies and the like. Co-ordination is difficult in these circumstances, particularly in so far as uniformity in approach and avoidance of duplication of effort is concerned.

It is impractical for Tender Boards to deal with all procurement matters pertaining to goods, services and works falling under their jurisdiction. Accordingly, Tender Boards frequently delegate authority to consumer departments or local authorities should these entities have systems in place to effectively manage and control procurement activities. Delegation eases the work load on Tender Boards and in effect streamlines the procurement process.

National and Regional Tender Boards, particularly those which are comprised of both government officials and non-government persons, are seldom encountered in Public Sector Procurement in other countries.

For example, the award of contracts in the United Kingdom, is the responsibility of the department concerned. There is no system of referring tenders to tender boards; contracting agencies are free to set up internal committees for the evaluation of tenders. In France, tender boards play more of an advisory and policy role and have little power to review individual contracts. Many of the former British colonies permit departments to award tenders up to a certain threshold and have either permanent tender boards or ad hoc arrangements to deal with the award of large contracts.

Internationally, there are also different approaches to the regulation of procurement. In Anglophone Africa, which is reflective of British administrative practice, government procurement regulations often form part of the financial regulations. As a consequence, procurement procedures are enforced upon ministries, departments and other government agencies as part of a broader set of financial instructions. In Francophone Africa, which is reflective of French administration, procurement regulations are detailed and inclined towards central control by trying to integrate the regulations on public procurement in one legislative structure, normally consisting of a public procurement code, accompanied by standard general conditions for contracts of different kinds. The entities subject to public procurement regulations may not only be government departments but also decentralised collective entities, public entities, majority state owned enterprises and corporate bodies to the extent that they use public funds.

It is acknowledged that the present system of procurement through Tender Boards in South Africa is often cumbersome and unwieldy and in some instances results in delays of functional services being performed by organs of State.

### **2.3.2 Vision**

To have uniformity in tender procedures and control measures to ensure that procurement is efficiently, and effectively, utilised as an instrument of government policy throughout South Africa in a transparent, fair, equitable, competitive and cost effective manner.

#### **2.3.3. Secondary vision**

- To encourage the uniform implementation of procurement policy at national, provincial and local levels.
- To ensure that procurement procedures are simple, cost effective, inexpensive, quick, transparent and free of corruption.
- To simplify tender procedures and make them more efficient.

- To have a system of procurement which is uniformly applied by all organs of State, including parastatals.
- To utilise procurement as an instrument of government policy.

#### **2.3.4. Constraints**

*The new Constitution requires that procurement must be in accordance with a system which is fair, equitable, transparent, competitive and cost effective.*

Current constraints to the attainment of the vision include:

- There is a lack of clear, concise policy regarding procurement reform objectives.
- Existing Tender Boards do not necessarily have the capacity and expertise to effectively implement procurement reform.
- There are currently 10 autonomous Tender Boards at national and provincial levels in South Africa.
- Parastatal procurement falls outside the jurisdiction of the State and Provincial Tender Boards.
- Accounting officers, who are held accountable for all expenditures within their own departments, are required to have procurement dealt with by Tender Boards without necessarily being represented on such boards.

#### **2.3.5. Discussion**

##### ***i. Systems of control and accountability***

The starting point for any discussion about public procurement organisation must be the systems of control and accountability applied to public sector expenditure. The crucial issue is the interaction between user departments, on the one hand, and organs in charge of control, on the other hand.

The continued role and functions of tender boards needs to be critically re-examined in view of South Africa's developmental objectives together with its programme to urgently deliver without undue delays. In addition, Clause 217(1) of the Constitution reads as follows "217.(1) when an organ of State in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective".

In this regard, the following control measures are currently in place:

- The accounting officers of departments are responsible for all expenditures incurred within their respective departments and they are accountable to their respective parliaments in this respect.
- The various departments already have or are in the process of establishing their own auditing systems. In some departments these system are already in operation.
- The Auditor-General audits the expenditures of all departments and reports his findings to the respective parliaments. Accounting officers are compelled to respond to such reports.

- Clause 216 of the new Constitution permits the national treasury to prescribe measures to ensure, inter alia, expenditure control in each sphere of government.
- The Office of the Public Protector is available to investigate procurement irregularities.

With all the abovementioned control measures in place and given that the Government's current policy is to devolve more managerial responsibility to heads of departments, the following two questions arise:

- Are tender boards still needed as a further controlling measure?
- Should organs of State be entrusted with the awarding of contracts?

Clause 217 of the Constitution also raises another fundamental question: should parastatals be subject to public sector procurement regulations and the like?

#### *ii. Linkages between National and Provincial Procurement policies*

Decisions taken by one Tender Board can impact negatively on, and set poor precedents for other Tender Boards.

Decisions taken by one Provincial Tender Board in the best interests of a province can have negative impacts on neighbouring provinces. A good example of this has been some recent decisions taken in respect of stimulating local economies. Preferences for local content in some provinces have led to market distortions as such preferences have inflated local prices and caused local products to be dumped at lower prices in neighbouring provinces.

Decisions by Tender Boards have in some instances set poor precedents for others, particularly in the areas where emerging enterprises are seeking to engage in public sector procurement. This raises unrealistic expectations which are often not sustainable and causes delays in the procurement activities of National Departments who are subject to the State Tender Board procedures and are often not in a position to adapt their contract strategies to fall in line with local precedents. The converse is also true. Much confusion exists within the business environment, particularly in the case of national enterprises who have to develop different strategies (which may be in conflict with each other), in order to secure contracts in different parts of the country.

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The Constitution recognises the aforementioned difficulties associated with fragmented policies relating to developmental objectives. In this regard, clause 217(2) makes provision for organs of State and institutions identified in national legislation to implement a procurement policy which makes provision for "categories of preference in the allocation of contracts" and "the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination". Clause 217(3), however, requires that "National legislation must prescribe a framework" within which such policies may be implemented.

To achieve uniformity in National and Provincial Procurement laws, National Government should first develop clear, concise policy statements regarding its procurement reform objectives. Such policy should clearly state the Government's affirmative action and anti-discrimination objectives. Empowerment cannot be achieved outside the mutuality of these provisions. A framework for the dissemination and evaluation of these policies should be put into place to enlighten Local, Provincial and National leadership. It should consider stating - through appropriate legislative enactment - its minimum threshold expectation of Provinces in respect of participation goals, job creation goals, affirmative action goals, etc., and the establishment of conditions for appropriation of national monies to Provinces.

The introduction of targeted procurement as envisaged in Chapter 3 in order to affirm the reconstruction and development programme requires that value for money, in so far as the development component is concerned, needs to be monitored and measured as well as the attainment of the objectives themselves. Affirmative action policy and its impact on society needs to be researched, developed, co-ordinated and facilitated through a National Commission on Affirmative Action, comprising representatives of various Ministries, Provincial and Local Government appointees, parastatals, non-governmental organisations and private sector bodies, rather than by a collection of Tender Boards having a narrow focus solely on procurement related issues.

Central government should also consider the aggressive imposition of sanctions on violators of any National or Provincial procurement law, such that no contract involving allocations of national monies can be awarded by an organ of State or institution identified in national legislation to any contractor who has been sanctioned or prohibited from participating in national procurement processes. Such a sanction will deter fraudulent representation regarding issues such as equity ownership, management and the attainment of development objectives.

The State should further establish creative incentives to encourage provinces to implement threshold national reforms. This can, to some extent, be achieved by making major grants available to national, provincial and local bodies subject to such funds being used to further specific socio-economic objectives within well defined economically disadvantaged communities.

### *iii. The case for central tendering*

Central tendering has, in the past, proved to be cost effective.

With regard to general period contracts which are contracts arranged on behalf of more than one department for the supply of universal goods and services, the principle of central tendering is advocated. Quantities are generally unknown and the purpose of these contracts is to obtain the best unit prices for the various commodities or services. Central government departments and provincial departments participating in these contracts, are compelled to purchase their specific requirements from the successful tenderers at the contractual prices. As these contracts, in many instances, have resulted in enormous savings for the government in the past and in all likelihood will continue to do so in the future, it is suggested that the offices of the State and Provincial Tender Board continue with these contracts. This action will have minimal effect on the functionality of the different



departments as they are only compelled to order from contractors when they are in need of the specific commodity and/or service.

*iv. The case for a Procurement Compliance Office*

Given that :

- there are Treasury control measures which are in place;
- it is not a specified requirement of the Constitution that Tender Boards be established;
- it is Government's stated policy to devolve more managerial responsibility to departments;
- the Constitution requires national legislation to prescribe a framework within which policies relating to preferences and the advancement of persons or categories of persons disadvantaged by unfair discrimination, are to be implemented;
- national data bases will have to be established to facilitate many aspects of procurement reform.
- co-ordination and uniformity in application of policies is extremely difficult, if not impossible, between ten autonomous Tender Boards;

The reconstitution of the offices of the national and provincial Tender Boards, the disbanding of the Tender Boards, the establishment of a National Procurement Compliance Office and a national legislative framework is advocated.

It is submitted that the continuation of the system of national and provincial tender boards would not best serve the country's procurement needs in the light of the changed environment and is not an appropriate mechanism to affirm the Reconstruction and Development Programme through the procurement system.

What is required is a system which permits consumer organs of State to procure goods, services and works within a national legislative framework and Treasury regulations, retains the services of the existing offices (as opposed to Boards themselves) of the various Tender Boards for general period contracts and certain ad hoc contracts and has a nationally based mechanism for directing procurement policy and ensuring compliance with policy directives and legislation. Such a system would be driven by two independent arms; procurement offices/centres being the one arm, and an office of procurement compliance, the other. The procurement offices/centres would be responsible for the day to day procurement activities i.e. inviting tenders, adjudicating tenders, inspecting and testing of supplies and services offered and the awarding of tenders, in terms of a national legislative procurement framework and the systems of procurement established by the accounting officer responsible for procurement of relevant organs of State.

The Procurement Compliance Office, which would be nationally based, would on the other hand:

- formulate and advise on policy
- administer national procurement legislation
- audit the performance of Procurement Offices and Centres
- serve as a linkage between central government, national treasury and the different procurement offices/centres located in organs of State.

- issue instructions to ensure uniform application of the national procurement policy.
- promote communications and liaison between different procurement offices / centres.
- investigate any complaints received from the public regarding tender procedures and any irregularities.
- assist procurement offices / centres in executing the national procurement policy and sanction those who are not adhering to or implementing such policy.
- monitor the manner in which policy is implemented in respect of development objectives, the manner in which targets are set and attained, value for money obtained, delivery mechanisms employed, etc.

### **2.3.6. Linkages between Accounting Officers and the Procurement Compliance Office**

Accounting Officers of the different Organs of State should be fully responsible and accountable for any expenditures regarding procurement within their line of responsibility. Any expenditures incurred in this regard should be subject to appropriate regulations and directives. However, to ensure uniformity within the procurement system, national directives issued by the Procurement Compliance Office should apply. The Procurement Compliance Office must endeavour to monitor all public sector procurement and should assist any Accounting Officer in rectifying any deviations from the national directives should such deviations occur.

### **2.3.7. Principles and proposals**

A national legislative framework is needed to establish uniformity in tender procedures, policies and control measures

A National Procurement Framework needs to be drafted and promulgated to set out uniform tender procedures, policies and control measures as well as preferences and policies with respect to the advancement / protection of persons or categories of persons disadvantaged by unfair discrimination. Such legislation should also include mechanisms for implementing new and reformed policies. Tender Board Acts need to be repealed and a national Procurement Compliance Office needs to be established. The State and Provincial Tender Boards should be disbanded.

The office of the State Tender Board and the offices of the Provincial Tender Board should be reconstituted as Procurement Offices serving either national, provincial or local organs of State, as appropriate. These offices should be responsible for administering ad hoc contracts, where consumer organs of State choose not to procure goods, services or works to supply their internal needs, and central tendering (general period contracts).

Consumer organs of State (national, provincial and local) should be permitted to procure goods, services and works should they so desire; except those falling under the jurisdiction of the Procurement Offices or those in terms of Treasury instructions which are regarded as being the functional responsibility of another department to provide. Accounting officers who are responsible for Procurement Offices and Procurement Centres should procure goods, services and works, as relevant, in accordance with any system which they may devise provided that such a system

complies with the National Procurement Framework. They should, as such, be responsible for developing clear procurement strategies, good management systems and staff training and development strategies.

Consumer organs of State which engage in procurement activities (Procurement Centres) as well as all Procurement Offices should submit regular reports on their activities to the Procurement Compliance Office and should be subject to regular inspections and ongoing monitoring by that office. Annual reports should inter alia, set out milestones achieved in respect of targeted procurement goals, time frames for increasing goals, changes in the ownership profiles of prime contractors/service providers and the degree to which RDP related objectives have been met.

The national Procurement Compliance Office should ensure that centres comply with national legislation, co-ordinate the implementation of new and reformed policies, monitor progress made in the implementation of reform measures and attend to complaints received from the public.

Entities which should be subject to national procurement legislation should include not only all organs of State, but also certain parastatals, particularly state majority owned enterprises.

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## **2.4. UNIFORMITY IN CONTRACT DOCUMENTATION AND CONTRACT OPTIONS**

### **2.4.1 Description**

Tender Boards have not played a role in establishing uniformity in contract documentation and contract options.

Tender documents define the rights, risks and obligations of the parties to be involved in a contract and define the nature, quantity and quality of the goods, services or works to be provided in the performance of the contract. Accordingly, such documentation should be legally and technically correct and assign risk in an appropriate manner.

Typically, tender documents comprise core documents which set out conditions of tender; conditions of contract; specifications; data sheets / drawings; and the tender itself. Contract documents contain certain additional documents, including the contract agreement.

Tender Boards in South Africa are generally concerned with the processing of tenders, the delegation of authority and in ensuring that contracts are awarded in an equitable, transparent and public manner. Historically, Tender Boards have not played a proactive role in tender documentation and have generally only examined aspects such as conditions of tender and conditions of contract. As Tender Boards do not usually have the expertise to scrutinise these documents, changes or new forms of contract are accepted if they have been favourably received by State or Provincial legal advisers.

As a result, there is little uniformity in contract documentation and delivery systems. Each organ of State may use its preferred conditions of contract, subject to this being acceptable to the relevant Tender Board, draft their own specifications, and format their documents in the style of their own choosing. In works contracts, the tendency is to follow the recommendations laid down by professional associations and learned societies and to utilise standard industry documents and systems. This has also not resulted in the standardisation of documentation, as groupings within these bodies and organs of State have for various reasons retained older forms of contracts, opted for hybridised documentation or developed parallel documents. Furthermore, various groupings have developed or supported different sets of documentation. The division of the construction industry into building and civil engineering components has further complicated the issue.

Reconstruction and Development principles and recent government socio-economic policy objectives have demanded that contract documentation and contract options be revisited to accommodate emerging enterprises and marginalised sectors of society and attain certain socio-economic objectives. This has led to a largely fragmented proliferation of new documentation.

There is also a need, following the lead of countries such as the United Kingdom, to revisit delivery systems and forms of contract to improve sector efficiency and effectiveness and to achieve good governance.

#### **2.4.2 Vision**

To have uniformity in contract documentation and contract options in order to meet the Reconstruction and Development principles and socio-economic objectives, effect economies in procurement and enable consumer organs of State to be best practice clients.

#### **2.4.3. Secondary visions**

- To simplify the documentation process
- To enable tenderers to more accurately price the risks which they are to assume.
- To increase the effectiveness and efficiency of public sector procurement.

#### **2.4.4. Constraints**

Organs of State are free to utilise the documentation of their choice, subject to it being legally and technically correct.

The lack of appropriate regulations and the absence of co-ordination of contract documentation and contract options are the major obstacles to the attainment of the vision.

#### **2.4.5. Discussion**

Different organs of State use different conditions of contract. Some utilise in-house conditions of contract, others, particularly in respect of works contracts, use industry based conditions. In some instances, extensive special conditions of contract have

transformed standard, industry-based contracts into in-house ones, as the amendments are of such a nature that they change the very structure of the documents. The South African Federation of Civil Engineering Contractors reports that their members are currently faced with approximately 25 different conditions of contract when dealing with public and private sector procurement agencies in South Africa.

Insofar as specifications are concerned, the South African Bureau of Standards (SABS), a statutory body which was established by the Standards Act of 1945, has published approximately 3 500 national standards. Over and above the development of national standards, the SABS also provides its expertise for the development of co-ordinating (CKS) specifications in order to standardise and co-ordinate the bulk purchases of government and semi-government bodies. CKS specifications are used where no national standards are available. Organs of State, particularly in the case of works contracts, frequently draft their own standards to cover situations which are either not covered by SABS specifications, or where the existing SABS specifications for various reasons, do not cover the subject to their satisfaction.

Frequently those responsible for preparing tender documents have randomly mixed conditions of tenders, conditions of contract, specifications, and measurement and payment terms. This has resulted in documentation being complex and ambiguous and in the allocation of ill-defined and unacceptable risks to contractors.

Uniformity in tender and contract documentation will promote:

- effective participation by new entrants/ emerging enterprises to the business environment.
- cost effectiveness, both in financial and human resource terms.
- understanding and interpretation by new entrants / emerging contractors.
- the simplification of the documentation process

Uniformity in contract documentation will result in:

- tenderers being able to more easily determine the scope and extent of risk.
- the management of a contract becoming routine and administration procedures becoming mechanised.
- savings in cost and improvement in quality.

For uniformity to be effective, it should be implemented by all organs of State, parastatals and the private sector.

#### *i. The generic categorisation of contracts*

In South Africa, Tender Boards have broadly grouped "goods and services" into a single condition of contract and separated "works" from "goods and services". The ST 36 General Conditions and Procedures, as a result, covers supply only, supply and install and design and fabricate/make up in a single, all encompassing document. As a result, the document is not focused and is confusing to certain sectors of industry. The generic categorisation of contracts would enable a family of focused conditions of contract to be drafted and, particularly in the case of works contracts, uniform delivery options to be formulated.

Contracts could be categorised as follows:

<b>goods:</b> being the supply of raw materials or commodities made available for general sale.	<b>services:</b> being the provision of labour and/or knowledge based expertise.	<b>engineering &amp; construction works:</b> being the provision of a combination of goods and services, including building and engineering infrastructure, arranged for the development and provision of an asset or refurbishment of an existing asset.
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Some activities will, unavoidably, fall between the abovementioned categories. In such circumstances, such activities should be categorised on the basis of where the greater proportion of sub-activities lie.

*The generic categorisation of contracts will enable the contracting environment to be rationalised, simplified and regulated.*

The abovementioned categories of contracts can be further divided into sub-categories. This will enable the contracting environment to be rationalised, simplified and regulated. It would, furthermore, facilitate the implementation of targeted procurement and in some instances training, the development of enterprises and the delegation of authority.

Goods contracts could, for example, be further categorised on the basis of whether or not they have foreign components or are likely to have foreign components. Services could be subdivided into professional services, management services, development support services and general services. Engineering and construction works contracts, could be classified on the basis of factors such as size, complexity, novelty / innovation, intensity (speed of design and construction), physical location, likelihood of variations in scope, quality of the completed work and responsibilities i.e. risk factors. Construction is, however, the synthesis of four functional activities, namely, construction management, materials management, materials supply and physical work (labour, plant and equipment). Accordingly, contracts can be further categorised on the basis of who the contracting parties are, and the functional activities performed by such parties. This latter categorisation is particularly relevant to the engagement and development of emerging contractors in public sector procurement activities.

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*ii. Alternative delivery and contract options in engineering and construction works contracts*

A wide range of strategies for public sector engagement in the provision of services is available. An organ of State may use a variety of options to improve a service being rendered or to engage the private sector for the delivery of services. Organs of State may procure the resources of private sector companies in service delivery through service contracts, management contracts, the renting of assets and investment linked contracts. In each of these options the responsibility of the organ of State diminishes; in service contracts responsibility for the operation and maintenance of the service is retained; in management contracts most of the responsibilities are retained, in the renting of assets ownership is retained and in investment linked contracts (or concessions) responsibilities are deferred for a period of time.

A wide variety of strategies are available for the procurement of assets, some of which include Design and Build; Develop and Construct; Traditional Pre-planned; Management Contract (i.e. contracts are between the management contractor and the trade contractors); Construction Management (contracts are between an organ of State and the trade contractors); and Investment-linked (also known as Build, Own, Transfer; Build, Own, Operate; Build, Own, Operate, Transfer).

International studies have shown that the optimum contract strategy can influence the overall project cost by between 10 and 15%.

Payment terms to allow for major risk allocation between parties include, lump sum contracts; remeasurable contracts; target type contracts which facilitate modern partnering strategies; and cost reimbursable contracts.

Apart from the abovementioned delivery systems, a range of contracting models has also been developed to facilitate the participation of emerging contractors and the development of new businesses owned by previously disadvantaged individuals; other models have been developed to engage local resources and to generate jobs through the substitution of people for machines. South Africans have been very innovative and creative in these areas.

*There is a need to have uniform construction standards.*

The importance of uniformity in approach and standardisation of contract documentation in the development and implementation of the abovementioned delivery systems cannot be overstated. There is a desperate need to co-ordinate initiatives, avoid duplication of effort (and fruitless expenditure), and disseminate these new methodologies to all organs of State. Organs of State should become best practice clients.

### *iii. Construction Standards*

The National Building Regulations contain functional regulations which set out the requirements for the performance of a building, or element thereof, without specifying the materials, dimensions or methods of construction. Rules have been formulated to facilitate the design of traditional forms of construction. Compliance with these rules is deemed-to-satisfy the regulations. No deemed-to-satisfy construction rules are, however, provided; the regulations merely require that *"all workmanship in the erection of any building shall be in accordance with sound*

*building practice".* As a result there is no standardisation of construction practices and differences of opinion exist as to what constitutes good practice.

When the National Home Builders Registration Council's (NHBRC) Standards and Guidelines committee was developing construction rules for the recently launched home builder's warranty scheme, they found that none of the current building industry specifications adequately covered house construction. As a result, they were obliged to draft construction standards to minimise the NHBRC's risk exposure. These standards would have been better located in national building regulations or a national standard.

The SABS has been effective in introducing standardisation in the area of materials specifications and to some extent, due to an industry based initiative, in civil engineering construction standards. There is considerable scope for achieving a higher degree of standardisation in the civil engineering industry, to introduce standardisation in the building industry and to achieve national standardisation covering both industries. Currently methods of measurement are incorporated in civil engineering construction standards and this presents a barrier to the standardisation of specifications. There are many examples of a lack of standardisation in specifications which could be common to the two industries.

Standardisation of construction standards will not only contribute to quality, cost effective products and savings in construction costs, but will also enable new entrants / emerging contractors to learn what is required of them in a consistent and systematic manner. The quality of training will also improve as trainers will know what standards are applicable, and what trainees are required to produce.

#### *iv. Documentation for emerging contractors*

It is highly desirable that contract documentation be appropriate to facilitate the development of emerging contractors and manufacturers into the mainstream of the economy. In recent years, much documentation has been produced, the quality of which has been extremely variable.

The writing of abridged contract documentation should be avoided as the adequacy of such documents is questionable; they are unfamiliar to officials and professionals; emerging contractors will not be afforded the opportunity of becoming familiar with industry standards and may as a result be precluded from tendering for work outside of development programmes; and such documents may not handle the rights, risks and obligations of all parties in an equitable manner.

Construction contract documentation should be drafted in such a way that it caters for a "hierarchy" of projects in terms of complexity. Moving towards this system will greatly enhance the confidence, capacity and capabilities of the emerging entrepreneur. In addition it could save the client / client's agent time and money if an appropriate document is available, which contains only what is necessary.

#### *v. The role of a national Procurement Compliance Office*

Uniformity in contract documentation and contract options in the public sector has not to date been achieved in South Africa for a number of reasons, despite there



having been many initiatives to do so. The reason for this is the manner in which procurement is regulated. Currently, South African procurement is framed around financial instructions following British colonial administrative practice. In countries which are influenced by the French system of procurement, uniformity is achieved because documentation is a subject of the procurement framework and regulations and expenditure of public funds is conditional upon the use of prescribed documentation. For example, it is mandatory in projects which are funded by the European Union in South Africa to make use of the European Union's conditions of contract.

In France, the Tender Board is concerned with the detail of contract documentation and not the award of individual contracts. The role of the French National Tender Board is that of preparing, publishing, interpreting and promoting regulations and standard documents for public procurement.

The French National Tender Board has four sections consisting of collegial bodies of experts under the chairmanship of high-ranking officials, namely:

- **The Administrative Section**, responsible for regulations and documentation;
- **The Economic Section**, responsible for studies on the impact of public procurement on the overall economy;

*Regulation will result in uniformity of contract documentation and the approach to procurement.*

- **The Technical Section**, responsible for standard technical specifications and similar documents designed to rationalise procurement; and
- **The Price Section**, which formulates opinions on prices and studies price adjustment formulae.

The French system is, accordingly, highly regulated and prescriptive insofar as contract documentation is concerned and ensures uniformity in contract documentation and a structured approach to procurement.

The South African Bureau of Standards has not been entirely successful in achieving standardisation, particularly in respect of the construction and allied industries. Two notable examples are the absence of construction standards in the building industry and the lack of materials specifications for water supply plumbing components. The reason for this is that the SABS does not conduct the necessary research and development required to formulate standards. Such research and development work needs to have been undertaken by other organisations or private industry. Frequently the research work is undertaken on a voluntary basis by learned societies or professional associations and invariably, the technical committee members are not remunerated for their time. As a result, the process is drawn out and it may take several years to finalise documents. Clearly this situation is not conducive to standardisation in public sector procurement.

*A national Procurement Compliance Office can regulate contract documentation and contract options.*

It is submitted that the National Procurement Framework which is proposed to achieve uniformity in tender procedures, policies and control measures should be extended to regulate contract documentation and contract options and that a Procurement Compliance Office could play a leading role in regulating such matters by:

- prescribing standard sets of documentation in respect of each generic category and sub-category of contracts, which may be used by all organs of State.
- updating and amending such standard documents from time to time.
- co-ordinating the drafting of new contract documentation.
- identifying deficiencies in documentation and the need for further development of documentation
- funding and directing the research and development required to facilitate the preparation of national standards.

The Procurement Compliance Office could appoint collegial bodies of experts as is done in France to oversee and advise on these activities. Such bodies can also take responsibility for the development of human resource specifications and the like. This arrangement would enable uniformity to be achieved in the most cost effective manner and would eliminate duplication of effort.

#### **2.4.6. Principles and Proposals**

- There should be complete separation in contract documentation between conditions of tender, conditions of contract specifications and terms of payment (including methods of measurement).
- A generic categorisation of contracts should be developed in order to regulate and administer Public Sector Procurement activity in a uniform manner.
- A national standards body should publish and distribute both human resource and technical specifications.
- Standard conditions of contract, based on the generic categorisation and classification of contracts, should be used by all organs of State with minimal project specific amendments.
- Government should play a leading role in the standardisation of contract documentation and contract options and set an example in this regard for the private sector.
- Construction standards common to all disciplines should be developed for engineering and construction works contracts.
- Engineering and construction works contracts should be drafted in such a way that they cater for a "hierarchy" of projects in terms of complexity and needs.

The legislative framework which is proposed to achieve uniformity in tender procedures, policies and control measures should be extended to regulate contract documentation and contract options. The national Procurement Compliance Office should prescribe standard sets of documentation which may be used by organs of State, update documentation, co-ordinate the drafting of new documentation and fund and direct any research and development required to develop documentation. Parastatals, particularly those that are state majority owned, should be subject to these regulations as set out in National Procurement Legislation.

Aid agencies should be informed of the benefits of using the standard documentation, particularly, those pertaining to socio-economic objectives, and be dissuaded from introducing their own documentation.

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## **2.5. ESTABLISHING A PROCUREMENT COMPLIANCE OFFICE**

### **The function of a Procurement Compliance Office**

*A national Procurement Compliance Office should manage procurement reform, oversee the way in which the State does business with the private sector and maintain the procurement system.*

The establishment of a national Procurement Compliance Office is the proposed institutional means of implementing procurement reform in terms of a National Procurement Framework, overseeing the manner in which the State does business with the private sector, and maintaining the public procurement system in South Africa. This office would not have the power to conclude agreements, invite offers, cancel agreements and the like as current Tender Boards enjoy, as such powers will be vested in the offices (as opposed to the Boards themselves) of the current national and provincial Tender Boards and various consumer organs of State. The prime function of the Procurement Compliance Office will be that of overseeing the procurement system in order to ensure that the procurement of goods, services and works is conducted in a fair, equitable, transparent, competitive and cost effective manner in accordance with the prevailing legislation and within the parameters of government policy. The Procurement Compliance Office will not be involved in the awarding of individual tenders.

In terms of the proposals, existing national and provincial offices of Tender Boards and accounting officers of organs of State will effect procurement as Procurement Offices and Procurement Centres, respectively. Procurement Offices and Procurement Centres will be responsible for all day to day procurement activities i.e. inviting tenders, adjudicating tenders, inspecting and testing of supplies and services offered and the awarding of tenders in terms of a National Procurement Framework and the local system of procurement established by the accounting officer responsible for such procurement. These Offices and Centres will, however, be responsible for developing their own systems and strategies, management systems, staff training and development strategies subject to their compliance with a National Procurement Framework, and will be required to submit regular reports on their activities and be subject to regular inspection and monitoring by the national Procurement Compliance Office.

The basic functions of a national Procurement Compliance Office should in broad terms be to:

- formulate and advise on policy
- administer national procurement legislation
- audit the performance of Procurement Offices and Centres with respect to:
  - adherence to regulations pertaining to the National Procurement Framework
  - efficiency in procuring goods, services and works, as relevant

- effectiveness in implementing policy relating to socio-economic objectives
- attainment of affirmative (targeted) procurement goals
- adherence to treasury instructions
- attainment of specific national programme goals and objectives
- ensure that procurement officers implement policies and regulations in an appropriate, consistent and systematic manner
- serve as a linkage between central government, national treasury and the different Procurement Offices/Centres
- issue instructions to ensure uniform application of the national procurement policy
- determine the scope of goods and services which should fall under the jurisdiction of Procurement Offices
- promote communications and liaison between different Procurement Offices / Centres
- gather information / research procurement related issues and trends
- play a role within SADEC to ensure a uniform procurement policy for member countries and to assist other member countries to develop and establish sound procurement systems

*A code of conduct should be used to regulate private sector participation and govern the actions of officials.*

- assist Procurement Offices / Centres in executing the national procurement policy and sanction those who are not adhering to or implementing such policy
- regulate contract options and contract documentation
- monitor the manner in which policy is implemented in respect of development objectives, the manner in which targets are set and attained, value for money, delivery mechanisms employed in works contracts, etc.
- establish national data bases in respect of suppliers / service providers / contractors, targeted business enterprises and the like
- develop information systems to ensure the exposure of the larger public tenders to potential tenderers throughout the whole of the country
- monitor preference provisions

A code of conduct should be drafted to govern the participation of suppliers, service providers and contractors in public sector procurement. Similarly, a code of conduct should be drafted to govern the manner in which officials of organs of State act. The Procurement Compliance Office should be empowered to sanction those that transgress these codes in an appropriate manner.

The Procurement Compliance Office should also attend to and investigate complaints received from the public regarding tender procedures and any regulations. Should this office not reply to the satisfaction of the plaintiff, the latter should be free to approach the office of the Public Protector in this regard.

The Procurement Compliance Office should also be empowered to audit procurement which, for reasons of national security or confidentiality or political sensitivities, cannot follow normal procedures.

### **2.5.2. Specialist arms of a national Procurement Compliance Office**

A Procurement Compliance Office should comprise five specialist arms covering the following functional areas:

- Administration
- Registration
- Socio-economic affairs
- Technical matters
- Education and Training

Each arm should be headed by a high-ranking official and where necessary supported by collegial bodies of experts.

*i. Administrative arm*

The specific responsibilities of the **administrative arm** would be the regulation of tender procedures, policies and control measures so as to achieve uniformity and to permit procurement to be efficiently and effectively utilised as an instrument of government policy throughout South Africa. Responsibilities could include:

- co-ordination of the implementation of new and reformed policies.
- providing uniform interpretation for target groups in the implementation of an Affirmative Procurement Policy.
- documenting and setting out policy directives.
- ensuring that enforcement mechanisms are introduced into every level of government to ensure that targeted groups are given every opportunity to compete for government contracts.
- receiving and reviewing annual reports submitted by all Procurement Offices and Procurement Centres.
- developing and updating codes of conduct.
- drafting regulations which govern procurement activities in terms of a National Procurement Framework.
- auditing procurement procedures adopted by accounting officers
- auditing actual procurement practices of Procurement Offices and Centres

*ii. Registration arm*

The **registration arm** should deal with all matters pertaining to registration. Its responsibilities could include:

- the establishment of a national data base of suppliers, service providers and contractors.
- the physical registration of suppliers, service providers and contractors.
- the certification and registration of target group enterprises.
- publishing, distributing and maintaining directories of target group enterprises.
- sanctioning those that transgress the code of conduct for officials and the code of conduct for service providers, suppliers and contractors.
- sanctioning those participants who abuse the system or secure contracts on a fraudulent basis.
- initiating an information and communication awareness programme (outreach).

### *iii. Socio-economic arm*

The specific responsibilities of the **socio-economic arm** would be to ensure that the potential of public sector procurement is realised as an instrument of policy in the transformation process in a cost effective, transparent and efficient manner. Responsibilities could include:

- monitoring progress made in the implementation of reform measures.
- monitoring cost premiums, if any, in implementing socio-economic strategies.
- monitoring, auditing and controlling delivery mechanisms employed on construction projects which target marginalised sectors of society.
- regulating all matters pertaining to preferences.
- monitoring the manner in which targets (goals) are set and attained.
- issuing directives pertaining to the socio-economic goals which regions should strive to attain.
- establishing targets to achieve socio-economic objectives.

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### *iv. Technical arm*

The specific responsibilities of the **technical arm** would be the regulation of contract documentation and contract options so as to achieve uniformity in order to meet Reconstruction and Development principles and socio-economic objectives, effect economies in procurement and enable consumer organs of State to be best practice clients. Responsibilities could include:

- prescribing standard sets of documentation in respect of each generic category and sub-category of contracts, which may be used by all organs of State.
  - arranging for the updating and amending of such standard documents from time to time.
  - co-ordinating the drafting of new contract documentation.
  - identifying deficiencies in documentation and the need for further development of documentation.
  - funding and directing the necessary research and development required to facilitate the preparation of national standards.
  - liaising with a national standards body responsible for publishing and distributing human resource and technical specifications.
  - auditing documentation which is utilised by Procurement Offices and Centres in their procurement activities for compliance with documentation directives.
  - monitoring the use of documentation in public sector procurement activities.
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### 3. ACHIEVING SOCIO-ECONOMIC OBJECTIVES THROUGH PROCUREMENT

#### Contents

- 3.1. [Opportunities and Constraints](#)
- 3.2. [Access to tendering information and the simplification of tender documents](#)
- 3.3. [Breakout procurement](#) (Unbundling)
- 3.4. [Awarding of tenders in terms of a development objective / price mechanism](#)
- 3.5. [An affirmative small, medium and micro enterprise participation programme](#)
- 3.6. [Promoting employment-intensive practices](#)
- 3.7. [Affirming marginalised sectors of society in construction projects](#)
- 3.8. [The development of an Affirmative Procurement Policy](#)

*The aim of the review process is to develop a national procurement system that promotes the principles of the Reconstruction and*

*Development Programme and government's policies relating to socio-economic objectives. Emphasis is placed on the facilitation of easy*

*access for small, medium and micro enterprises, particularly those owned*

*and controlled by previously disadvantaged persons, into the mainstream procurement activities funded by the Public Sector.*

*The aim of empowering small, medium and micro enterprises so that they can access the procurement process will be directed towards having a spin-off in the formalisation of a previously informal sector of the economy.*

*This in turn will have spin-offs in the form of a broadened tax base, improved labour standards and structured economic growth.*

#### Objectives:

1. To make public procurement accessible to all by simplifying the process, and by encouraging fairness and transparency.

2. To encourage greater competition in the public procurement process through the creation of an enabling environment for small, medium and micro enterprises while retaining quality and standards.
3. To support participation of a broadened range of enterprises with appropriate inland revenue registration and labour practices in order to ensure sustainability.
4. To revise the concept of value-for-money in the procurement process in terms of the new objectives which are to be applied.
5. To set out targeting policies in order to create opportunities for the broadest possible participation in the public procurement process.
6. To increase the volume of work available to the poor and enhance the income generation of marginalised sectors of society.

### **3.1. OPPORTUNITIES AND CONSTRAINTS**

#### **3.1.1 Description**

*Procurement Policy should complement the macro-economic strategy and extend affirmative action into the area of economic development.*

There is undoubtedly a need to fundamentally transform the existing public sector procurement system in order that it responds to current needs of South African society. Current policies and procedures tend to favour the larger and better established entrepreneurs and do not create a favourable environment for small, medium and micro enterprises, in particular those owned and controlled by previously disadvantaged persons, to access the mainstream procurement activities funded by the public sector. In addition, the control of economic power that established business has continued to hold, following South Africa's democratisation, has rendered the country's political transformation meaningless for many. While it seems logical that established business will always support economic growth and a market economy, these have not always been popularly embraced by emerging business as they are not necessarily accompanied by empowerment strategies. Debate and discussion on the racial composition of the business sector and affirmative action will continue as long as disadvantaged businesses are not actively participating in the mainstream economy.

It is imperative that the historical distortions that have negated the increase in business opportunities that could have emanated from entrepreneurship and natural partnerships be reversed.

A fundamental requirement for any new procurement policy is that it should be in line with the Government's overall macro-economic strategy with the acceptance that the country is now operating in a changed environment both locally and internationally. It should, therefore, be reflective of the changed environment, embrace representative government and take cognisance of the authority vested in the provincial and third tier government structures and the provisions of the constitution in a pragmatic manner. Furthermore, it should form part of the strategy for rebuilding and restructuring as envisaged in the Reconstruction and Development Programme. As such, the policy should extend the principles of affirmative action into the area of economic development.

#### **3.1.2 Vision**



To realise the potential of public sector procurement as an instrument of policy in the socio-economic transformation process.

### **Secondary vision**

To utilise procurement as a mechanism and a tool for extending the principles of affirmative action into the area of economic reform.

#### **3.1.3. Constraints**

*Public sector procurement can be used as an instrument of policy in the transformation process.*

In theory the only constraints to the attainment of the vision are those relating to constitutional provisions and legal issues. In practice, however, the constraints could include the lack of political will, and the lack of willingness and/or determination of officials to implement the proposed procurement policies as a means of transformation in a systematic manner.

#### **3.1.4. Discussion**

It is generally accepted that *black* economic empowerment needs to be a focal point in the government's policy framework as the continued exclusion of most of the population from the mainstream economy would have serious long-term consequences. There has to be a mechanism whereby the Government can reverse the economic inequities of centuries of systematic *black* disempowerment. An expanding *black* middle class, fueled by education, employment and business development programmes designed to overcome historic, legalised, racial discrimination, will open new markets for South African products. Businesses will be able to increase their competitiveness by bringing in a whole new class of productive employees and, at the same time, adding a fresh perspective to the traditional corporate culture. The objective is to right a wrong, not to damage or punish persons who benefited from the old system.

Government's role in economic growth and development is significant. If present trends continue, economic disparities between the haves and have-nots will move from inequitable to inhuman. There is an urgent need to ensure that empowerment of the majority of the people keeps pace with economic growth. The task of government, therefore, is to harness the energies of the people into a significant force so that the expected economic growth advances human development, sustained employment and equity.

*Constitutional provisions do not rule out affirmative action.*

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#### *i. Legal and Constitutional provisions*

Any proposed strategy must be in accordance with South Africa's legal and Constitutional provisions. The interim Constitution under section 26 (1 & 2) stated that every person shall have the right to engage freely in economic activity, but does

not preclude measures designed to promote *inter alia*, human development, social justice and equal opportunity for all, since such provision are justifiable in an open and democratic society based on freedom and equality. Further, the interim Constitution stated under sections 8 (2) and 8 (3) (a) that no person shall be unfairly discriminated against, but this provision does not preclude measures designed to achieve adequate protection and advancement of persons or groups or categories of persons previously disadvantaged by unfair discrimination, in order to permit their full and equal enjoyment of all rights and freedoms. These principles are embodied in the 1996 Constitution.

The underlying aim of the Constitution is to form a bridge from an unjust past system to a future underpinned by openness, democratic principles, human rights, reconciliation, reconstruction and peaceful co-existence. It further provides a bridge between the past of a divided society characterised by suffering and injustice, and a future founded on the recognition of, *inter alia*, development opportunities. The pursuit for the well-being of all citizens requires the reconstruction of society. There is a need for reparation. The effect of this is that it can be argued that the requirement of the Constitution for the tendering system to be fair, equitable, transparent, competitive, and cost effective, does not necessarily rule out the principles of affirmative action.

*A system which includes some, but specifically excludes others, may violate Constitutional rights.*

Clearly, this calls for a well formulated and structured approach that will promote the long term interests of the country without the exclusion of any person or group of persons. A system that promotes opportunities for some, but specifically excludes others by reserved procurement, or set aside schemes, can be considered to violate the rights of individuals in terms of the Constitution and may not be legally enforceable. What is necessary is a procurement option based on a philosophy of targeting. This would permit all to engage in economic activity in a fair, equitable, transparent, competitive and cost effective manner, whilst containing measures to promote human resource development and equal business opportunities. It would allow all to participate, but would tip the scales in favour of the target group. Thus, tenderers who choose not to meet certain requirements would be penalised, but would not be precluded from participating. On the other hand, those who fall within the targeted group and meet all the relevant requirements cannot be permitted to hold a project to ransom in terms of price and the reward for compliance must be able to be outweighed by penalties incurred through uncompetitive prices. The objective of meeting the short term demands of redistribution and economic empowerment should not necessarily result in additional costs being incurred, or in loss of competitiveness.

*Partnerships between established and disadvantaged sectors needs to be established.*

Competition has, by any measure, been shown over and over again to be a driving force behind increased standards of excellence. What is therefore necessary is a system that can be used to overcome the competitive advantages of established business created by discrimination and compounded over time by intergenerational transfers of human and financial capital. If the law created the disparity then the law must remedy the inequity. Targeted programmes will expand competitiveness and

efficiency by encouraging *black* business development and capital formation, thereby raising living standards for all South Africans.

Appropriate targeting will facilitate partnerships between businesses in the established and the disadvantaged sectors, and could herald the beginning of a system that will deracialise business ownership and control. This will eliminate the sectarian nature of the economy which continues to create divisions in the socio-political fabric of our society. As long as businesses continue to develop on racial lines and to operate parallel to each other, South Africa cannot develop to its full potential and will not compete internationally as a nation.

### **3.1.5 Principles and proposals**

Any new procurement policy framework should comply and be consistent with the Constitution which supports special measures in terms of Section 217 (2) and specifically states that any system advocated does not prevent any organs of State or institutions 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.

To promote the stated macro-economic strategy, targets should be designed to facilitate one or more of the following :

- the development of small, medium and micro enterprises particularly those owned and operated by previously disadvantaged persons.
- an increase in the volume of work available to the poor and in the income generation of marginalised sectors of society.
- affirmative action to *address the deliberate marginalisation from economic, political and social power of black people, women and rural communities and to empower communities and individuals from previously disadvantaged sectors of society.*

New policies and procedures must be developed in a practical and pragmatic manner which will promote Government's socio-economic objectives and Reconstruction and Development principles in South Africa. This will enable organs of the State to put in place systems in a targeted, transparent, visible, measurable, and efficient manner when engaging in economic activity with the private sector, without comprising principles such as fairness, competition, cost efficiency and inclusion.

## **3.2. ACCESS TO TENDERING INFORMATION AND SIMPLIFICATION OF TENDER DOCUMENTS:**

### **3.2.1. Description**

*The simplification of Tender procedures, information networks and documentation is aimed at removing barriers which prevent emerging businesses from competing freely for public sector contracts.*

It has been argued that current procurement policies and procedures tend to favour the larger and more established enterprises. They are so complex that they do not provide small, medium and micro enterprises with easy access into the mainstream procurement activities funded by the public sector. Furthermore, it is difficult to obtain accurate and timely information about tendering opportunities.

The process of adjudication of tenders also occurs under a perceived veil of secrecy. This creates a potentially debilitating environment where accusations and suspicions about the fairness of the process abound.

The general lack of feedback to unsuccessful tenderers has made it difficult for emerging businesses to learn what is required to win tenders and to improve on their mistakes. New entrants to public sector procurement activities are, therefore, susceptible to repeating the same mistakes in their tenders.

Currently there is little structured formal exchange of information between tenderers and procurement departments. Obtaining accurate and timely information about tendering opportunities is difficult for emerging enterprises who do not have sophisticated information networks.

In addition, the present system of tender submission requires the completion of various forms and supporting documents which, in their present format, are unnecessarily complicated. Emerging concerns find them difficult to complete satisfactorily, and logistical problems are often encountered by suppliers in preparing and submitting tenders, especially in the emerging sector.

The paperwork and procedures required in the tendering process dissuade, restrict and preclude willing and able emerging businesses from participation in public sector procurement activities.

### **3.2.2. Vision**

To remove barriers created by limited and entrenched information networks, and unnecessarily complex documents and procedures which prevent emerging businesses from competing freely for public sector contracts.

### **3.2.3. Constraints**

Research has shown that there are several constraints which presently stand in the way of achieving the vision identified. Various aspects of the current systems used to communicate tender information and process tenders constitute impediments towards achieving the vision of making the procurement process more accessible. Some of these are:

*The most important problem facing disadvantaged communities is the lack of infrastructure and ability to tender because of the need to access an unnecessarily complicated tendering system and work with complex documentation.*

1. Currently there is little interaction between procurement units and prospective tenderers. So, the parties do not know each others' requirements

- and difficulties. The result is that the procurement process is unresponsive to the changing local tendering context and environment.
2. There is a perceived lack of transparency in the process of awarding tenders. The criteria which are used to adjudicate tenders are not clearly spelt out, and often no reasons are given for acceptance or rejection of a tender.
  3. At present, tender invitations are advertised in State and Provincial Tender Bulletins, or are posted on the notice boards of the Regional Offices. Sometimes advertisements are also placed in newspapers, or tenderers on the approved list compiled by Tender Boards of procurement units are notified. These methods of tender information dissemination generally do not reach emerging businesses.
  4. The documents describing tendering policies and procedures (and the actual tenders) are currently written in languages which are alien to many businesses (English and Afrikaans). In addition, most documents associated with tendering use highly technical language, jargon and legalese which makes them incomprehensible to many emerging businesses. Furthermore, they are often poorly written and difficult to understand.
  5. The layout and packaging of tender documentation is generally not methodical, and is therefore confusing to most emerging businesses. Frequently, conditions of tender are mixed with conditions of contract and are interspersed with technical specifications. This lack of discipline in the drafting of documents is very confusing to those who have not had considerable exposure to such documents.
  6. Frequently, the standard conditions of tender and conditions of contract are drafted to cater for every conceivable eventuality and no attempt is made to present conditions appropriate to relatively simple and straightforward contracts. For example, the ST 36 conditions are applicable to all goods and service contracts, irrespective of size, complexity or nature of the goods or services required. Thus, the small enterprise wishing to supply a local commodity is confronted with the same documentation used for the purchase of, say, complex, imported electronic equipment.
  7. Various public sector procurement units use different tender documentation which requires tenderers to invest time in order to familiarise themselves with differing documents.
  8. Standard forms of contract or specifications, particularly in the case of building and construction contracts, are often extensively amended by public sector procurement units. Invariably, the list of amendments grows over a period of time as amendments are rarely withdrawn. These documents are extremely confusing and difficult to comprehend.

#### **3.2.4. Discussion**

*i. A structured interaction between purchasers and tenderers should be fostered and a relationship cultivated:*

Workshops, meetings, printed and electronic media advertisements, and information brochures are possible avenues through which the procurement departments could mount out-reach campaigns to target tenderers with general tendering information such as an explanation of departmental activities, projected tendering opportunities, tendering policies and procedures, general conditions and requirements of tenders.

*ii. The tender award process should be more transparent:*

- Information regarding adjudication procedures and criteria could be included in tender documentation.
- Lists could be prepared, for all tenders adjudicated, indicating submissions that have been considered and those that have been disqualified.
- Proceedings at adjudication meetings could be recorded and transcripts made available for public scrutiny should the need arise.
- Reasons for approving or rejecting any tender should be furnished to the tenderer on request.
- In the event of a complaint about the award of a particular contract, the investigations should be undertaken by officials who were not involved in the adjudication process.
- For certain strategic tenders, a post-contract award de-briefing meeting with tenderers could be arranged to discuss generic shortcomings of submissions.

*iii. Popular and accessible media should be used to disseminate tendering information:*

Although the Tender Bulletin, albeit in revised format, could always be an official medium to advertise public sector tenders, particularly for big contracts, tender information could be more widely disseminated.

In addition to the Tender Bulletin, certain tenders, particularly the small and local ones, could be advertised through avenues such as, small business development organisations' notice boards, local emerging business/contractor organisations, Tender Advice Centres, community and commercial newspapers, and community buildings (such as magistrate's courts, Post Offices etc.).

*iv. A list of approved suppliers should be established, based on performance:*

A data base of all approved suppliers (including small, medium and micro enterprises) could be compiled. Inclusion on the database could be based on quality, delivery, reliability, stability, expertise, experience, existing facilities and human resource levels of the supplier.

*v. An information booklet on Tendering should be published:*

A booklet on how to tender could be compiled. It could contain examples of tender documents with examples of obvious errors and how to avoid them. The prospective tenderer could then familiarise him/herself with the language used and the general conditions and procedures involved.

*vi. Tendering documentation should be easy to comprehend and user-friendly:*

Some general concerns common to all documents are; the very sophisticated language, legal terminology, a complex numbering system, lengthy paragraphs, small font sizes, cramped layout and a tendency to present information as rules.

These concerns should be addressed, and the following guidelines considered:

- Tender forms could be reformatted so that the number of pages is minimised and the layout is more user-friendly.
- Language used in the documentation should be easily understood by tenderers.
- All documents that are relevant to completing a tender could be included in tender packages or available at tender issuing offices.
- Tenders for similar goods or services may be standardised. Uniformity of tender documents can be achieved by adopting a general format in these circumstances.
- Where reference is made, in any tender document, to another document or standard or specification such document of standard or specification must be available at all Regional Offices, Tender Advice Centres (TACs) and Local Business Service Centres (LBSCs) for tenderers' use.

*vii. Use of standard and appropriate documentation*

There needs to be a commitment from procurement units to use standard contract documentation with minimal deviations from the accepted standard forms of contract and specifications. The practice of writing extensive special conditions of contract to change the risks, rights and obligations of the parties upon which standard conditions of contract are based, should cease. Bodies responsible for the development and publication of such documents must be called upon to publish amended versions of their documents as soon as the general weight of opinion requires such amendments.

Conditions of contract and specifications must be appropriate and fit for their intended purpose. Contracts may be classified in terms of the risk exposure of each party. Factors such as size, complexity, novelty, intensity (speed of delivery), physical location, likelihood of variations in scope, volume and responsibilities are indicators of risk. Standard conditions of contract can be drafted around risk exposure for any class of contract. Accordingly, if standard conditions of contract for a particular class of contract are used, the documentation should be appropriate and commensurate with the risks associated with such contracts. To address concerns that emerging businesses may not understand the manner in which they are to conduct their business in terms of classes of contracts with higher risk exposures, a summary of the principal features of the contract could be drawn up and issued without prejudice.

*viii. The feasibility of increasing the number of locations for submissions should be investigated:*

At this stage it is difficult to conceive of a suitable working arrangement which would allow tenders to be submitted by electronic means such as fax or e-mail. Also, it may not be realistic to permit tender documents to be delivered to remote, local post offices instead of to the designated office.

The biggest advantage of the introduction of an electronic tendering system would be that it would bring procurement to the people. Simplified procedures could ensure access to information by marginally literate people at the touch of a button. Safeguards against corruption could be built into the system. In addition, the system would not necessarily require that each small, medium and micro enterprise should

have its own personal computer. Rather, computers could be located at the LBSCs and TACs for use by tenderers.

or

Since tendering opportunities should be offered to small, medium and micro enterprises at a local level, and local contractors are known in the communities and can be contacted in an informal manner, tenders could be submitted to one point in each area.

Theoretically, tenders could be submitted to various locations and then sent, unopened, to a central point for adjudication.

In order to encourage small, medium and micro enterprises to tender, tenders should be advertised, distributed and awarded as near as possible to where the work is to be done, or the services are to be supplied.

Additional branch offices should be opened to cater for the needs of specific regions and tenderers should be allowed to deposit tenders at these branch offices. The branch offices would be responsible for transporting the tenders to the Head Office within, say, 24 hours and placing them in the Master Tender Box.

However, where tenders are submitted to more than one point the chances of fraud taking place are increased and this approach is therefore in conflict with the commonly held view that tenders should be lodged at one place and be collectively opened at a specific time.

### **3.2.5. Principles and proposals**

To institute a responsive procurement process it is necessary to foster a structured interaction and cultivate a relationship between the procurement units and prospective tenderers.

The tendering process should not only be fair but should also be seen to be fair (transparent) through all stages i.e. pre-tenders (briefing) tender opening, tender award, and post-tender award (responding to complaints).

More popular and accessible media should be used to reach a wider spectrum of potential tenderers with tendering information.

Tender documentation should be completely overhauled and rationalised to encourage participation by emerging businesses in public sector procurement activities. The whole tendering process should be made more accessible by ensuring that tender documentation is:

- Easy to comprehend and user-friendly.
- Free of unduly onerous requirements and conditions.
- More widely disseminated and distributed, in order to reach all potential tenderers.
- Standardised.



### **3.3. BREAK-OUT PROCUREMENT (UNBUNDLING)**

#### **3.3.1. Description**

*The scale and scope of tenders can be adjusted to provide the emerging sector with greater opportunities for accessing the public procurement process.*

Small, medium and micro enterprises can participate in public sector procurement in one of two ways. They can either contract directly with a State, provincial or local body to execute a contract as a prime or main contractor, or participate as a subcontractor, supplier or service provider to a prime contractor in the delivery chain, popularly referred to as outsourcing. The scale and scope of a particular contract, dictates to a large extent the nature of an enterprise's possible participation.

Emerging and historically disadvantaged enterprises find it difficult to establish productive linkages with large scale enterprises. Accordingly, many tenders have recently been broken down into smaller components to afford these enterprises an opportunity to participate as prime contractors, service providers or suppliers. These smaller contracts are an important source of work for enterprises which are graduating from development programmes and establishing themselves.

#### **3.3.2. Vision**

To have a public procurement system which is accessible to emerging businesses in as wide as a range of activities as possible, without impacting negatively on time, cost and quality.

#### **3.3.3. Constraints**

The administration by public sector bodies, and their agents, of a large number of small contracts could be more complex and costly than of fewer large ones. Also the administrative capacity might not be in place to handle the geographical dispersion of smaller contracts, the increased number of interactions and communications with suppliers and contractors, and the processing of an increased number of payment certificates.

The breaking down of tenders into smaller components is not always justifiable, particularly for engineering and construction contracts. The reasons for this include division of responsibilities, interdependence of activities, programming, duplication of establishment charges and under utilisation of resources. Large engineering and construction projects may be compared to an assembly line. A management contractor is required to manage the assembly and to outsource production line items. The breaking up of the assembly line into discrete and independent activities (contracts) is frequently inefficient, as it destroys cohesive management.

The breaking down of a contract into smaller prime contracts in order to accommodate the aspirations of smaller firms can have a negative impact on cost and time. The international trend is to procure on the largest possible scale in the knowledge that small specialist firms will manufacture / fabricate / construct / provide various components and so be engaged in delivery.

### **3.3.4. Discussion**

The vision may be realised in one, or a combination, of the following ways:

*Any programme aimed at making the procurement system accessible to emerging businesses must ensure that such businesses either perform the contract, or add value in the performance of the contract.*

*Period and ad hoc tenders can be broken down into the smallest practicable quantities, and into manageable sectors*

1. By procuring goods, services and works in the smallest practicable quantities, without compromising cost efficiency, timeous delivery and quality of product.
2. By obligating prime contractors to engage targeted businesses in the performance of their contracts.
3. By requiring joint venture formation between established businesses and targeted emerging business enterprises.

Emerging businesses have frequently preferred to contract directly with public bodies and are somewhat reluctant to contract with prime contractors for a variety of reasons, many of which relate to unfair conditions of contract and difficulties in obtaining payment from prime contractor. This reluctance can be addressed to some extent by regulating the type of contract which a prime contractor is permitted to use in the engagement of targeted business and by providing for secured payment.

Consideration must be given to the contract period as the intensity of delivery has a direct bearing on the type of enterprise which is able to execute a contract. In some instances, long contract periods may be desirable in order to enable emerging businesses to justify the acquisition of capital equipment. This approach has proved to be successful in equipping contractors engaged in contractor development programmes in Ghana and other countries.

Any programme or measure aimed at making the procurement system accessible to emerging businesses must ensure that such businesses either perform the contract or add value in the performance of the contract. Fronting should be strenuously countered and procedures to establish the bona fides of targeted businesses should form an integral part of the tender process.

### **3.3.5. Principles and proposals**

#### *i. Breaking tenders down into smaller contracts*

Where feasible the following principles should be considered for breaking up period and ad hoc contracts.

- To break areas of supply for contracts down into manageable sectors (on a provincial, regional and local basis).
- To ensure that contracts involving more than one product or service can be separately adjudicated, and handled by different contractors.

- To consider the outsourcing of contracts for delivery services in order to empower small, medium and micro enterprises. This will require prices to be broken down into components in order to establish the costs of distribution and delivery.
- To categorise products and services in terms of their complexity, in order to allow small, medium and micro enterprises to access the procurement process by tendering for simpler contracts which involve lower risks.
- To award contracts on the basis of a development objective / price mechanism (a point-scoring tender adjudication procedure) which has the engagement of small, medium and micro enterprises as an objective.
- To award contracts for quantities that can be handled by small, medium and micro enterprises whilst remaining cost effective to the State.

*ii. The use of human resource specifications as a tool for unbundling*

*Contractors can be compelled by means of a human resource specification to engage targeted small, medium and micro enterprises in the execution of their contracts*

Contractors, suppliers and service providers are, normally, required to construct, supply or provide a service in accordance with a technical specification. They can, also, be required to execute their contracts in accordance with a human resource specification which defines and sets out the goals for targeted small, medium and micro enterprise participation in the performance of the contract in such a manner that it can be quantified, measured, verified and audited. Human resource specifications should set out how firms can meet these goals in order to comply with the requirements of the contract. Furthermore, they should set out the measures which the client body (employer) has at its disposal to remedy, or penalise, non-compliance.

Participation Goals can be defined as the net value of goods, services and works for the supply of which the firm contracts to engage targeted small, medium and micro enterprises in the performance of the contract, expressed as a percentage of the tender value of the contract. Thus a participation goal of 20% would imply that the amount of contract expenditure funneled through targeted small enterprises is 20% of the tender value. Firms could, for example, meet their participation goal obligations by:

- subcontracting portions of the contract to targeted small, medium and micro enterprises.
- obtaining manufactured articles from manufacturers who are targeted small, medium and micro enterprises
- obtaining supplies and materials from suppliers who are targeted small, medium and micro enterprises
- engaging professional, technical or managerial service providers who are targeted small, medium and micro enterprises
- obtaining insurances from targeted small, medium and micro enterprises.

In this manner, prime contractors can be required to 'unpack' their contracts into smaller contracts and to procure the services of targeted small, medium and micro

enterprises to perform such contracts and to administer them. The question of unfair conditions of sub-contract can be readily dealt with by denying prime contractors credits towards their participation goal obligations should they not enter into written sub-contracts with targeted enterprises which are free of unfair conditions.

Development objective / price mechanisms can be used to reward firms which undertake to better specified minimum participation goals for a contract.

### *iii. Structured Joint Ventures*

*Small, medium and micro enterprise participation on a contract can be secured by requiring joint venture formation between large and small businesses*

Joint venture formation between large and small businesses can be used to encourage and secure small, medium and micro enterprise participation. Human resource specifications, as described above, can be utilised to structure, facilitate and measure joint venture formation with targeted enterprises and joint venture participation goals can be set.

Joint venture participation goals can be met where targeted small, medium and micro enterprises acting as joint venture partners, perform with their own resources work equal to a predetermined fraction of their participation and are responsible for the execution of portions of the contract equivalent to their joint-venture participation percentages.

Specifications can be drawn up to permit emerging businesses to enter into joint ventures with established businesses. Such specifications should be sufficiently flexible to permit the restructuring of the joint ventures should the emerging businesses not perform satisfactorily.

## **3.4. AWARDING OF TENDERS IN TERMS OF A DEVELOPMENT OBJECTIVE / PRICE MECHANISM**

### **3.4.1. Description**

*By revisiting the current system of awarding tenders, greater opportunities can be created for the accommodation of socio-economic objectives in the procurement process.*

*The acceptance of the lowest tender does not necessarily reflect value for money in the changed environment*

Historically, tenders have been awarded to the lowest tenderer, who has been overlooked only when there is clear evidence that he does not have the necessary experience or capacity to undertake the work or is financially unsound. In other words, the lowest tenderer has been overlooked only when it is considered that the risk of failure by him to satisfactorily complete the contract would be high.

In the changed environment, value for money should not be measured by monetary cost alone. It could be measured, also, by providing increased employment opportunities per unit of expenditure, or a more acceptable technical offer, or an

exceptional human resource development offer. If, however, one moves away from awarding contracts to the lowest tenderers in order to reward them for the socio-economic components of their tenders, tender evaluation criteria must be clearly spelt out in the tender documents to enable tenderers to compete on an equitable basis and in a transparent manner.

### **3.4.2. Vision**

To provide a public, competitive and fair tendering system which allows for participation by all South Africans, while creating accelerated opportunities for target groups.

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### **Secondary vision**

To provide value for money in terms of both technical and human resource offers, so as to achieve certain socio-economic objectives in a targeted, transparent, visible and measurable manner.

### **3.4.3. Constraints**

The current practice of accepting the lowest tender in terms of price only, is inflexible and will restrict the degree to which the secondary vision may be attained.

### **3.4.4. Discussion**

Tenders could be awarded on a point scoring system in terms of a development objective / price mechanism in such a manner that tenderers are awarded points in the first instance for their financial offer and, in the second instance, for their offer to exceed specified socio-economic objectives, or their current enterprise status.

*The current practice of accepting the lowest tenderer in terms of price only, is inflexible and will restrict the degree to which the smaller enterprises can access the process.*

Development objective points could be awarded for exceeding targets set in respect of:

- use of local resources
- use of targeted labour
- use of small, medium and micro enterprises
- employment generated

or the degree to which the tendering enterprise has embraced:

- equity shareholding
- affirmative action principles.

Points could, also, be awarded on the basis of an enterprise's status, or for environmentally-friendly practices.

The successful tenderer would, normally, be the one who is awarded the most points, subject to technical factors, previous contractual performance, financial references, unit rates and prices, alternative offers, qualifications etc., being acceptable. The premium, if any, which an organ of the State is prepared to pay to meet certain specific socio-economic / development objectives is defined in the formulation of the development objective / price mechanism which could be standardised throughout South Africa.

In this manner the premium payable for incorporating socio-economic objectives into projects would be minimised, as tenderers would compete both on the basis of price and of meeting socio-economic objectives. Market forces will dictate the degree to which contractors can meet socio-economic objectives in the most cost-effective manner.

### **3.4.5. Principles and proposals**

- Tender evaluation criteria should be formulated in such a manner that certain socio-economic and development objectives are promoted by a weighting in favour of targeted groups, without preventing those who fall outside such target groups from tendering.
- Tenderers should be free to choose the degree to which they wish to meet stated socio-economic and development objectives set out in tender documents, based on economic considerations, but should be penalised should the degree to which they propose to meet such objectives be limited.
- Tenderers should be free to decide on how they would marshal resources in the performance of the contract based on economic considerations and their skill, knowledge and creativity.
- Tenders should be structured in such a manner that those individuals or communities who fall into targeted groups cannot hold a project to ransom for financial or any other reasons.
- Socio-economic / developmental parameters or targets which are set must be definable, measurable, quantifiable, verifiable and auditable.
- Penalties should be applicable to enable any cost premium paid in respect of socio-economic / developmental objectives, which are not met during the performance of the contract, to be recovered.
- Adjudication criteria, including the manner in which adjudication points are to be awarded, should be clearly and unambiguously made known to all tenderers.
- Adjudication points should be awarded in such a manner that persons who are not part of the adjudication team would arrive at a similar result were they to perform the adjudication.
- Details regarding the awarding of adjudication points in respect of all contracts should be recorded for audit and evaluation purposes.

## **3.5. AN AFFIRMATIVE SMALL, MEDIUM AND MICRO ENTERPRISE PARTICIPATION PROGRAMME**

### **3.5.1. Description**

There are major disparities in South Africa in the extent of business ownership and participation in the provision of goods, services and works, when previously

disadvantaged race groups are compared to formerly advantaged race groups. Similar disparities are found in terms of gender.

Participation by the disadvantaged groupings in public procurement activities, given the current population demographics, is extremely low throughout the country.

The RDP in its problem statement in the chapter on building the economy states: *"The South African economy is in deep-seated structural crisis, and as such requires fundamental reconstruction. For decades forces within the white minority have used their exclusive access to political and economic power to promote their own sectional interests at the expense of black people....The South African economy is also characterized by excessive concentrations of economic power in the hands of a tiny minority of the population.*

*"Through the pyramid system and the resultant control over a vast network of subsidiary companies, a small number of very large conglomerates now dominate the production, distribution and financial sectors.....Not only does this create racial and social tension, but it is to be seriously doubted that such high levels of concentration can be economically beneficial.*

*Current business ownership is not reflective of population demographics.*

*"A particular weakness of the economy, aggravated by racist and sexist policies, is the inability to maintain a dynamic small-scale and micro enterprises sector. Smaller firms, especially if owned by black people, can rarely develop productive linkages with the large-scale sector. Most people in the informal sector lack productive and managerial skill plus access to business sites, capital and markets."*

The RDP cites four major constraints which face small and micro enterprises, being the lack of:

- access to markets
- credits
- skills
- supportive institutional arrangements

Three recurrent themes of the RDP call for:

- The putting in place of a programme of affirmative action to address the *deliberate marginalisation from economic, political and social power of black people, women and rural communities* and individuals from previously disadvantaged sectors of society.
- The development of small businesses, particularly, those owned and operated by *black entrepreneurs*.
- The provision of jobs and the addressing of unemployment.

The challenge is to create a cost effective system of encouraging and promoting the use of small, medium and micro enterprises owned and controlled by *blacks and women* in as wide a spectrum of public sector activities as possible , without:

- taxing the administrative capacity of implementing organs of State or;

- abusing or lowering labour standards

in a fair, equitable, competitive and transparent environment.

*An affirmative small, medium and micro enterprise programme should not attract undue costs or overload procurement agencies' administrative capacities, and should adhere to acceptable labour standards.*

This challenge can be met, to some extent, by introducing an affirmative participation programme directed at small, medium and micro enterprises and aimed at:

- Reducing disparities in business ownership
- Directing some of the flow of commerce to and through these population segments which have historically been under-utilised and excluded from participation.
- Engaging small, medium and micro enterprises in public sector procurement activities through prime (main) contractors on medium to large public sector contracts.
- Providing accessible markets
- Forging linkages with large scale enterprises

### **3.5.2. Vision**

To promote and advance small, medium and micro enterprises, particularly those owned and operated by previously disadvantaged individuals, in public sector procurement without attracting undue costs and overloading procurement agencies' administrative capacities.

### **3.5.3. Constraints**

The central blockage to the attainment of the vision is the lack of a coherent transparent, participatory, and accountable procurement policy, and a long term strategy and mechanisms to implement such policy in support of the vision.

### **3.5.4. Discussion**

An affirmative small, medium and micro enterprise participation programme should be regarded as being an instrument for the creation and redistribution of increased wealth rather than the redistribution of existing wealth. The development of healthy, competitive business enterprises can only lead to wealth creation.

It must, however, be recognised that because of the extreme disparities which exist in South Africa in respect of issues such as levels of education and income, intergenerational transfer of wealth and degree of economic activity amongst the various population groups, an affirmative small, medium and micro enterprise participation programme will have to be implemented in a progressive and incremental manner and will have to be linked to development programmes.



*An affirmative small, medium and micro enterprise participation programme should be regarded as being an instrument for the creation of wealth rather than the redistribution of existing wealth.*

Typically, development programmes could range from providing access to capital and business counseling to entities which have already been established, to enable them to consolidate and expand their businesses, to providing opportunities for individuals to establish first-time businesses with the support of development specialists in accordance with structured training programmes.

In the building and construction industry, for example, proactive, third party management support has enabled previously disadvantaged communities to participate in construction activities as contractors (entrepreneurs) and programmes have been put in place to enable those with the necessary entrepreneurial flair to develop fully fledged contracting businesses over a period of time. What is required is to build upon these development programmes and to further develop these emerging businesses in competition with established businesses by means of structured participation programmes which enable emerging businesses to compete in the mainstream of the economy. An Affirmative Procurement Policy, based on participation principles, is needed to shift the focus from developing new capacity, to growing majority population owned businesses which embrace sound business practices and contribute to the economy of the country.

The primary purpose of an affirmative small, medium and micro enterprise participation programme is to provide equal access in contracting and procurement opportunities for targeted businesses and, in so doing, eradicate the effects of past and present discrimination in public and private sector procurement practices and assist in creating and developing business enterprises which are reflective of population demographics. The adoption of such a policy should not imply "reverse discrimination" but should be regarded as an endeavour to ensure that all sectors of the population have access to opportunities on a competitive basis and may advance according to their relative abilities.

It is acknowledged that, in some instances, there may be time and cost premiums attached to the implementation of this policy, as programmes may require longer tendering periods to secure participation by the target group and for the training of emerging businesses, and will attract administrative costs. This premium is, however, considered to be rather insignificant and may be regarded as an integral part of transformation costs. The issue is not whether the State, provinces and the local authorities can afford to implement such a programme, but rather whether they can afford not to.

In small contracts, all small, medium and micro enterprises should have the opportunity to participate. A development objective / price mechanism which targets ownership by previously disadvantaged individuals / women can be introduced. Typically, points can be allocated on the basis of the percentage ownership of the enterprise by persons falling into certain race and gender groupings should the presumption be made that persons falling into race groups who were prevented from participating in the previous political dispensation, as well as women, are socially and economically disadvantaged.

*Development objective/ price mechanisms with or without human resource specification can be used to ensure significant participation of targeted small, medium and micro enterprises in public sector procurement contracts in an affirmative manner.*

In medium to large contracts, goals can be set with respect to affirmative participation targets (Contract Participation Goals) to ensure participation by small, medium and micro enterprises owned and controlled by previously disadvantaged persons who have annual average turnovers commensurate with the limits provided for in the draft Small Business Enabling Act (Affirmable Business Enterprises). The setting of such targets and the measurement of key participation parameters which may be used in the evaluation of tenders and the audit of compliance during the execution of the contract can be described and set out in a human resource specification.

Minimum participation or threshold goals can be set. Failure to achieve these goals would disqualify a tenderer as it would be deemed that his tender has not complied with the specifications. Tenderers who tender increased goals can be awarded a preference in terms of the development objective / price mechanism. In this manner, the price premium, if any, for requiring target group participation can be confined to within acceptable limits.

Human resource specifications may also be used to facilitate joint venture formation with Affirmable Business Enterprises. The removal of restrictions on the turnover of any targeted enterprise, will afford larger emerging businesses owned by previously disadvantaged individuals who have outgrown their small, medium and micro enterprise status to be further developed by means of joint venture formation with larger established businesses.

### **3.5.5. Principles and proposals**

The purposeful flow of public funds directed to and through those population segments which have historically been excluded from participation should be achieved by:

- *making the tender process accessible to the target group without, however, guaranteeing work; and*
- *linking the flow of money into target business enterprises with a concomitant flow of responsibility*

As such, an affirmative small, medium and micro enterprise participation programme should embrace the following principles:

- Any measures, which are adopted to secure participation by the target business group, should not result in a failure in delivery, or a deterioration in the quality of the goods, services and works which are procured.
- Sunset provisions based on the attainment of goals and objectives should be built into the programme to ensure that participation measures do not continue beyond the point at which they are no longer justifiable.
- Only those businesses which are currently in operation in a particular industry and are considered capable of successfully completing a given contract, at the

- point in time when goods, services and works are required, should be considered.
- Businesses should compete for participation in contracts.
  - Measures which are adopted to secure participation by the target group business enterprises should fall away, once such businesses reach predetermined turnover milestones.
  - Business enterprises falling within the target group should:
    - add value in the delivery of goods, services and works
    - be controlled and managed by those individuals falling within the target group
    - be at least two thirds owned by persons falling into the target group
  - Companies which fall outside of the target group should:
    - not be excluded from participation provided, however, that they comply with certain human resource requirements
    - be rewarded for implementing affirmative action programmes within their companies should they achieve specific milestones in terms of their company's shareholding (applicable only, to private companies), executive directorship and senior management profiles.

An affirmative small, medium and micro enterprise participation programme should be integrated with development initiatives aimed at enhancing the business capacity and skills of established small, medium and micro enterprises and should provide work opportunities for those enterprises which graduate from initiatives aimed at developing new small, medium and micro enterprise capacity.

The programme should, in the long term:

- facilitate growth in terms of the efficiency and effectiveness of delivery as well as the numbers and size of businesses owned and controlled by previously disadvantaged individuals.
- ensure that emerging businesses contribute to the tax base, engage workers who are affiliated to labour organisations, and adhere to safety and environmental standards associated with those of developed countries.

### **3.6. PROMOTING EMPLOYMENT-INTENSIVE PRACTICES**

#### **3.6.1 Description**

*Labour and resource based works programmes aim to serve several purposes, including the influencing of infrastructural investment policies so as to maximise employment and income generation, the creation of productive assets and poverty alleviation.*

Several employment intensive works programmes have been implemented in Africa and Asia over the last two decades. These labour and resource based works programmes aim to serve several purposes simultaneously. Above all, they aim to influence infrastructural investment policies so as to maximise employment and income generation, the creation of productive assets and poverty alleviation. In some instances, the programmes have also set out to create and strengthen both public and private capacity for the effective planning and implementation of employment-intensive policies and programmes.

Such programmes are usually either of a relief, or a growth and development, nature and involve either public works or works of community/household interest. Typically, programmes of a public works nature have involved the construction or maintenance of roads, afforestation, soil conservation and other environmental protection works on public land. Community-based works programmes on the other hand, have focused on small to medium scale irrigation works, small dam construction, afforestation on private lands and community woodlots.

Similar programmes have been introduced and implemented in South Africa during the last few years.

Employment-intensive methods have been employed in South Africa on construction projects which include rural gravel roads; low level bridges; small dams; residential township roads (surfaced and gravel); water and sewerage reticulation for townships; bituminous surfacing of roads; low voltage electrical reticulations; stormwater drainage systems; and on-site sanitation. Road maintenance projects have included regraveling, and routine road maintenance.

*The promotion of employment-intensive projects can be seen as an attempt to realise the potential of the procurement system as an instrument of job creation.*

Other employment-intensive projects have included materials manufacture (precast concrete products, timber roof trusses, metal window frames); agricultural structures (dams, erosion control measures, irrigation projects); building works (community centres, clinics, schools, classrooms, housing); agriculture (vegetable and flower growing, indigenous herbs, poultry farming); clothing manufacture; handcrafts; electrification; and refuse collection.

Frequently, employment-intensive practices have been implemented by small scale community-based contractors.

### **3.6.2 Vision**

To realise the potential of the procurement system as an instrument of job creation.

#### **Secondary vision**

- To ensure that the concept of value for money includes the dynamic of employment generation.
- To provide goods and works, wherever possible in a manner which maximises cost effective employment creation / income generation.
- To encourage the substitution of labour for capital.
- To encourage the use of "labour friendly" technologies in order to substitute local resources for imports.
- To increase the volume of work available to the poor / marginalised sectors of society.
- To increase the opportunities for employment generated per unit of expenditure.

### **3.6.3 Constraints**

Employment-intensive construction can be defined in civil engineering projects as *"the economically efficient employment of as much labour as is technically feasible to produce as high a standard of construction as demanded by the specifications and allowed by the funding available."*

If employment-intensive works were always more economical than plant-based works there would be no problem. The quality of the end product can be readily measured and compared whereas economic efficiency cannot. Value for money assessments, where socio-economic considerations prevail, are subjective. What are the socio-economic parameters? What is value for money? There is also the question of sustainability. Can employment-intensive works lead to sustainable job creation / income generation?

### **3.6.4 Discussion**

Employment-intensive works have been highly visible in the civil engineering industry as the industry has aggressively marketed such practices. (This industry probably has the highest exposure to public sector procurement. During the 1995 calendar year 83% of contracts awarded to the industry were let by organs of State. The comparable figure for the building industry was a mere 15%.) The civil engineering industry is plant intensive when compared to the building industry. Both industries are employment-intensive when compared to most other industries. The building industry, in general, generates more employment opportunities per unit of expenditure than does the civil engineering industry. If, however, labour is substituted for machines, this position can be reversed. Alternatively, if a blend of labour and light equipment is used on civil engineering projects, the difference in labour intensiveness between the two industries will reduce.

Public sector building and construction work forms a significant portion of both industries' workload. These industries are supported by numerous professional and contractor associations and learned societies, which facilitate the dissemination of information. As a result, employment-intensive construction issues are published and are visible. The same is not true of other sectors of industry, particularly where public sector expenditure is relatively insignificant. Invariably, the focus in sectors outside the building and construction industry has been on the development of sustainable small business enterprises which are employers of labour and for which labour-friendly technologies have frequently been developed in order to facilitate the functioning of the enterprises.

The choice of technology has a marked influence on the number and location of employment opportunities generated and the choice of construction method can, particularly in the case of civil engineering projects, significantly influence the total number of personhours of employment generated.

On building and electrification projects, significant increases in the number of employment opportunities per unit of expenditure are only possible where earthworks activities for which labour-intensive construction methods are feasible, form a significant part of the works, e.g. where underground cables are to be laid.

The choice of manufacturing method of building and construction components and materials can also significantly affect the number of employment opportunities generated. There is considerable scope for increasing employment opportunities through the use of employment-intensive methods of manufacture.

The choice of technology is generally made during the basic design phase of works contracts, whereas the choice of construction method / method of manufacture is usually decided upon during the construction phase. Two alternative procurement approaches to implementing employment-intensive works methods can be adopted.

**Method 1** : lay down the use of specific employment-intensive technologies and methods of construction / manufacture in the contract document.

**Method 2:** afford tenderers the opportunity to choose the technology / construction method / method of materials manufacture which they wish to use in order to implement employment-intensive methods.

*The choice of technology has a marked influence on the number of employment opportunities generated and where such employment is located.*

Either method may be used to increase the quantity of employment generated per unit of expenditure. Method 1 usually achieves the objective by restricting the use of certain types of plant / manufacturing methods and by specifying particular technologies. Method 2, on the other hand, requires tenderers to tender the amount of targeted labour, measured in accordance with a human resource specification, which they undertake to engage in the performance of the contract. Method 2, accordingly, permits tenderers to use their knowledge, skill and creativity in arriving at an optimum economic mix of equipment, technologies and labour in order to meet the objectives.

Method 1 is well suited to the targeting of local labour. The economic viability of this approach is, however, dependent on the ability of the designer / specifier to forecast cost. Method 2 can be used for the employment of relatively unskilled labour and any potential price premium can be readily assessed by adjudicating of tenders in accordance with a development objective / price mechanism. Method 2 therefore has the distinct advantage that tender prices will usually fall within acceptable limits and economic justification of decisions relating to employment generation will not be necessary.

*A distinction should be made between the increase in the volume of jobs available and the allocation of jobs to local labour.*

With regard to employment sustainability, work on infrastructure construction is, by its nature, temporary. It is also self-targeting towards the poorest members of society, because unskilled wages in construction are traditionally low. Workers with better options tend to go into other kinds of work and leave the temporary jobs in construction to those with fewer options, the poorest. Thus, although the jobs created are not permanent, the total volume of work available to the poor is increased considerably.

Any form of employment-intensive construction or manufacture, should be closely linked with the targeting of employment opportunities. The question, "**How many employment opportunities are created?**" is no less important than "**Who is to be employed and which persons will benefit from the projects?**"

Targeted procurement can be used by government as one of the strategies to ensure that the private sector implements policy relating to employment creation on public sector contracts.

It may be argued that expenditure in any sector of the economy will create employment opportunities. However, some sectors of industry are more efficient than others in generating employment opportunities for a given capital inflow. Industries where the potential for the effective substitutions of labour for capital and local resources for imports exist, can expect to achieve enhanced performance in the provision of employment opportunities.

### **3.5.5 Principals and proposals**

Procurement should facilitate the generation of jobs in South Africa by:

- ensuring that the foreign content in contracts involving goods, services and works is minimised.
- encouraging the substitution of labour for capital.
- supporting the use of "labour friendly" technologies which utilise a higher degree of labour input than is the case for conventional technologies, or are well suited to implementation by small scale enterprises.
- encouraging and developing small scale enterprises to implement employment intensive practices and "labour-friendly" technologies.

Human resource specifications and development objective / price mechanisms should be used to encourage cost effective employment intensive practices.

A distinction should be made in the targeting of local labour in order to stimulate local economies and the increase in employment opportunities generated per unit of expenditure. Increased credits in development objective / price mechanisms should be granted to encourage the increase in employment opportunities generated per unit of expenditure where tenderers are permitted to choose technologies and work methods.

Any premiums to be paid in respect of employment-intensive practices should be determined and accepted prior to the award contracts. Employment intensive practices should result in the generation of jobs as opposed to the displacement of jobs.

## **3.7. AFFIRMING MARGINALISED SECTORS OF SOCIETY IN CONSTRUCTION PROJECTS**

### **3.7.1 Description**

*Construction projects are amenable to area-bound forms of targeted procurement.*

*The targeting of marginalised sectors of society is frequently linked to poverty alleviation and the channeled flow of income to the poorest sectors of the community.*

Previous subsections entitled "An affirmative small, medium and micro enterprise participation programme" and "Promoting employment-intensive practices" describe forms of targeted procurement in terms of which the target groups are not confined to well-defined, narrow geographical areas. The targets are of a generic nature and are not area-bound. Construction projects, however, lend themselves to area-bound targeting as the assets which are procured have to be constructed in a specific location.

The targeting of marginalised sectors of society (communities) in construction projects is invariably linked to labour-based works. Frequently, it is linked to poverty alleviation and the purposeful flow of income to the poorest sectors of the community. Education and training are often seen as a means of economic empowerment as the construction projects themselves are usually of comparatively short duration. The development of community capacity to manage its own affairs in some instances forms part of such projects as this is considered an essential component in the strengthening of local governance and the generation of sustainable economic development.

The development of local enterprises is of great value to a community. The resources readily available include local materials, local manpower, local machinery and local money. Development support systems have evolved to provide professional / developmental assistance and the resources lacked by local enterprises to enable communities to construct their own infrastructures and to acquire skills and competencies in commercial, administrative and managerial fields. Community members have, in addition to the more traditional construction activities, also become involved in the operation of stores facilities; the provision of support to local contractors by involvement in administration, monitoring of progress etc.; the transportation of materials from central stores to local labour only contractors; the manufacture of certain materials; the supply of minor materials; and the security of the site.

Construction projects which target marginalised communities in the context of public sector procurement should not be confused with relief programmes, which are of a social and compensatory employment nature, or programmes involving works of community or household interest where the beneficiaries of the assets are directly involved and wage payment is not the prime factor motivating their participation, e.g. construction on privately owned land. Projects which target (affirm) communities are works administered by organs of State for the benefit of the public, where ownership of the infrastructure created is retained by such organs and the major motivation for the labour force engaged in the schemes is the wage received in compensation for their labour.

There is at present no comprehensive policy in place to engage marginalised communities in construction activities in South Africa and current initiatives are a mix of international and local practice. There is a need to review current practices, delivery systems and implementation mechanisms from a procurement perspective and to establish policy in this regard.



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### **3.7.2 Vision**

To realise the potential of the procurement system as a means of empowering marginalised sectors of society in order to alleviate their marginalisation from economic, political and social power through the creation of assets.

#### **Secondary vision**

To structure projects involving the creation of assets within targeted (area-bound) communities in such a manner, insofar as the community is concerned, that:

- The community is, from the outset, involved in decision making and is, as far as possible, actively involved in all aspects of project implementation.
- The maximum number of jobs are created.
- Entrepreneurship is actively promoted.
- Skills are transferred to the community.
- The amount of project funds retained within the community is as great as possible.

### **3.7.3 Constraints**

There are, of course constraints applicable to any project, irrespective of the supplementary benefits that may otherwise accrue to the community. These are:

- The project must be completed on time.
- Project expenditure must be within budget.
- The finished product must meet specified quality standards.
- The assets which are created must be appropriate and in the public interest.

Delivery systems which seek to attain the vision must:

- not place organs of State at undue risk with respect to failure to deliver, cost overruns or cost premiums.
- be easily audited.
- assign clear responsibilities to the parties which are involved.
- not compromise the provisions of the constitution or labour standards.
- not propose procedures which could result in undue cost premiums, cost overruns, or delayed completion.
- ensure that all public funds are accounted for.

### **3.7.4 Discussion**

*Community projects can be community or authority controlled, depending upon where administrative and financial control is placed.*

*The selection of the contract strategy dictates the degree to which beneficiary communities can participate in construction activities.*

Community projects are **process** (the manner in which the asset is acquired and constructed) driven as opposed to **product** (asset) driven, the process being just as important as the product. Community development may be viewed as a process with milestones, completed projects being beneficial by-products of the process, which does not have a definable start, or a definable end. Facilitation is necessary to drive the development process, whilst contractors / service providers are required to deliver the projects. Construction projects do have definable starts and ends. Accordingly, tensions may arise over short term construction related issues, as technical priorities do not always match community priorities and construction expediences do not always meet community aspirations.

Facilitators should be impartial managers of the process and are frequently required to lead/ assist communities in structuring themselves and to generate sufficient consensus on the appointment of professional teams to provide the necessary support in respect of design, organisation, project / construction management, training, community needs and the like.

Projects which target marginalised communities will, depending upon where the financial responsibility for dispersing of funds and the administration of the project is placed, be regarded as being either **community controlled**, or **authority controlled**. Within either of these two categories, community participation insofar as construction is concerned, can range from the provision of unskilled labour to the construction of the project as a whole.

Marginalised communities rarely possess sufficient resources to undertake projects without external assistance and technical, commercial and financial support is required to facilitate their participation. Implementation mechanisms range from labour-pool worker programmes, in which prime contractors contract to engage unskilled workers from the community, to the engagement of community contractors in tandem with third parties who "*fill the gaps*" and minimise the public authority's risk exposure. In some instances, communities have employed labour directly.

The contract strategy which is adopted dictates to a large degree the extent to which communities can participate in construction activities. Participation can be secured by means of human resource specifications and development objective / price mechanisms; goals may be set for either the engagement of local enterprises (local labour and local enterprises including local suppliers and local manufacturers) or for the engagement of targeted labour. Participation can also be secured by means of joint venture formation with targeted enterprises within communities or by letting labour only and labour and material contracts and providing third party management support to perform construction and materials management functions.

Third party management support has facilitated contractor development based on the progressive introduction of labour, transport, materials, plant and finance. The third party's responsibilities reduce as emerging contractors become capable of assuming successive areas of responsibility and mastering functional activities.

Competitive tendering can be used in all the aforementioned contract strategies to secure targeted community participation without resorting to set asides. Targets, however, need to be clearly and unambiguously defined on a project specific basis. Contract strategies also need to be set on a contract specific basis in order to optimise the benefits accruing to marginalised communities.

*i. Community Controlled Projects*

*Community controlled projects are based on the philosophy of making the community totally responsible for the project and its outcome.*

*Community controlled projects build capacity outside of the third tier of government*

Community controlled projects are projects which are specifically designed to be executed through community control, but with outside expertise and assistance to help the communities in their efforts. For these projects, communities are expected to set up their own legal entities, varying from voluntary associations and trusts to Section 21 companies. These entities represent the communities by prioritising their particular project needs, setting up management and control systems, receiving funds and implementing the projects.

Community controlled projects are based on the philosophy of making the communities totally responsible for the projects. Each community is, for the purposes of the project, the client and is therefore responsible for the outcome. The focus of control during the planning, design, implementation and operation of the project is within the community. Organs of State provide assistance to communities, and approve project plans in accordance with their normal responsibilities, but do not control projects.

Where communities appoint consultants, organs of State exercise no direct control over the consultants. This situation is not ideal, either from the consultants', or the State's point of view. On some projects, consultants are remunerated directly by organs of State and the communities are the consultants' sub-clients.

In what is known as the Community-based Public Works Programme, communities make application to organs of State for community-based projects. Approval of an application enables the community to secure funding for advice and assistance in order for it to commence with the planning of the project and the preparation of project proposals, business plans and the like. Funding for the project is only released upon acceptance of the proposals. Currently between 10% and 45% of the project cost is paid into the community's banking account upon approval of the project. The remaining funds are disbursed against monitoring reports which record progress against predetermined milestones. Upon completion of the project, all remaining funds are returned to the department and are reallocated to other projects.

The community is charged with all procurement matters and is entitled to enter into contracts. The community is, furthermore, required to ensure that any physical assets that are built are of an acceptable quality and is required to exercise control over the monies received.

*Communities are represented, and participate procedurally, in a number of ways in authority controlled projects.*

There is a view that **community controlled** projects provide communities with 100% preference and are, in effect, set asides. Concerns have been expressed that

the community structures which are formed to oversee projects are, in effect, gate keepers and opportunists; that community structures undermine local governance; and that communities compromise labour standards. Some have questioned the wisdom of placing responsibility for procurement and financial control in the hands of the community, which does not have accounting officers as required in terms of treasury controls. Others have questioned the sustainability of enterprises which have developed, as they may not be able to secure work in programmes outside of their own communities, as neighbouring communities will demand set asides for their members.

It may be further argued that Community-based Public Works programmes develop capacity in communities which would be better located and more sustainable in the third tier of government. The practice of placing funds outside the direct control of accounting officers does raise a number of questions relating to risk. For example, what happens if a community is unable to deliver the project within its financial allocation and how are monies to be recovered from the community in the event that funds are fraudulently or irresponsibly spent?

#### *ii. Authority Controlled Projects*

In authority controlled projects, accountability lies with an organ of State, although communities can be represented and can participate procedurally in projects in a number of ways. Projects can be identified either from within the community or by the controlling authority. In some cases, the community may be required to confirm the priority of an identified project.

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Opportunities for engaging communities in project implementation include seeking approval for the asset to be created; the use of employment-intensive construction methods; recruitment procedures and task-based systems of employment and remuneration; the community liaison process; pre-tender arrangements; maintenance and management arrangements for the assets after the project is completed; and financial and training arrangements.

Community approval is construed to be given by the conclusion of a contract between a representative community structure and the responsible authority, or by a resolution taken at a representative community meeting. This approach has generally been used in the implementation of labour-pool worker programmes.

At the other end of the spectrum of authority controlled programmes lies the Development Compact approach. In terms of this approach, the beneficiary community and the developer (implementing organ of State or their agent) enter into a Development Compact, i.e., an agreement which lays down a procedure, which is to be followed from inception to completion, allocates areas of responsibility and requires participants to account for their actions. Project steering committees are formed to administer this type of agreement.

*The third tier of government should become community joint venture partners and take responsibility for the implementation of projects.*

Both the beneficiary community and the developer have obligations in terms of the Development Compact. In essence, the developer is responsible for working through the delivery options with the beneficiary community, while the beneficiary community is responsible for accepting the development strategies, defining the geographical area which is to be regarded as being local, nominating candidates for management posts, advising on community needs, etc. In this manner, the beneficiary community exercises more influence over the project than would normally be the case, advises on community requirements and identifies local resources.

The Development Compact deals with issues at local or project level. It presupposes that planning at the macro level has taken place and the wider community has mandated the beneficiary community to enter into a development compact with the implementing organ of State.

It may be argued that authority controlled approaches to engage communities in construction activities were developed to overcome difficulties associated with illegitimate government and are no longer necessary.

### *iii. The role of third tier government in community projects*

Funds have been placed in the hands of the communities for **community controlled** projects for reasons other than a desire to develop capacity in the communities. In many African countries, donors have opted for this route in order to secure and dedicate the funds for the project in question and to by-pass organs of State. In South Africa, this route has in the past been followed in certain instances in order to locate monies in community structures as opposed to "illegitimate" local authorities, or to provide a vehicle to disburse funds on projects where the third tier of government had no capacity to do so, or was not functioning.

Recent local elections throughout South Africa have resulted in democratically elected representatives being installed in metropolitan, town, rural and district councils. The question now arises as to the role of these councils.

It is submitted that :

- councils should account for public monies and that any capacity building which may be necessary in this regard, should be directed at council officials.
- councils should define marginalised sectors of society (beneficiary communities) and lay down specific targets in delivery mechanisms, using human resource specifications.
- councils should be the conduits through which national and provincial implementing departments identify community projects and interface with the communities.
- councils can, using local knowledge, guide national and provincial implementing departments in deciding upon the best contract strategies for particular projects.
- councils, or their agents, can undertake the necessary community facilitation.

In effect, councils should become community "joint venture partners". Councils should, as far as it is practicable, take responsibility for the initiation and management of community projects and out-source as necessary the execution of

such projects to firms which are capable of providing the necessary resources. The third tier of government should assume a co-ordinating role in project facilitation and data collection, so as to avoid duplication and to achieve uniformity in policy and approach within a particular region.

It is acknowledged that in certain areas, particularly rural ones, councils are not fully functional. In such circumstances national and regional implementing departments may, in the short term, need to undertake facilitation in conjunction with relevant councillors and broker agreements with beneficiary communities.

#### *iv. Compensatory wage packages in community projects*

The jobs created by construction projects usually last only as long as the construction phase of the project. To ensure some degree of sustainability after completion of the project, education and training, in the form of vocational training (technical, managerial, administrative); generic training (life skills; adult basic education); and institutional training (developing a community to manage its own affairs), is frequently provided to those working on the project. This is seen by some as highly desirable and as providing a stepping stone to obtaining jobs elsewhere, or becoming self employed.

Current recommendations for training budgets range between 5% and 10% of total project cost. Funding has, in the past, been sourced from project budgets, government departments such as the Department of Labour, schemes such as the Unemployed Persons Training Scheme and donors.

Wages and training costs have, in effect, become a "tax" on community projects, particularly where, on civil engineering works, labour is substituted for machines in an environment where wages are controlled by a wage order, or conciliation board agreements. The wage order prescribes a minimum wage level and requires employees to be remunerated on the basis of time worked rather than the quantity of work done. Industry has argued that to make projects viable, workers should be remunerated on a task-based payment system at a lower wage rate than the industry minimum. Training is linked to the lowering of wages to sweeten the wage package. This has proved successful where the Department of Labour has had funds available for the purpose, but has become unattractive where the funding of training has had to be drawn from project budgets which may already have been reduced to accommodate more costly employment-intensive construction methods.

There is a relationship between wages and productivity. The lowering of wages frequently leads to lower productivity and is not a recipe for sustainable development, or enterprise creation.

The linking of training, at the level envisaged, to employment, in order to permit a lowering of wages, has become a major issue. How should training be funded? Should training be project specific? Should non-industry specific training be linked to construction projects? Will industry specific training lead to an over supply of labour in the market? All these questions need to be answered as the demand for training has, in effect, resulted in a cost premium for projects of this nature. Negotiations over wages and training can be very protracted and time consuming. This results in delayed starts to projects. Also, communities which renege on their acceptance of lower wages can hold projects to ransom.

### **3.8.6. Principles and proposals**

Projects which involve the area-bound targeting of marginalised sectors of society should, in a safe and healthy environment, be completed:

- on time
- within budget
- to the required quality
- with the optimal transference of skills and competencies to the community
- with the optimal amount of project funds being retained within the community.

Such projects should be based on the following principals:

- Risk must be allocated to the party best able to manage it. (In practice, communities can rarely take on more risk than that arising from community support / acceptance for the project, labour wage rates and labour availability).
- Communities should be held responsible for the quality of the work except where third party management support or external contractors are involved.
- Labour standards should be upheld; employment policies should be consistent with the new Labour Relations Act and conditions of employment.
- Adequate provision must be made to minimise risk exposure through the use of appropriate contracting arrangements and integrated risk management comprising risk control / improvement and risk financing.
- The roles, responsibilities, rights, risks and obligations of all participants need to be clearly and unambiguously defined at the outset.
- Marginalised communities should be offered participation / job opportunities.
- Organs of State should appoint consultants and training providers.
- Upfront work with communities is a prerequisite for success.
- Policy should be flexible enough to enable a range of community orientated projects with differing objectives, delivery mechanisms and administrative arrangements to be implemented both in rural and urban areas.
- The third tier of government should take responsibility for process facilitation, the cost of which should not be borne by the project. Project specific facilitation should form an integral part of the project, the cost of which should be borne by the project. (In rural areas funding should be obtained to finance the facilitation of the process, should this be necessary).
- The third tier of government should define marginalised sectors of society, establish area-bound targets (goals), interface with and assist regional and national implementing departments in choosing the best contract strategy for a project, establish data bases and perform a project co-ordination role.
- Contractors should have the prerogative to select participants (community members / enterprises) from the target group and be permitted to make substitutions for participants, or be relieved of their obligations should the selected participants fail to perform.
- Communities should be compensated for their out of pocket expenses and only receive remuneration should they perform a project specific function which, had they not done so would have necessitated the employment of someone else.
- Training should, as far as possible, build onto existing skills bases rather than create new capacity from scratch.

- All projects which are funded solely by means of public funds should be authority controlled. Community controlled projects should only be permitted where a significant proportion of the funds are obtained from sources other than organs of State and effective controls are in place to protect the financial interests of the State.

In order to facilitate delivery and to maintain labour standards, task-based payments based on wage levels expressed as percentages of statutory wage levels, should be legislated. Furthermore, conditions of employment should be developed and promulgated for project-specific workers (temporary workers) whose status is neither that of casual or permanent workers. This will reduce delays in procurement.

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In general, training should not be project specific, except for on-the-job training, and should not be linked to the lowering of wages. Regional budgets and programmes should address training for marginalised sectors of society on a programme basis. All training should be in accordance with provincial human resource development strategies, guidelines and principles. Contractors responsible for works contracts should not be required to provide training other than specific on-the-job training.

Community projects should be categorised. This will enable organs of State to have a starting point when interacting with communities, and opportunities and systems to be linked to categories of projects. It is proposed that community projects be classified as either being **budget offer** or **target market** and **community** or **authority** controlled.

**Budget offer** projects would be those in which a sum of money is set aside for a specific community to be provided with certain facilities within broad parameters and the flexibility exists for the end product to be determined, both in quantity and quality, by the process without changing the budget. (A well known example of this type of project may be found in the State's housing programme where communities can, depending upon their priorities, have larger or smaller top structures, depending upon their technical, training and method of construction choices.) Thus in **budget offer** projects, community choices at every stage of delivery has an impact on the final product. Accordingly, training budgets can be project specific and funded through the project; less economically efficient delivery systems which meet the needs of the community can be considered and contracts can be set aside for members of the community to execute.

In the **target market** category, the community is provided with facilities without the flexibility of the budget offer approach and has its role confined to the submission of inputs, setting of affirmative targets and choice of delivery mechanism within the constraints of value for money through the third tier of government.

Target market projects should afford constituents of beneficiary communities an opportunity of participation in projects, but should not guarantee work to any individual or enterprise. Budget offer projects should be confined to those projects where a narrow sector of the community benefits from the asset that is created.

### **3.8. THE DEVELOPMENT OF AN AFFIRMATIVE PROCUREMENT POLICY**



## **Requirements for an Affirmative Procurement Policy**

*An Affirmative Procurement Policy is required to enact the vision for the Procurement Reform Process and to facilitate the engagement of previously disadvantaged enterprises and communities.*

What is required is an Affirmative Procurement Policy which sets out to enact the vision for the Procurement Reform Process. Such a policy would need to set out clear statements of intent and address issues raised by questions such as:

- How can previously disadvantaged enterprises be given preferential consideration for award of contracts?
- How does one ensure the performance of emergent, previously disadvantaged firms?
- How will interventions be monitored and, if necessary, redirected to achieve predetermined goals?
- How can previously disadvantaged enterprises be financially assisted to establish themselves?
- What cost premium is government prepared to bear on contracts in order to correct skewed apartheid influences?
- What needs to change in existing legislation to facilitate the engagement of previously disadvantaged enterprises and communities?
- When should special measures taken to address skewed apartheid influences, be withdrawn?

*Affirmative Procurement should include programmes aimed at the engagement of small, medium and micro enterprises; an increase in the volume of work available to the poor, and income generation for the marginalised sectors of society.*

## **Guiding principles for the development of an Affirmative Procurement Policy**

The Government has a compelling interest in ensuring that public funds are expended in such a way that all segments of the South African population benefit from such expenditure through job creation and commercial activity. Accordingly, it is necessary, to purposefully direct the flow of commerce to and through those population segments which have historically been under-utilised and excluded from participation. This should be done in such a manner that participation in procurement activities is ensured through:

- making the tendering process accessible to the target group without, however, guaranteeing work; and
- linking the flow of money into target business enterprises with a concomitant flow of responsibility.

In addition, an Affirmative Procurement Policy should, where practicable :

- increase the volume of work available to the poor and marginalised sectors of society.
- provide employment and income generation opportunities for marginalised sectors of society.

*An Affirmative Procurement Policy should have a development component which enables the target group to participate in procurement activities.*

Affirmative Procurement should, accordingly, comprise participation programmes aimed at the engagement of small, medium and micro enterprises owned by previously disadvantaged persons, in all types of contracts and, in engineering and construction contracts, increasing the volume of work available to the poor and income generation for marginalised sectors of society. Sunset provisions should be built into the system to ensure that programmes do not continue to protect and advance persons and sectors of society, historically disadvantaged by unfair discrimination, beyond the point at which such measures are no longer justifiable.

Affirmative Procurement should in the long term :

- facilitate growth in terms of the efficiency and effectiveness of delivery as well as the numbers and sizes of business enterprises owned and controlled by previously disadvantaged individuals.
- ensure that emerging enterprises contribute to the tax base, engage workers who are affiliated to labour organisations, adhere to safety and environmental regulations and, in their business activities reflect norms and standards prevalent in developed countries.

The policy for Affirmative Procurement should have two main legs, viz.:

- a development component which seeks to ensure that there are, in fact, target group enterprises, albeit fledgling, which are capable of executing public sector contracts for the provision of goods, services and works.
- a structured participation component which ensures that enterprises owned and controlled by the target group are afforded the opportunity to compete for the award of public contracts for the provision of goods, services and works.

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Development programmes which provide the necessary developmental support to emerging target group enterprises should:

- ensure that goods, services and works are delivered on time, within budget and to the required quality standards.
- transfer skills and competencies to the target groups.
- maximise the contract expenditure retained by the target groups.

Affirmative small, medium and micro enterprise participation programmes should, on the other hand, embrace the following principles:

- any measures which are adopted to secure participation by the target enterprise group should not result in failure in the delivery of, or deterioration in the quality of the goods, services and works which are contracted for.
- only those enterprises which are in operation in a particular industry and are considered capable of successfully completing a given contract at the time when goods, services or works are requested, should be considered.

- businesses should compete for the award of contracts.
- measures which are adopted to secure participation by target group enterprises should fall away once such enterprises reach predetermined turnover milestones.

Accordingly, the development component of the policy should be concerned with:

- the clear allocation of risks, rights and obligations of participants.
- the manner in which the development support is engaged.
- the selection of participants.
- capacity building, entrepreneurial enhancement and technical and managerial training.

The structured participation component of the policy should be concerned with:

- goals
- certification
- sanctions
- compliance

*Targeting should be focused so that the target group is readily and unambiguously identifiable.*

In both components, programmes should be structured in a transparent manner and should be narrow in their targeting, so that the target group is readily and unambiguously identifiable.

Participants in programmes should be registered. Sanctions, such as exclusion from future participation in public sector procurement, should be applied to those who contravene the conditions of participation, or secure participation in a fraudulent manner.

The target groups for participation programmes aimed at the engagement of small, medium and micro enterprises and the increase in work available to the poor, should not be area bound. The target groups for participation programmes in engineering and construction works contracts aimed at increasing income generation to marginalised sectors of society should, on the other hand, be area bound. The setting of area bound targets should be undertaken by metropolitan / town / rural / district councils. The councillors in whose constituencies construction is to take place should, if mandated by their councils, be consulted by the implementing organ of State. The cost of facilitation should be borne by the metropolitan / town / rural / district council and should institutional capacity building be necessary this should be directed at the third tier of government.

Administrative procedures located within an Affirmative Procurement Policy should:

- be simple, cost effective, quick and transparent
- prevent corruption
- contain no form of discrimination of any kind

Finally, the policy should be underpinned by strategies which provide:

- flexibility
- clarity
- stimuli for good project management
- empowerment for small, medium and micro enterprises to form and run their businesses in a vibrant fashion in accordance with Reconstruction and Development Programme principles.
- monitoring procedures to ensure that measures taken to advance and protect disadvantaged persons and sectors of society are justifiable.

**Some practical considerations regarding an affirmative small, medium and micro enterprise participation programme.**

*Certification in affirmative small, medium and micro enterprise participation programmes is required to establish that the target group owns and controls the enterprise.*

Certification is required to establish the bona fides of the target group. Much of the focus of the certification process is on identifying fronts and frauds and ensuring the integrity of the programme; the idea being that the screening process will ensure that only bona fide target groups can claim target status, be accorded preferential treatment and be empowered through the programme.

Where target enterprises are claimed to be owned and controlled by previously disadvantaged individuals, certification should seek to confirm such ownership and control.

Control of a business entity signifies the power to direct both the operational and management control of the business entity. Accordingly, the certification process needs to establish that, from an **operation control** point of view, the target group:

- is knowledgeable in all aspects of the business.
- independently makes basic decisions pertaining to the daily operations.
- has some experience and technical competence in the industry, to which certification is sought.

Certification, from a managerial point of view, has to demonstrate the ability of the target group to make independent and unilateral business decisions, and to guide the future and destiny of the business. Ownership and control can, to some extent, be established by questioning persons to whom goods, services or works have previously been provided by the business entity.

Certification can be undertaken on a self-certification basis, with minimal independent checks, provided that it is linked to a system of registration, which permits transgressors to be deregistered and prevented from participation in future contracts, and is open to public scrutiny. Self-certification which is not linked to registration and public scrutiny should not be pursued in the medium term, as recourse against those who abuse the system would be difficult.

Regional registers are not desirable as programmes would not be based on area bound enterprises and co-ordination would be difficult. Registration can best be effected by a national Procurement Compliance Office.

Prime contractors can also abuse participation programmes by employing targeted enterprises in "pass through" activities (targeted enterprises would fail to perform meaningful functions). Sanctions in the form of contract administration remedies and the barring of contractors from tendering on future contracts is considered to be the best method of dealing with such practices. To effect this, registration of all contractors is required. Such registration and sanction can best be effected by a national Procurement Compliance Office.

In special circumstances, sheltered market tenders may have to be considered and designed for the 'differently-abled' community in order to ensure that those targeted end up with contracts. As this is a form of reserved procurement, such programmes need to be implemented under strict controls, and only when other remedies are determined to be inadequate, or inappropriate, to meet the desired objectives. A national Procurement Compliance Office can play an important moderating and supervisory role in this regard.

*Deregistration is an effective means of sanctioning those parties that abuse the system.*

*A Procurement Compliance Office can register contractors, engage in outreach, and publish directories of target group enterprises.*

An information and communication awareness campaign is required to inform established industry and emerging target group enterprises of the programme and the specific opportunities presented thereby. A national Procurement Compliance Office could assume responsibility for this. The publication of directories of target group enterprises by such an office, broken down into regions and the services provided by the enterprises, would enable productive linkages to be established between emerging target group enterprises and large scale established businesses.

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### **Some practical considerations regarding the affirming of marginalised sectors of society in construction projects**

The defining of general target groups on the basis of parameters such as franchise in terms of the 1984 constitution (race-based), gender and scale of enterprise is relatively easy, as such definitions are universally applicable. Furthermore, such targeting is not area bound. There is, however, no universal definition for the targeting of marginalised sectors of society in construction projects. There are many factors which need to be considered when determining which communities may be regarded as being marginalised. Invariably, such communities are confined to specific geographic areas.

All marginalised communities have labour which can be engaged on projects. Some have enterprises which may supply materials, hire plant and equipment, manufacture materials, construct portions of the work, etc. There are also degrees to which specific groupings within communities are marginalised. Thus if the local resources are available within marginalised communities, there may be different weightings which should apply to different resources and to different sectors within the community. At the same time, geographic areas which may be used to define

enterprises will generally be wider than those which may be used for unskilled labour.

It was proposed earlier in this chapter that elected councillors, in whose constituencies construction takes place, should engage with implementing organs of State on delivery options and define target groups, if relevant, provided that they are mandated to do so by their respective councils. As such targets have, for the aforementioned reasons, to be defined on a project specific basis, it is submitted that in some instances targets which are set may not necessarily be appropriate. The system is open to abuse and manipulation and councilors may, for reasons of vested interest, promote delivery systems or promote enterprises which should, rather, participate in other forms of programme. Furthermore, the setting of area bound targets is a form of preference which, in terms of the new Constitution, must be regulated by national legislation.

*A national Procurement Compliance Office can exercise external controls and perform audits on the third tier of government's engagement of marginalised sectors of society in construction contracts.*

In order to overcome these constraints, both actual and perceived, external controls and auditing systems need to be put in place. A national Procurement Compliance Office could do this and enforce a uniform interpretation of the term "marginalised sectors of society". This arrangement would also ensure that poor precedents are not set by metropolitan, town, rural or district councils. This is particularly important, as the development of community contractors can work against the development of *black-owned* small, medium and micro enterprises. For example, community C may demand that only contractors from community C be engaged on a project. This would mean that any contractors developed through projects in communities A and B would be excluded from participation and have no continuity of work, i.e., enterprises developed through community projects will not be able to export their services to neighbouring communities and so develop in a sustainable manner.

### **The role of a national Procurement Compliance Office.**

National legislation as recommended in chapter 2 should be drafted to set out uniform tender procedures, policies and control measures and to require all organs of State to use standard contract documentation and contract options. Such legislation should also set out preferences and policies with respect to the advancement / protection of persons or categories of persons disadvantaged by unfair discrimination, define the target groups and provide for the establishment of a national Procurement Compliance Office. The Procurement Compliance Office, apart from ensuring that procurement offices and procurement centres comply with national legislation and setting regulations and policy with respect to contract documentation and contract options, should, *inter alia* :

- co-ordinate the implementation of new and reformed policies.
- monitor progress made in the implementation of reform measures.
- sanction those that transgress the code of conduct for officials and the code of conduct for service providers, suppliers and contractors.
- ensure that enforcement mechanisms are intertwined into every level of government to ensure that targeted groups are given every opportunity to compete for government contracts.

- receive and review annual reports submitted by all procurement offices and procurement centres.
- establish and maintain registers of all those engaged in procurement activities both as targeted enterprises and prime contractors.
- sanction those participants who abuse the system or secure contracts on a fraudulent basis.
- initiate an information and communication awareness programme (outreach)
- be responsible for certifying targeted enterprises.
- publish, distribute and maintain directories of target group enterprises.
- monitor, audit and control delivery mechanisms on construction projects which target marginalised sectors of society.

*The Procurement Compliance Office is the engine which may be used to drive Affirmative Procurement.*

- oversee any sheltered market programmes which target the 'differently-abled' community.
- consolidate information and compile data for review and reporting.

From the above it can be seen that the Procurement Compliance Office would play a pivotal role and be, in essence, the engine which drives Affirmative Procurement.

### **Key elements for the successful implementation of an Affirmative Procurement Policy.**

Aspects of an enabling environment which are conducive to the effective implementation of an Affirmative Procurement Policy are:

- Access to tendering information and the simplification of tender documents.
- Break out procurement (unbundling).
- Awarding of tenders in terms of development objective / price mechanism.

The key elements of an Affirmative Procurement Policy, on the other hand, are:

- An affirmative small, medium and micro enterprise participation programme.
- Promoting employment-intensive practices
- Affirming marginalised sectors of society in construction projects.

The statement entitled "Affirmative Procurement in Brief" which may be found at the end of this paper, summarises these aspects of an Affirmative Procurement Policy.

The success of an Affirmative Procurement Policy is highly dependent on :

- endorsement and support from policy makers, senior administrators and those accountable for the procurement of goods, services and works at national, provincial and local level.
- a commitment from the highest levels of government (i.e. executive, legislative and judicial) that the promotion of the target groups is a high priority.
- comprehensive and unambiguous supporting documentation.
- effective monitoring and reporting systems being established.

- establishing the bona fides of the target group.
- business development of the target group taking place.
- ready, willing and eager target groups who are able to take advantage to the empowerment programme.
- competent and well trained officials and staff who are dedicated to endorsing in a pragmatic manner elements set forth in legislative and policy initiatives.
- a national Procurement Compliance Office:
  - being responsible for establishing written procedures to enact Affirmative Procurement Policy, establishing and reviewing participation goals on an annual basis for all procurement offices and procurement centres, sanctioning violators of procurement codes, investigating violations of policy and abuse, investigating and taking action regarding complaints, collecting and maintaining statistics regarding the target groups and their participation in public sector procurement, and publishing registers of target enterprises.
  - being proactive in aspects such as outreach, certification, participation, monitoring and establishing and maintaining a national register / data base.
  - instituting monitoring systems to ensure that measures taken to advance and protect individuals and sectors of society are justifiable.
- third tier of government facilitating the engagement of marginalised sectors of society in construction projects.
- a comprehensive training and skills development programme being embarked upon to ensure that officials and external service providers who engage in procurement activities are competent and conversant with all aspects of Affirmative Procurement.

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## 4. Specific Aspects of Procurement Reform

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#### 4.1 Introduction

Public Sector procurement is an instrument of Government policy. The setting of new policies to serve socio-economic objectives, the changed environment, and good governance require a review of the detail of the procurement system. If this is not done, new policies will not be able to produce the desired results. At the same time, government needs to be able to govern in an efficient and effective manner. Procurement should facilitate and not frustrate organs of State in their functioning and the discharge of their obligations.

The validity of current public procurement practices needs to be examined, and certain practices need to be revised, some housekeeping is necessary and issues which have never been satisfactorily resolved, need to be addressed.

Procurement activities may for practical reasons be considered as falling into one of the three following categories:

<p><b>goods:</b> being the supply of raw materials or commodities made available for general sale.</p>	<p><b>services:</b> being the provision of labour and/or knowledge based expertise.</p>	<p><b>engineering &amp; construction works:</b> being the provision of a combination of goods and services, including building and engineering infrastructure, arranged for the development and provision of an asset or refurbishment of an existing asset.</p>
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The principles of procurement are, generally, applicable to all three types of activity; the details, however, may change. The discussion and proposals presented below, examines, as far as possible, issues in a non category specific manner.

Engineering and Construction Works procurement is, normally, more complex than that for Goods and Services as this type of contract requires elements of both Goods and Services to be combined and arranged for the performance of the contract. Construction contracts require assets to be constructed in a specific location, and have requirements which are very industry specific. For these reasons, and because the construction industry's role in public sector procurement is significant, some of the issues which need to be addressed in construction projects specifically are also raised.

## **4.2 Value for money**

### *i. Discussion*

Value for money, in the context of human resource development, is discussed in Chapter 3. The technical component of value for money also needs to be re-examined.

Organs of State will need to embrace disciplines such as value engineering (i.e. the structured and continuous approach to developing a common understanding of a project's aims and requirements together with all aspects of function, design, construction and operation) to enable the best functional balance between cost, reliability and performance, and, hence, value for money to be achieved.

Procurement procedures should encourage tenderers to offer alternative designs, techniques or proposals that offer better value for money. Proposals which enhance the intrinsic quality without affecting monetary savings should, also, be considered.

### *ii. Proposals*

- Organs of State should, where appropriate, embrace the discipline of value engineering.
- Tenderers who submit alternative tenders based on performance specifications, should not necessarily be required to submit, in addition, tenders without qualification or modification.

## **4.3 International competition (Foreign Tenders)**

### *i. Discussion*

Most of South Africa's industries are not yet in position to compete on a par with their international counter-parts. There are a number of reasons for this state of affairs, particularly the fact that South African industries have not gone through the full development cycle experienced by other developed economies. Accordingly, many South African industries would find it very difficult to compete both locally and abroad if all forms of preference and support for locally manufactured products were to be abolished.

Whilst State regulatory policy should aim to achieve its goals in an international context, it must also take into consideration the support and development of local industry, and the creation of job opportunities. The policy must respond to key issues of national priority such as the upliftment of previously disadvantaged sections of the community, whilst also reflecting on issues pertinent to international trading, and how these issues will be managed. Industry must become competitive both on the local and international markets.

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Local industry can be protected in a number of ways including:

- The imposition of restrictive tariffs on all goods of foreign origin.
- The institution of non-tariff based controls on importation (i.e. Import Control).
- The provision of preferences for local supply based on local content.
- The application of affirmative (targeted) procurement practices.

Price-based preferences invariably raise the issue of value for money, particularly where the price differences between imported and locally produced goods are significant. Such preferences are, furthermore, often in conflict with international trade agreements.

Contract strategies and the packaging of contracts can also be used to tip the scales in favour of the local industry. The size of contract, early warnings to prospective local suppliers of forthcoming tenders, and technical assistance programmes can all play a part in ensuring, that local tenderers have a fair chance of winning contracts.

Targeted procurement practices can be effectively used, particularly on construction projects, to ensure that there is significant local content. The objective can be achieved without resorting to the conventional restrictive trade practices as all tenderers, including foreign tenderers will be required to deliver in terms of technical and human resource specifications.

Both technology transfer and human resource development are crucial to the advancement and development of local industry. South Africa's policies ought to ensure that the country enjoys the maximum benefit of foreign participation by incorporating a requirement for technology transfer and human resource development as integral conditions for foreign tenders.

A single, broad and comprehensive policy may be easier to manage than numerous narrowly defined policies. An offset policy is an ideal instrument through which all requirements can be achieved. Technology transfer and human resource development can be used as credits for the required offset value under an offset contract. Alternatively, it could be a requirement that foreign tenderers meet their offset requirements through purchases or services sourced from small, medium and micro enterprises.

To develop and formulate an offset policy, data would need to be gathered and analyzed. Accordingly, this is a medium to long term approach.

Since South Africa has joined the international trading community by signing the World Trade Organisation agreement, it is desirable to develop harmonised and transparent procurement procedures, acceptable to local and foreign tenderers, which make provision for value for money and competitiveness, with special emphasis on meeting the principles of the Reconstruction and Development Programme and the socio-economic objectives of government. It is, however, important that South African industries move rapidly to a position where they can compete on par with other world economies. An export orientated policy which is consistent with international trading norms might be the key to developing local industries to the required level of competitiveness.

#### *ii. Proposals*

- The current preference system for local content should be continued and be extended to professional service contracts.
- Specific attention should be paid to the selection of contract strategies, the packaging of contracts and the setting of human resource goals in order to maximise local content.
- The continuation of the preference system should not rule out the adoption of broader policies in the future which may be easier to manage and which can yield increased benefits. One of these policies could be an offset policy. An offset policy can be comprehensive, covering many issues, yet be easy to manage, since the responsibility for satisfying the offset agreement requirements rests with the seller (foreign tenderer). An offset policy has an inherent bias towards export promotion, which is an indirect, but more effective way of supporting local industry.
- In order to simplify tender documentation, streamline administrative procedures and focus protective measures, preference systems should be linked to the categorisation of contracts and applied only to specific sub-categories of contracts.
- Foreign labour should be utilised only in circumstances where the requirements cannot be met by using local labour. Government procurement policy should ensure that this policy is respected by the those tenderers who respond to government tenders.
- The appointment of international specialists should be conditional upon the transfer of skills to their South African successors.
- Foreign tender participation should be based on, *inter alia*, value for money and on the promotion of international competitiveness.
- Foreign tenderers should be used for the development and benefit of local industry. Both technology transfer and human resource development should be linked to such tenders in order to ensure that South Africa enjoys the maximum benefit from foreign tenders.

### **4.4 Impact of the World Trade Organisation Agreements (WTO - formerly GATT)**

#### *i. Discussion*

The World Trade Organisation (WTO - formerly GATT) is the body that regulates international trade. It fulfills three main functions, viz:

- it is the preeminent forum for negotiating multilateral trade agreements which, in effect, regulate national trade-related economic policies;
- it contains established legal instruments governing international trade; and
- it possesses *Dispute Settlement Procedures* to resolve trade friction between Members.

South Africa, a Founder Member of GATT, is classified in the WTO as a *developed* country and there is some debate as to whether South Africa should seek to be reclassified as a *developing* country. Although South Africa has never formally sought reclassification, it negotiated favourable conditions and extended implementation periods in several of its sensitive economic sectors during the Uruguay Round of the GATT. Thus, while WTO rules regulate international trade practises and procedures, there is significant scope to negotiate specific terms and conditions that cater for national interest and priorities.

Unlike most of the WTO agreements to which South Africa is committed as part of the WTO's single undertaking principle, the Agreement on Government Procurement is plurilateral and extends obligations only to Members that are signatory to its provisions. South Africa has, to date, not signed the Agreement and there are expectations that the Government will come under increasing pressure from its main trade partners to do so.

In responding to the pressure, South Africa should adopt a balanced approach that recognises not only potential costs, but also the potential benefits that accession to the Agreement on Government Procurement may provide. It is critically important to recognise that the issue of government procurement will remain on the multilateral negotiating agenda and the challenge is to engage the issue in a way that promotes South Africa's national interests. Moreover, Government needs to take cognisance that once it has defined its interests in this area, it is possible to negotiate the terms of accession to the Agreement in a manner that is not inconsistent with national priorities.

The Agreement on Government Procurement recognises that 'entities', which encompass governments and agencies controlled by them, are significant buyers of goods and services. Given the growing significance of this market (several billion dollars), a potential benefit of accession to the Agreement is that it will permit South African firms to tender for valuable government contracts issued by other Member countries. The purchases of governments and their agencies around the world cover a range of goods and services that may be of interest to South African firms.

Counter arguments suggest that accession to the Agreement will preclude the Government from applying preferences in awarding contracts on the basis of national development priorities; to promote local business (including SMMEs) and to encourage *black* economic empowerment. The argument is that foreign firms will be successful in tendering for South African Government procurement contracts and may supplant smaller, less competitive South African suppliers.

In addition, the potential (negative) effects of the Agreement may be to:

- weaken the country's balance of payments situation;
- lessen the utilisation of installed production capacity;
- downscale the creation and maintenance of job opportunities;

- weaken the socio-economic principles of the RDP;
- lessen the ability to maintain an Offset policy; and
- make the government procurement system inaccessible to disadvantaged persons.

These effects need to be thoroughly researched before any definite conclusions can be drawn. In any event, the constraints imposed on Members by the Agreement are not absolute as there is considerable scope for the negotiation of exemptions and exclusions; Governments may list (or specify) which entities will be covered by the Agreement; entities are entitled to maintain their own specific lists of permanent suppliers. There is also provision for selective tendering.

The Agreement specifies that it only applies to procurement contracts valued at SDR 150 000 or more. Governments can therefore establish their own independent criteria in awarding contracts valued at less than this amount. It would, accordingly, be valuable to explore whether this threshold can be negotiated upward or not. If South Africa were to secure developing country status in acceding to the Agreement, it would qualify for Special and Differential Treatment which permits measures to, amongst other things:

- safeguard the balance of payments;
- promote SMMEs (infant industries); and
- revitalise rural and underdeveloped (sub-national) regions.

In addition, Members that participate in regional arrangements (SADC) are able to negotiate exclusions on the basis of, for example, promoting regional industrial development. In short, the Agreement contains degrees of flexibility that need to be examined.

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## *ii. Proposals*

- South Africa should not adopt an intransigent or dogmatic approach to the issue of public sector procurement. While it may be opportune to resist accession to the Agreement at this time, it is important that South Africa begins to engage the issue directly and to define its interest empirically.
- It is also important to recognise that the issue will not disappear from the multilateral trade agenda. In this regard it should be noted that at the WTO Ministerial Meeting, held in Singapore in December 1996, Ministers agreed to establish a Working Group to conduct a study on transparency in government procurement practises, taking into account national policies and to develop elements for inclusion in an appropriate agreement. As the principle of transparency and due process are enshrined in the Constitution, the WTO process should pose no threat to South Africa.
- A broad, long term strategy will need to be formulated. In formulating this strategy, more research is required to analyse and calculate:
  - the potential for foreign firms tendering for government contracts;
  - the potential benefits that may flow from successful tendering by South African firms in foreign countries.
- In addition, a detailed analysis of the Agreement on Government Procurement and how it has been implemented in other countries should be undertaken.

The aim would be to explore the scope of flexibility contained in the Agreement and the full range of options that may be available to Governments. It is also vital to recognise the advantages that flow from developing country status. If South Africa's trading partners are keen to secure this country's accession, it may provide the leverage to accede on a developing country basis (either formally or informally). This option needs to be explored. South Africa may also accede to the Agreement gradually. It could open up to foreign competition on a case-by-case basis weighing up the overall (socio-economic / efficiency) costs and benefits.

#### 4.5 Appointment of consultants

##### *i. Discussion*

Consultant appointments can be broadly classified in terms of certain characteristics which may affect the extent to which specific selection criteria and specifically price, may appropriately be used in the selection process. The two extreme poles of the spectrum of consulting assignments can be defined as follows:

- **Routine assignments** i.e. tasks of a straightforward nature involving, in the main, standard technologies in terms of which inputs are relatively well known and can be readily defined.
- **Conceptual, complex and multi-disciplinary assignments** i.e. those assignments that call for considerable innovation, creativity and skills, frequently outside a single discipline. Examples include policy development, project management, technically complex assignments, restructuring, expert advice, strategic planning, and research and development. Such assignments are broadly characterised by both unknown and ill-defined inputs and outputs, with the appointment's impact on the end product very uncertain.

In routine assignments, price can play a significant role in the selection process, whereas in conceptual, complex and multi-disciplinary assignments, the use of price as a selection criteria should be less significant.

The calling for open tenders under all circumstances, even for routine assignments, is neither in an organ of State's nor the consultant's interests. Apart from an organ of State's costs in preparing and adjudicating such tenders and the consultant's costs in submitting tenders, such practices will favour the established large consultancies who have greater capacity to absorb the costs. Medium and small companies and, in particular, emerging consultants, are at a distinct disadvantage. Elaborate and complex adjudication systems are required for the satisfactory adjudication of tenders for consulting services.

A major problem with competitive tendering relates to the definition of the scope of services to be performed. Consultants cannot price their services if these are ill defined. In research and development, policy formulation, human resource development, community-based developments and the like, the scope of services can seldom be well defined prior to the commencement of the project or commission.

For engineering and construction projects, life cycle costs are most critical and are largely dependent on design quality. Any potential saving in the design fee would form only a minuscule portion of the life cost of the project and should not be

allowed to jeopardise the best value for money option on the project as a whole. Likewise, the costs of policy research are trivial relative to the impacts of policy decisions on the nation. The selection of consultants on the basis of price alone may well lead to unsatisfactory, or even disastrous outcomes which could, in all likelihood, have been avoided at insignificantly greater overall cost.

International experience regarding competitive tendering for professional services has been mixed. In the United States of America, legislation was introduced as far back as 1972 to outlaw competitive tendering for professional services on construction projects. Contracts are awarded in terms of an Act which requires government to negotiate contracts on the basis of demonstrated competence and qualification for the type of services required, at fair and reasonable prices; the principle being that contracts are awarded to the most qualified firm and not the least costly. In the United Kingdom, surveys have indicated that where competitive fees (lowest price) was the criteria for award, clients on engineering and construction contracts got less value for money, as consultants were reluctant to consider alternatives, produced simpler designs, resisted client changes, spent less resources on education and training etc. Current thinking is to opt for the awarding of contracts on the basis of a quality / price mechanism, in terms of which price, depending upon the nature of the services required, accounts for from 15% to 50% of the points allocated.

The World Bank has no requirement for competitive tendering for consulting services and recommends that selection be based primarily on quality. Price forms part of the selection process only where projects are of a routine nature, and proposals are judged to lead to comparable outputs.

The principle factors which the World Bank suggests that should be used when deciding upon appointments are:

- The adequacy of the work plan submitted by the consultant in response to a brief (scope of work).
- The consultant's general experience in the field of assignment.
- The qualifications and competence of the personnel proposed for the assignment.
- The relationship the consultant has with the client.

The specific needs of emerging consultants owned and controlled by previously disadvantaged individuals must be taken into account. Although this group of consultants may demonstrate competency, they are likely to lack experience which can only be obtained through the granting of appointments.

Current practices which are being pursued to facilitate the participation of emerging consultants and to reward consultants who have been proactive in developing previously disadvantaged individuals within their companies or developing capacity in emerging consultancies, include insisting that all work be performed in association with such enterprises, accelerated roster systems, joint venture requirements, and the scoring of adjudication points. Information provided by established firms in support of human resource development and social responsibility programmes is extremely difficult to verify and is seldom called for. Furthermore, such criteria frequently favour the large firms who, for various reasons relating to scale of operation, have more scope and opportunity to meet such criteria, particularly as



their contributions are seldom measured in terms of their turnovers. Thus, although such systems may achieve their objectives in providing work for emerging consultants and rewarding pro-active established consultants, it is vulnerable to window-dressing and fronting and generally favours the larger consultancies.

Many organs of State have established panels of consultants who have the necessary experience and expertise to provide routine services e.g. auditing, design, contract administration, legal advice, etc. Certain appointments made to firms on these panels have resulted in strong relationships which have endured for long periods and a number of these panels have not incorporated any new panelists from the time that they were originally constituted.

Insofar as auditing appointments are concerned, calls have been made for the rotation of audits so as to prevent relationships between the auditor and auditee becoming "too comfortable" as this may result in a loss of independence. The office of the Auditor General in New Zealand applies the practice of compulsory rotation of audit firms every three years. The practice of rotation on a five year cycle is also enforced in Switzerland, both in the private and public sectors.

Organs of State, other than those functioning at national level, often require consultants to maintain local offices within their areas of jurisdiction. In many instances such offices do not, in fact, perform the work using their own resources. Instead they pass it through to associated offices in other centres. This practice is very difficult to monitor and the consequence is that appointments to consultants with local offices do not necessarily lead to local economic development.

Given the efficiency and speed of current modes of information transfer, the desirability of consultants being required to maintain local offices, which may be mere facades, is questionable. It may, in fact, be submitted that the requirement for maintaining a local office is a form of local preference, which works against free trade within the country and is, therefore, in conflict with the constitution.

Under certain circumstances, particularly where work of a highly specialised nature is required, it may be advantageous to approach a particular firm, or individual consultant, rather than to conduct a selection process. Such appointments would, normally, be desirable where the particular consultant has been closely involved in work similar to that required, or has expertise not widely available. Appointments of this nature are unavoidably open to abuse and criteria and policy in respect of sole service providers needs to be formulated.

There is a need in regard to construction projects to have available standard sets of interlocking professional appointment documents which not only govern the conditions of the appointment but also set out, as far as possible, the services to be performed by consultants and the relationships which such consultants have with construction contractors and other consultants. This is particularly necessary to enable "non-traditional" consultants e.g. training managers, mentors, project facilitators, contract compliance monitors, etc. to be appointed to ensure that development objectives are met and to describe the services required of consultants where non-traditional contract delivery options or new forms of contracts are utilised on projects.

## *Proposals*

- Any system for engaging consultants should not be elaborate to the extent that it is unwieldy to administer and cause delays in making appointments; neither should it sacrifice time and cost for quality. It should furthermore take cognisance of:
  - the erratic stop / start nature of projects
  - imbalances in supply
  - budgeting constraints
  - lack of exposure and experience
  - increased administrative work loads
  - window dressing and fronting
  - cost of tendering both in terms of direct client costs and consultant costs
  - scale of project
  - lack of detailed information on a project
- Officials of organs of State should prepare terms of reference (scope of work) in as clear, unambiguous and precise a manner as the nature of the project will permit.
- The following basic criteria should form the point of departure for the appointment of consultants :
  - competence
  - fairness of work allocation
  - price insofar as it does not affect quality.
  - capacity to deliver
- Appointments should be made on the most appropriate of the following methods:
  1. **tariff appointments** (fixed scales of fees or prescribed rates ) :
    - invite two or three firms of similar sizes or capabilities drawn from a data base, using a method that over a period of time will afford all those on the list an opportunity of participation, to submit proposals and make the appointment on the basis of the quality offered;
    - make appointments from a rotating roster in respect of routine assignments; or
    - make appointments from a panel of consultants with the aim of ensuring that those on the panel have equitable / balanced work loads commensurate with their abilities and capabilities.
  2. **competitive tendering** :
    - invite tenders from a short list of consultants who have similar capabilities, capacity and experience, appropriate for the required service which is to be performed, selected from a comprehensive data base in such a manner that over a period of time all those on the data base will have an opportunity to tender; or
    - invite any interested firm to tender on the basis of a quality / price mechanism and reject any tenderer who does not meet a minimum quality threshold.
- The competitive tendering route should only be followed if the terms of reference / scope of the work can be adequately defined.

- The basis upon which firms are selected and invited to submit proposals / tenders should be documented and submitted for review to the Procurement Compliance Office.
- Quality should be measured in terms such as competency, available project specific expertise, stated approach, methodology and qualifications of key personnel.
- The criteria for admittance to panels / data bases should be made public and firms complying with such requirements should be permitted to make application to join such panels on an ongoing basis.
- Selection on the basis of quality, should not necessarily mean the best quality available, but quality appropriate for the assignment.
- Quality selection criteria should be clearly stated in enquiry documents.
- The scoring of quality should be clearly stated in adjudication documents and should be such that, should parties who were not part of the original adjudication team score submissions, a similar result would be obtained.
- Auditing appointments should be rotated.
- Firms of consultants owned and controlled by previously disadvantaged individuals whose turnovers are within predetermined limits, should be afforded accelerated work opportunities. Accelerated work opportunities for such firms should be achieved by means of one or more of the following:
  - by rotating the target group consultants at a faster rate in roster systems.
  - by setting participation goals on large scale appointments in terms of human resource specifications to ensure that the target group consultants are engaged either as sub-consultants for distinct portions of the work or as joint venture partners.
- Ongoing, non project specific appointments should be made for a specific period of time.
- Procedures should be put in place in research and policy development appointments to control the end product.
- Standard appointment documents and standardised documentation relating to the services which are to be performed should be prepared in respect of routine assignments.
- Contracts with consultants should specify the type and terms of professional liability insurance cover, commensurate with the nature of the assignment, which is to be maintained by the consultants.
- The appointment of sole service providers should be permitted, subject to adequate justification on the grounds of the scarcity of their skills and experience, value for money being obtained, and the likelihood that the outcome of the assignment would be compromised without such a selection.
- The practice of affording preference, or confining appointments to consultants maintaining offices within a specific geographic area should, in general, be discontinued. Only where it can be demonstrated that clear advantages would accrue to the organs of State by the use of local consultants should the selection be confined to them.
- Procurement Offices and Centres should report on a regular basis to the Procurement Compliance Office regarding all appointments of consultants. Particulars of the scope and nature of assignments, the terms of appointment and remuneration, the estimated fee amounts and the departments, or sections requesting the appointments should be furnished.

#### **4.6 Language**

### *i. Discussion*

Currently, national standards are written in technical language. As standards have become, more internationalised, the technical languages of international standards, viz. English, French and Russian, tend to dominate world wide. Of these, only English is of importance to South Africa. In the past all national standards were translated into Afrikaans. In the case of compulsory standards, this is still the case, as prescribed to the South African Bureau of Standards by the Department of Justice.

Insofar as general conditions of contract are concerned, documents are currently available in both English and Afrikaans. Difficulties have been experienced in the past when tenderers competing for a specific contract have been given the option of drawing documents in either of the two languages, as errors have inevitably crept into the documentation. These errors have, in some instances, resulted in inequitable tenders being received.

The problems relating to the provision of documentation in any of the official languages other than English and Afrikaans should not be underestimated as the necessary technical language does not exist and would have to be developed. As contract documents must convey technical information and requirements in an unambiguous manner, the preparation of documentation in a number of languages would be very difficult and fraught with dangers.

### *ii. Proposals*

- All contract documentation should be prepared in English, the international language of business.
- Guidance notes / summaries of principal features of contracts should be prepared in official languages other than English, where appropriate, and be issued without prejudice to tenderers.
- Provision should be made to assist tenderers with regard to technical translations.

## **4.7 Parastatals as suppliers**

### *i. Discussion*

Parastatals are those institutions which are directly or indirectly controlled by the State. Parastatals are often perceived to have an unfair advantage in competing for contracts with the private sector on various grounds, for example, they price on the basis of operating costs alone, they have tax concessions, they are not obliged to earn an adequate return on their investment and they undercut the prices of competitors despite making losses.

Where parastatals are permitted to compete with the private sector, it is necessary to develop criteria that allows the private sector to compete with parastatals in an equitable manner.

### *ii. Proposals*

As a general rule, parastatals should be discouraged from tendering in competition with the private sector. Where parastatals tender in competition with the private sector, a percentage loading should be applied to parastatal tenders in much the same way as a percentage loading is applied to "protect" local suppliers against foreign suppliers.

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#### **4.8 Registration of suppliers, service providers and contractors**

##### *i. Discussion*

There is a balance between fiscal discipline and nation building. In the context of developing emerging suppliers, service providers and contractors and integrating them into the mainstream of the economy, there needs to be a balance between cost effective creation of physical assets / supply of goods, services and works and the development of emerging business. Supplier / service provider / contractor registration is viewed by many as a means of reducing the State's risk exposure in engaging firms who have unproven capabilities or inadequate prior contractual experience.

Registration of contractors / service vendors is encountered in many countries. In some developed countries, contractor registration is used as a means of procuring goods, services and works by means of a qualification system. This system requires firms to qualify to be included on an approved list of tenderers. Public client bodies are able to access the list, draw up a schedule of firms which are suitable for a project (prequalify), and seek tenders from firms of equivalent size, capability and experience.

##### *ii. Proposals*

Registration in South Africa should be instituted as a means of:

- compiling a data base for the packaging of contracts and identifying target groups.
- regulating participation in public sector procurement.
- promoting good business practices and adhering to statutory regulations and requirements.
- censuring those who transgress codes of conduct, fail to meet their tax, levy or service charge obligations, or obtain work in a fraudulent manner.

Non-registered suppliers, service providers and contractors should not be permitted to participate in public sector procurement activities. Registration should be subject to the observance of a code of conduct which should, *inter alia*, require that signatories undertake to:

- tender only on projects which they are capable of executing with the resources they are able to marshal in accordance with the terms and conditions of the contract;
- remunerate staff in accordance with relevant labour legislation;

- pay UIF, Workman's compensation, service charges, VAT, income tax and other taxes as appropriate.
- adhere to safety and health regulations in so far as their workers are concerned.
- engage subcontractors under fair conditions of contract and require them to adhere to labour standards.
- not engage in Dutch auctioning in the engagement of subcontractors (i.e. the practice of hawking prices around in order to drive prices own).
- adhere to environmental standards.

#### **4.9 Life cycle costing**

##### *i. Discussion*

The prime objective of public sector procurement is to achieve best value for money. Best value for money in the context of a technical component in procurement is the optimum combination of whole life cost and quality to meet a user department's requirements and not the lowest short term cost. Whole life cost takes into account all aspects of cost over the lifetime of the asset, including capital, maintenance, management and operating costs.

For complex procurements, whole life costs may be very different from and only loosely related to initial price. In the case of capital assets, the greater part of the whole life cost is normally incurred after purchase, the purchase price frequently being as little as 20% of the total cost.

Goods which are not wholly consumed in the course of their use will have to be disposed of. When some assets are no longer needed, they may have a resale value. Accordingly, many factors need to be taken into account in an integrated procurement process.

In engineering and construction projects, life cycle costs are most important and are very dependent on design quality. Design quality is about providing, within the available resources, added value over and above the merely adequate. The procurement system needs to be structured so that quality designs and not lowest cost design is procured, as the work of the designer has a significant impact on life cycle costing.

##### *ii. Proposals*

- Emphasis should be placed on economy over time, not on short term savings.
- Appropriate quality should be determined on the basis of whole life costs as opposed to initial cost or lowest price.
- Comparative tenders should be evaluated in terms of standards methods and procedures.
- High quality as opposed to least cost lower quality designs should be procured in engineering and construction projects where life cycle costs overshadow initial costs.

#### **4.10 Quality**

### *i. Discussion*

ISO 8402 defines quality as *the total characteristics of an entity that bear on its ability to meet stated and implied needs*. Quality may be regarded as conformance to stated requirements (specification) rather than fitness for purpose. It is achieved by executing a contract to the stated requirements. Quality can be managed and given visibility by means of one or more of the following:

- Quality assurance e.g. SABS ISO 9000 and other such certification schemes.
- Total Quality Management
- Development of personnel
- Bench marking

The South African Bureau of Standards has a product certification scheme called the Mark Scheme. If a manufacturer is prepared to manufacture commodities in accordance with the requirements of a mark specification and to apply the required quality control measures to his factory, he may apply to the SABS to use the applicable certification mark on his commodity. Of the some 3500 SABS specifications, about 700 have been declared mark specifications. There are currently, approximately 3000 permit holders.

SABS ISO 9000 has strong support in some areas and forms the basis for most certification schemes. It has, however, been strongly criticised for being over-bureaucratic, expensive, vulnerable to variable interpretation, inappropriate for small firms and existing as a goal rather than a means to an end. Nevertheless, it is an appropriate basis for effective management of quality notwithstanding its reliance on paperwork. Currently, approximately 1500 firms have been certified.

Small firms have experienced some difficulties with the SABS ISO 9000 scheme. They have argued for a simplification of the standard and have complained about the cost of certification. There is no doubt that the cost of certification as a proportion of turnover for a small firm is significantly greater than for a large firm.

In engineering and construction works contracts, many of the problems with quality originate from poor design. A poor design may give rise to additional costs both in the construction process and on future maintenance. To ensure that suitable quality standards are maintained over time, particular care must be taken in the manner in which design commissions are awarded. Incentives may need to be provided so as to achieve high value designs.

Small and emerging manufacturers have particular problems in achieving quality, depending, however, upon how quality is measured and defined. Current practice is to define quality in terms of certain accepted criteria and to measure such acceptance in terms of prescribed test methods and procedures. These are usually set out in SABS specifications or test methods which have, to a large extent, been formulated or drafted with the approval of industry and industry-related research and development organisations.

It may be argued that these standards have been drafted to suit the formal industry, and are framed around plant-based methods of manufacture and medium to large scale enterprises which have a reasonable degree of technical competency and testing resources. In addition, the test methods and procedures for quality assurance

are generally written for a scale of operation where sufficient quantities for statistical purposes are manufactured, and the cost of testing by external authorities (or that associated with the establishment of in-house laboratories) can be written off against the volume of the article which is manufactured.

Failure by a small scale manufacturer to comply with one of the requirements of these specifications, albeit a relatively minor lack of compliance, means that compliance with a SABS specification cannot be claimed. Thus, in effect, many of the current specifications present a barrier to entry to small scale entrepreneurs and exclude their participation in particular markets.

## *ii. Proposals*

Quality should be procured on a contract specific basis by means of one or more of the following strategies:

- The full and proper specification of requirements.
- Improving, reviewing and updating procurement documentation on a regular basis.
- Taking cognisance of whole life costing in the adjudication of tenders.
- Utilising techniques such as value engineering when deciding upon procurement strategies.
- Prequalifying tenderers where exceptional quality is required.
- According preferences to tenderers who offer products which have the SABS mark or Agrément certification or are manufactured in accordance with quality assurance specifications such as SABS ISO 9000 providing that such measures do not exclude products which may otherwise be acceptable.
- Requiring tenderers to submit their plans for maintaining and improving quality together with their tenders, or to operate in accordance with Total Quality Management Principles, should such measures be deemed necessary to achieve the desired outcome.
- Awarding contracts in terms of a quality / price mechanism which evaluates both the price and quality of the offer.
- Accepting tenders only from those firms whose names appear on a quality register.
- Requiring consignment inspection.

The criterion in applying such strategies should be that:

- The measures are justifiable.
- The measures will lead to a quantifiable improvement or level in quality.
- The resultant quality is appropriate to satisfy end user requirements as opposed to the best quality available.
- The measures should not promote captive markets.

Prequalification should not be utilised to limit competition or to reserve work for specific groupings. It should only be used to achieve an appropriate level of quality.

Organs of State should consider alternative forms of testing to confirm compliance and relax standards, where appropriate, to facilitate the participation of emerging or local enterprises.



Strategies to overcome difficulties relating to small scale manufacture should include:

- monitoring of the performance of manufacturers by the State in terms of sampling plans.
- the establishment of centralised testing centres.
- formulation of specifications which describe product properties in terms of their physical properties rather than by reference to a series of standards.
- the development and specification of simple site (point of manufacture) tests which confirm the acceptability of products for their intended purpose.
- a review of testing and acceptance tests, criteria and norms.
- the setting of appropriate standards for different applications of a manufactured article.
- education and training of manufacturers.

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#### **4.11 Measures to combat corruption**

##### *i. Discussion*

In the context of public procurement, corruption usually comprises fraudulent behaviour by persons concerned with the procurement process leading to losses for an organ of State. Usually, there is some form of collusion between the buying and the selling side: responsible officials on the public procurement side request or are induced to accept favours from tenderers or contractors. Such practices are often, but not always, criminal; they are always immoral and improper in terms of good procurement practice. Fraudulent actions are sometimes confined to one side of the procurement transaction, such as when tenderers collude to "rig" tenders or when officials misappropriate public property, or assets.

Corrupt actions within organs of State may include:

- preparing slanted specifications
- approving inappropriate tenders
- tampering with tenders
- breaching confidentiality
- taking bribes
- lax contract administration
- use of position to obtain a private benefit.

Corrupt actions by suppliers / service providers / contractors may include:

- collusion
- influencing the choice of procurement method and technical standards
- inciting breaks of confidentiality
- influencing the work of evaluators
- offering of bribes
- over or under invoicing
- "fast pay" action
- inaccurate disclosures

Competition and transparency serve to combat corruption to some extent. Other measures, however, need to be instituted to minimise corruption.

#### *ii. Proposals*

The following preventative measures should be adopted:

- The establishment of codes of conduct for suppliers / service providers / contractors and procurement officials.
- The publicising of anti-corruption programmes by means of staff training and meetings.
- The institution of routine check points at the pre-award stage, or in the post-award stage, on the measurement of performance by contractors or on contract amendments.
- The performance of internal audits on specific items.
- The implementation of a "whistle-blower" system which allows and even encourages officials to inform on each other regarding instances of fraud or misconduct.
- The encouragement of strict observance of procurement regulations, particularly those relating to the documentation of the processes.
- The provision in tender documents for the disqualification of tenderers who attempt to influence the award of tenders.
- The deregistration / de-barring of offending suppliers / service providers / contractors from participation in public sector procurement for a period of time.
- The provision of opportunities for suppliers / service providers / contractors to raise objections concerning the status / practices of their competitors.

### **4.12 Early payment cycles**

#### *i. Discussion*

Access to finance is one of the most urgently felt needs among emerging businesses. The specific problem of delayed payment to suppliers and contractors often aggravates the financial position of small enterprises and further hampers their access to funds. Although the present tendering conditions provide for payment within 30 days, the actual period is often significantly longer than this.

#### *ii. Proposals*

- Payment systems should be streamlined and rationalised.
- Electronic payment systems should be introduced.
- The audit procedures of interim payments in engineering and construction works contracts should be revised.
- Interest at rates above the bank overdraft rates should be paid to suppliers / service providers / contractors in respect of overdue payments.

### **4.13 Financing of suppliers, service providers and contractors**

#### *i. Discussion*

One of the major challenges facing many small, medium and micro enterprises and emerging companies is their inability to attract sufficient debt and equity capital to fund the growth of the enterprise. As enterprises succeed in obtaining larger contracts their ability to internally finance themselves diminishes. Many of these firms, while still growing, have not reached the creditworthy stage usually required by traditional financing sources. Others, having utilised their existing credit lines, find that their bank is unwilling to extend them further credit, even for the performance of a contract.

#### *ii. Proposals*

The procurement system should make provision for:

- Mechanisms to facilitate factoring of payment certificates.
- Cession agreements with suppliers.
- Early payment cycles.
- Appointment of project administrators to facilitate early payment cycles in engineering and construction works contracts, where this measure is justifiable.
- Making monies available to third party management support providers to enable them to facilitate payments on a fortnightly basis to emerging contractors in certain engineering and construction works development programmes.

### **4.14 Period contracts**

#### *i. Discussion*

The contract strategy for period contracts in the past has tended to favour the maximisation of the quantities of goods, services and works required, the contract period and the geographic area served by such contracts. This policy is generally not conducive to small, medium and micro enterprise participation and does not geographically spread economic activity. There is accordingly a need to revisit the policy relating thereto and to unbundle such contracts.

A contract strategy in respect of single versus umbrella (multi-activity) contracts or facilities management needs to be determined. Furthermore, attention needs to be paid to the determination of the optimum contract period, as long period contracts:

- afford departments and providers of goods, services and works greater time and incentive to understand and co-operate with one another.
- allow suppliers to recover the cost of any investment (e.g. training, plant or new technology) required for the contract.

In circumstances where delay in delivery can result in consequential costs being incurred or where the commodity is not always available, consideration needs to be given to the awarding of contracts to two or three suppliers / service providers to permit consumer organs of State to have some flexibility. The most favourable tender will be accorded preferred contractor status and the secondary and tertiary contractors would only be approached should the preferred contractor be unable to supply or deliver. Consideration can also be given to implementing a system of

performance guarantees in terms of which a cash deposit is provided at the commencement of a contract by the preferred contractor. This cash deposit can then be used to compensate the State for any cost premiums arising from non-performance.

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#### *ii. Proposals*

Period contracts, in order to permit small, medium and micro enterprise participation, should be structured taking cognisance of the following :

- Contracts should procure items in quantities suitable for execution by small, medium and micro enterprises as prime contractors
- Human resource specifications can be used as a tool for unbundling.
- Small, medium and micro enterprises who match prices of large contractors / service providers / suppliers could be permitted to provide such items as alternative suppliers.

Period contracts can be used as a means of equipping emerging contractors / manufacturers with plant. In some circumstances, contracts should be awarded to two or three suppliers / service providers with one of these contractors being accorded preferred contractor status.

### **4.15 Emergency Procurement**

#### *i. Discussion*

Situations arise from time to time, wherein life, property and human well-being are threatened and rapid action is required to remedy, or alleviate, the situation, which may have resulted from among others :

- a natural event, such as a flood, or an earthquake
- the failure of a facility or service
- an accident
- war or civil commotion
- failure, over an extended period, to carry out essential maintenance and upgrading of a facility.

When a situation requiring rapid remedial action arises in respect of a facility for which an organ of State is responsible, it is essential that such organ should have readily available the means of procuring the services of competent contractors, suppliers and service providers in the shortest possible time. The extent and nature of the services required will probably be known only in broad terms, but this cannot be permitted to delay the commencement of delivery.

Criteria need to be set and certification systems to be put in place to ensure that this system of procurement is not abused and only used in specific circumstances.

#### *ii. Proposals*

A Rapid Delivery Procurement System should be established which :

- enables contracts to be awarded within one month of permission being obtained to proceed, whilst being transparent, equitable, fair, cost effective, and competitive.
- not place organs of State at undue risk with respect to failure to deliver, cost overruns or cost premiums.
- be flexible enough to accommodate Reconstruction and Development Programme principles and socio-economic objectives.
- be easily audited.
- assign clear responsibilities for the parties which are involved.

The criteria warranting the use of the Rapid Delivery Procurement System for an emergency should be that one, or more of the following conditions exist, or there should be an imminent danger of it about to exist :

- The possibility of human injury or death.
- The prevalence of human suffering or deprivation of rights.
- The possibility of damage to property, or suffering and death of livestock and animals.
- The interruption of essential services, including transportation and communications facilities.
- The possibility that the security of the State could be compromised.
- The possibility of serious damage occurring to the natural environment.
- The possibility that failure to take necessary action may result in the State not being able to render an essential community service.
- The prevailing situation, or imminent danger, should be of such a scale and nature that it could not readily be alleviated by interim measures, in order to allow time for normal procurement systems to be used.
- Available details of the nature and extent of the work and services required should be insufficient to permit an accelerated, or normal procurement system to be used.

The accounting officer in the organ of State wishing to utilise Rapid Delivery Systems should certify that the emergency meets the abovementioned requirements.

#### **4.16 Stimulation of local economies**

##### *i. Discussion*

Local economic development is an area of great promise, but which is fraught with difficulties owing to the skewed nature of the South African economy. The major factor in this imbalance is the economic dominance of large corporations. Perhaps the most serious consequences is the limit to ongoing, sustainable job creation.

While small businesses have burgeoned in recent years, they have concentrated on the retail sector. This is due to the limited availability of technical skills, lack of access to primary resources (such as land and capital) and price controls on raw materials which reduce the competitiveness of small firms. The challenges confronting proponents of local economic development are enormous.

Clearly government has to focus beyond administrative and service provision roles and take on the role of economic catalyst. Such a function should lead to new practices in procurement which will promote the development of small manufacturing, service and construction enterprises.

Preferences, in the past, have been utilised to protect regional industries in much the same manner as the local tenderers are afforded protection from foreign tenderers. Such practices can, however, have severe impacts on neighbouring areas, as such preferences cause market distortions. Typically, those protected by such preferences inflate their prices in the local economy and dump their products at lower prices in neighbouring areas. Furthermore, such preferences are difficult to administer.

The selection of contract strategies, the packaging of contracts and the employment of affirmative procurement practices can, on the other hand, tip the scales in favour of the local economy. In particular, Affirmative Procurement which seeks to engage the participation of small, medium and micro enterprises is to a large extent self targeting towards local enterprises.

#### *ii. Proposals*

- Contract strategies, the packaging of contracts and affirmative procurement practices should be used to stimulate local industries.
- Preferences outside of a National Procurement Framework for local suppliers, service providers and contractors or local content, designed to advantage those located in specific geographical areas over neighbouring regions within the boundaries of South Africa, should not be permitted.
- Local authorities should implement contractor / manufacturer development programmes in their areas of jurisdiction in order to develop target group enterprises who are capable of participating in participation programmes.
- Local authorities should interface with national and provincial organs of State in respect of engineering and construction contracts, in order to secure the contract strategy, and delivery and targeting options which best serve the local economy on contracts put out by such bodies.
- Local and regional authorities should establish data bases of local suppliers, service providers and contractors in order to award contracts having a low financial value to such enterprises where a less formal tendering system is permitted.

### **4.17 Contracts having low financial values**

#### *i. Discussion*

The present system of obtaining telephonic or verbal price quotations (no tenders are invited) for contracts under a certain value - R20 000 in the case of the State Tender Board (usually from a minimum of three suppliers), excludes many of the emerging small, medium and micro enterprises. The system is dependent on a data base of approved suppliers. Any business not on the approved list is excluded from the market.

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#### *ii. Proposals*

- Suppliers of goods and services falling into this category of contract should register with the relevant Procurement Office / Centre for the category of goods and services for which they wish to be registered.
- New applications for such registration should be advertised in the press and data bases should be updated at regular intervals.
- Quotations should be invited from a number of suppliers on a rotating basis.

#### **4.18. National Standards**

##### *i. Discussion*

National Standards, in the current South African context, is the collective term for Specifications, Codes of Practice and Test Methods which are published by the South African Bureau of Standards as national documents.

Standardisation is becoming more and more internationalised. The Agreement on Technical Barriers to trade within the WTO Agreement of Tariffs and Trade is also very explicit in its requirements for the harmonisation of standards on a regional and international basis. These trends are given further impetus by the massive harmonisation exercise currently underway in the European Union (EU). A similar drive is expected to take place within the Asia - Pacific Economic Community (APEC) in the near future.

South Africa cannot stand aloof from these developments. International trade is vitally important. Accordingly, standards should become more internationalised. In the electro-technical sector about 40% of the national standards have been aligned with International Electro-Technical Commission's (IEC) standards. In the non-electro-technical field approximately 15% have been aligned with the International Organisation for Standardisation's (ISO) standards, and in the telecommunications field, virtually all national standards are aligned with the international standards, mostly European Telecommunication Standards Institute's (ETSI) standards.

Construction standards have historically been based on British standards. As Britain has now become part of the European Union, it follows that construction standards should be aligned with that of the European Union. (The cement industries have already adopted the European standard and are manufacturing according to this specification, SABS EVN 197-1, and have adopted the nomenclature for cement contained therein).

##### *ii. Proposals*

- Standards should become more internationalised.
- Construction material standards should become increasingly aligned with those of the European Union.

#### **4.19. Labour Issues**

##### *i. Discussion*

Contractors, suppliers and service providers are, in so far as their labour is concerned, responsible for complying with the provisions of various pieces of

legislation such as: the Labour Relations Act.; the Workmen's Compensation Act; Unemployment Insurance Fund; and Occupational Health and Safety Act. Compliance with such legislation has a direct cost impact on suppliers. Frequently, unscrupulous employers fail to comply in order to maximise profits, or have insufficient capital to meet these financial commitments.

Labour standards have traditionally been enforced through courts of law, either in terms of criminal proceedings, or in terms of civil proceedings. Inspectors have been empowered to confirm and enforce compliance with such standards. The system is, for various reasons, cumbersome, ineffectual and time consuming. Frequently, cases are inconclusive or result in a warning, a suspended fine or an insignificant fine being handed down.

Criminal proceedings should not be the primary mechanism to encourage and enforce compliance with labour-standards. There should be a range of remedies available to encourage and enforce compliance in an expedient manner, some of which could relate to the procurement system.

On engineering and construction works contracts, because of the historic distinction between the building and construction industries, minimum wages differ between the industries. The problem is further complicated by the collapse of Industrial Councils in some regions. The Framework Agreement for Labour Intensive Construction and Community-based Public Works Programmes further complicates matters. For example, at present, two companies, the one allied to the building industry and the other to the civil engineering industry could quite easily be tendering for a building development. The civil engineering contractor is required to price for his locally recruited labour being paid the rates determined for the Magisterial district in question, whereas the building contractor can price his tender using the same labour but on the minimum *going rate* should the area not be covered by an Industrial Council. If another project "just up the road" is being administered in terms of the Framework Agreement, there is yet another wage rate for the same activities. Likewise, different wage rates and service conditions may exist on Community-Based Public Works Programmes which are administered by the community.

It is submitted that the status quo does not permit fair and equitable tender price comparisons to be made, is confusing, does not lead to the development of sustainable community enterprises and encourages contractors to engage subcontractors or *informal sector* enterprises who do not observe minimum wages, in order to remain competitive. A common wage order for all those engaged in construction activities, which takes account of regional and project specific variations and is based on the classification of job activities within which there may be grades of skill, would go a long way to resolving the aforementioned problems. Payment linked to productivity as opposed to time spent on the job could be permitted for categories of work for which labour may be substituted for machines in order to create jobs e.g. excavation activities, construction of road base courses, surfacing of roads, etc.

In countries where discrimination has been practised, particularly on racial lines, affirmative action programmes have been implemented to reinforce both equal employment and business opportunities with a view to removing disparities in employment practices and business ownership between different groups of people, usually on the basis of race and gender. Affirmative action, when properly applied,



should reinforce equal opportunity concepts and should not imply "preferential treatment" or "reverse discrimination". Affirmative action endeavours to ensure that all segments of society have the same opportunity to participate on the basis of open competition and to advance according to relative ability.

Various proposals have been made regarding employment equity in so far as public sector procurement is concerned. These include:

- Deregistration of contractors who do not have employment equity programmes or continue to embrace discriminatory employment practices.
- Prequalifying tenderers on the basis of compliance with employment equity requirements.
- Selecting tenderers for the award of contracts on the strength of their equity programmes/plans
- According preferences to tenderers who have implemented employment equity programmes in their companies.
- Requiring all tenderers to specify the following in their tenders in order to assess the usefulness of the tendering process in furthering broader social aims:
  - the number of employment opportunities created, levels of remuneration, and probable race and gender of employees;
  - the nature and extent of probable human resource development;
  - the race and gender of owners and managers.

Some have argued for quotas and targets to be established in terms of national legislation to implement affirmative action. Others in turn have argued for companies to become companies which may be viewed as being progressive in their orientation and conduct.

What needs to be established is which route will best serve the interests of employment equity viz., tax incentives, procurement activities or legislation or a combination thereof. Furthermore, the practicalities associated with the implementation of employment equity by means of such routes needs to be established. For example, should it be decided to accord preferences in public sector procurement for aspects of employment equity, employment equity will have to be defined, quantified, measured and audited in order to establish compliance during the performance of the contract in such a manner that companies of different sizes are not unfairly treated. (Small companies, because of their size in terms of turnover and employee complement may subscribe to employment equity principles but may take years to implement such policies due to low turnovers in their employee complement and slow growth in the size of the company).

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## *ii. Proposals*

- Suppliers, service providers or contractors who abuse labour standards should be disciplined by being deregistered and excluded from participating in public sector procurement for a period of time.
- Contracts in contractor development programmes should be awarded to emerging contractors only after an independent party has verified that the sum tendered has the potential to meet minimum labour standards.

- A common wage order applicable to all engineering and construction works projects, which is flexible enough to accommodate payment on the basis of outputs in specific circumstances, should be strived for in order to remove market distortions and enable tenderers to tender on an equitable basis.
- Employment equity should be linked to procurement only in instances where it can be adequately defined, quantified, measured, verified, audited and be implemented in a manner in which companies of different sizes are equitably treated.

#### **4.20. Short term service contracts**

##### *i. Discussion*

Where there is a shortage of particular skills in an organ of State or a short term crisis has developed, short term service contracts for some particular service may be required. Procurement in such circumstances can be very sensitive.

##### *ii. Proposals*

Short term service contracts should embrace the following set of principles:

- The contract should make provisions for technology transfer and capacity building.
- The service provider should follow sound environmental principles.
- Officials and employees of organs of State should not be prejudiced by such appointments.
- Service providers should be accountable to the people they service and be responsive to the needs and problems of users.

The performance of service providers should be monitored, and only those service providers who have the competence, capacity and availability of suitable personnel be entrusted with such contracts.

#### **4.21. Subcontracting issues**

##### *i. Discussion*

Subcontractors have very little negotiating power with prime contractors due to the fact that there is always a "next job syndrome"; non payment by the prime contractor; and victimisation.

Some of the problems expressed by subcontractors include the "Hawking" of prices submitted to prime contractors by them in order to obtain lower prices from others (i.e. the practice of Dutch Auctioning); the risk of non-payment; the use by prime contractors of hard earned subcontractors' monies as an interest free overdraft facility and prime contractor bodies frequently representing subcontractor interests at forums.

Invariably, as employers only have a relationship with the prime contractor, they regard subcontracting issues to be the prime contractor's problem and of no concern to them. Subcontracting is an effective means of involving small, medium and micro

enterprises in public sector procurement activities. As such, the plight of subcontractors cannot be ignored. Accordingly, measures need to be taken to address the shortcomings in the current subcontracting arrangements, particularly in respect of engineering and construction works contracts. Such measures could include some or all of the following:

- The establishment of Trust Funds or other such secured payment routes.
- Mechanisms to deal with late payments.
- Protection against prime contractor insolvency.
- Outlawing of Pay-when-Paid practices; the use of unfair set-off; provisions which seek to prevent access to adjudication or frustrate its conclusions.
- Introduction of fair conditions of subcontract.
- Introduction of Alternative Dispute Resolution procedures in standard forms of subcontract.

#### *ii. Proposals*

- The conditions of subcontract should be regulated in public sector procurement in order to ensure that subcontractors are engaged in terms of fair conditions of contract.
- Contractors who contravene the proposed provisions contained in the code of conduct relating to subcontractors should be deregistered.
- Secured payment routes should only be considered should the other measures which have been proposed not address the root causes of late, or non- payment.

### **4.22. Allocation of risk and change management**

#### *i. Discussion*

Risk cannot be eradicated, but can be managed; it is better to be proactive rather than reactive. Organs of State should identify and assess procurement risk on a case by case basis. As a general rule, the aim should be to allocate risks to those best able to manage them provided that the cost of transferring them to that party does not exceed the cost of retaining them. In many cases, this will be the supplier, contractor or service provider. Transferring risk to these parties may provide them with an incentive to improve their performance. Forcing them to accept risks which they have no chance of managing is, however, likely to be both costly and futile. Where there is doubt about where a risk should be, organs of State should compare the cost of transferring it with the cost of retaining it themselves.

In engineering and construction works contracts, the risks which need to be considered include construction risk; delays, performance and operational risks; commercial risks; and political, legal and financial risks in various forms. Risk management can involve:

- identifying preventative measures to avoid a risk or to reduce its effects.
- proceeding with a project stage-by-stage, initiating further investigation to reduce uncertainty through better information.
- considering risk transfer in the contract strategy, with attention to the motivational effects, and the control of risk allocations.
- considering risk transfer to insurers.

- setting and managing risk allowances in cost estimates, programmes and specifications.
- establishing contingency plans to deal with risks should they occur.

Risk management will not remove all risk from projects; its principal aim is to ensure that risks are managed most efficiently. Inevitably, certain risks will have to be borne by organs of State. Allowances for residual risks should be made in estimates of time and cost.

Contract documents are tools for managing risks. Their purpose is to determine the consequences of particular risks which have been identified. Contracts should accordingly clearly define the respective responsibilities of the parties and be flexible enough to deal with inevitable changes. The management of changes to requirements presents a special challenge. The importance of the clear allocation of risk and the management of change cannot be underestimated, particularly in contracts of a developmental nature, where third party management support is involved. Clear guidelines in this regard are required.

#### *ii. Proposals*

- Organs of State should identify and assess procurement risk on a case by case basis.
- Risks should be allocated to the party best able to manage them.
- The State should bear the cost of risks where the cost of transferring them is greater than that of retaining them.
- Organs of State should exercise risk management in a proactive manner and should make budgetary allowances to cover residual risks.
- Contract documentation should clearly and unambiguously assign risks to the contracting parties.

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### **4.23. Insurances**

#### *i. Discussion*

Insurance is not a substitute for effective risk management. Insurance is only intended to deal with measurable or known risks and shifts the impact of loss so as to reduce it. Insurance cannot deal with uncertainty itself and cannot prevent loss.

Most physical risks can be insured against. For example, in engineering and construction works contracts a contractor can have some of his risks covered by effecting insurance such as Contract Works Insurance; Public Liability Insurance; SASRIA Special Risks Insurance; Removal of Support insurance; general insurance cover for plant owned or hired by them; or Professional Indemnity Insurance.

Many standard forms of construction contracts require the contractor to effect Contract Works and Public Liability insurances and to extend such cover to subcontractors. Some require that in addition, contractors effect SASRIA and Removal of Support Insurance. Most National and Provincial Departments require contractors to effect the relevant insurances. On the other hand many public utilities

and local authorities have their own Contractor's All Risk policies under which the majority of work put out to tender is automatically insured through their Principal Controlled Insurance which may comprise a mix of conventional and self insurance. In such cases, contractors need only to effect any supplementary insurance cover such as insurance of construction plant and equipment, including tools, office and other temporary structures and contents, except those intended for incorporation into the Works; insurance in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act of 1993; motor vehicle liability insurance; and insurances for the manufacture / fabrication of portions of the works at premises other than the contract site.

There are many advantages to both the State and emerging contractors / small, and micro enterprises should the State have Contractors All Risk policies under which the majority of work put out to tender is automatically insured by them. In contractor development programmes, insurance excesses can in some instances be higher than the amount of profit on labour only contracts and as a result can cause a contractor to incur financial losses to the extent that he cannot continue with the contract.

The State self-insures its own assets. As a result, many uncertainties exist regarding insurances on the renovation and repair of buildings and what cover contractors have when effecting repairs.

#### *ii. Proposals*

- Organs of State should either insure for procurement related physical risks, establish risk management programmes or make advance provision for losses associated with such risks.
- Suitable arrangements should be made to ensure that insurance related excesses in the case of emerging small and micro enterprises do not cause such businesses to fail.
- Organs of State should investigate the benefits of Principal Controlled Insurance for their given circumstances.

### **4.24. Guarantees**

#### *i. Discussion*

Client bodies are exposed to a certain amount of risk particularly in respect of engineering and construction works contracts, to the extent that contractors may fail to perform or provide a defective product. This can have direct financial implications in so far as rectification and completion of the works is concerned, and consequential financial implications resulting from the delayed occupation or possession of the assets that are created. Delayed completion also inevitably results in increased construction costs. As a result, client bodies require contractors to lodge a security guarantee and retain an amount from interim certificates in order to cover some of this risk. Prime contractors in turn, in order to minimise their risk, often require subcontractors to provide similar guarantees. (Guarantees are seldom called for by the State Tender Board in respect of contracts involving the procurement of goods and services; certain local authorities require guarantees for most contracts involving goods and services).

A performance bond may be described as a three party contract between the employer, the contractor and the surety, guaranteeing performance by the contractor with a stated financial benefit in the event of non-performance. Retention is held by the employer as an insurance for the correction of defects not attended to by the contractor. Construction guarantees provided for in some private sector building contracts, covers more than a performance bond and effectively places insurance against failure to perform and failure to rectify defects at a single source.

Performance bonds should not be confused with retention monies which are intended to cover the cost of making good defects in construction. Performance bonds are intended to cover the additional cost of completing the works where the works are interrupted prior to their completion due to the termination of the contract for reasons which may include contractor insolvency, or failure to perform.

In so far as small, medium and micro enterprises / emerging construction businesses are concerned, this presents a significant financial hurdle to overcome in the pursuit of being awarded contracts. Furthermore, such enterprises, because of their greater risk factor presented to sureties, usually have to obtain their performance bonds at significantly higher rates than the large well established firms. Accordingly, they not only struggle to secure bonds, but have to do so at a cost premium.

Specific strategies and innovations are required to enable small, medium and micro enterprises / emerging construction businesses to obtain the necessary performance bonds. The provision of tender guarantees also needs to be considered, particularly where tenderers compete on the basis of both price and development objectives. Tender guarantees may also be necessary to afford organs of State some degree of protection from irresponsible tenderers. Such guarantees should, however, not be set so high as to discourage tenderers from tendering.

#### *ii. Proposals*

- Performance guarantees should be commensurate with the degree of contractual risk to which organs of State are exposed.
- Tender guarantees which are not unduly high, should be called for in large and complex contracts in order to minimise the submission of irresponsible tenders.
- Performance guarantees should spread the cost of the risk of failure between the contracting parties and should not be set at such a level that all the State's costs relating to such failure are likely to be recovered.
- Adequate provision should be made in all engineering and construction works contracts to ensure that monies are available to rectify defects.
- Performance bonds in engineering and construction works contracts should be waived only in respect of low value, low risk contracts or where the risk of failure is carried in an acceptable manner by a third party.

### **4.25. Training in construction projects**

#### *i. Discussion*

It is generally acknowledged that the lack of skills is one of the four major constraints facing small and micro enterprises. Training in the construction industry has historically been indirectly linked to procurement through the Manpower Training

Act of 1981 which permitted the minister to declare a scheme created by any group or association of employers, for the training of employees within given parameters, to be binding in respect of the industry in which they are engaged. This piece of legislation has led to the creation of Training Schemes managed by organisations who are empowered to levy compulsory payment from employers. Thus the cost of training is included in the contract price of participating employers.

In the construction industry, Training Schemes are administered by the South African Federation of Civil Engineering Contractors and the Building Industries Federation of South Africa. Participating contractors include the cost of levies in their tender prices in order to have access to training of their employees. Emerging contractors, not being members, do not price for training as they do not pay levies. As a result, they frequently have no access to industry-based training.

On projects which are designed to engage marginalised sectors of society in construction activities, the training costs are an order of magnitude higher than the aforementioned levies; typically allocations of between 5% and 10% of the contract price are called for. Such training raises a number of issues:

- should the funding of training be sourced from project budgets; if so should it be on a project specific or on a regional / provincial / national programme basis?
- who should control and oversee expenditure?
- who decides on what training should be procured and on what basis?
- how do you measure value for money provided by training providers?
- what type of training should be provided?
- how do you quantify training requirements for a particular project?

Another issue relating to procurement is that of value for money. The determination of value for money on a project specific basis is difficult to determine as the necessity and impact of such training in the long term is difficult to access, particularly where new capacity is generated.

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## *ii. Proposals*

The distinction should be made between short term RDP-related development objectives, which are project-related but programme-driven, and the medium / long term human resource development of the industry. Training should be integrated with the product. As such training needs should be determined jointly by organs of State and industry. Training should be undertaken on a programmed approach and not on a project specific basis. Training should be regionalised and managed by implementing departments or their delegated agents in co-operation with employer bodies / associations on a provincial basis.

Training should be measured in terms of regional structured training plans (human resource development strategies) in order to establish value for money.

Accordingly, provision for training, except for on-the-job training, should not be made in construction contracts. The services of training providers should be procured in the same manner as that proposed for the appointment of consultants.

#### **4.26. Adjudication of engineering and construction works tenders involving emerging / community contractors**

##### *i. Discussion*

Emerging / community contractors who undertake to perform certain construction functions and require third party management support to execute their contracts should be afforded some protection from tendering unrealistically low rates. The acceptance of unrealistically low prices will inevitably lead to failure of such contractors and increased costs to complete contracts. Furthermore, as labour is usually the largest cost component of such contracts, low tender prices will invariably translate into unacceptable wage payments to workers.

In most contractor development programmes outside of South Africa in sub-Saharan Africa, contractors are not selected by means of competitive tendering. A common way to select contractors for participation in programmes is to invite members of the public to fill out an application for training. Applications are processed and participants are selected on the basis of criteria which are dependent upon the objectives of the programmes. Graduates from training courses are then offered fixed-rate period contracts. Further fixed-rate period contracts are granted should they demonstrate satisfactory performance. This system has not succeeded in fostering an entrepreneurial spirit amongst contractors, who invariably remain entirely reliant for their livelihoods on work handed to them in this manner.

International donor bodies have tried to break out of this deadlock by insisting that contracts be awarded on the basis of competitive tendering and have advocated the acceptance of tenders on the basis of a banded price around an estimate, which is made known prior to the closing of tenders. Tendering consequently degenerates into "estimate plus" bidding.

##### *ii. Proposals*

Any system which is adopted to award contracts to emerging / community contractors should be based on the following:

- contractor selection should be on the basis of demonstrating credentials through the submission of tenders.
- prices should be controlled but not imposed.
- participants should learn to price work from the outset.

Tenders should be adjudicated in terms of an estimated price, prepared by a person responsible for either preparing the contract documentation or providing third party management support. Tenderers who price below a predetermined percentage below the estimate should be automatically rejected. Tenders should be awarded to the tenderer whose price is immediately above the cut off value. In the interests of transparency the method of adjudication should be made known to tenderers. The estimate should, be kept secret and be only read out and recorded immediately prior to the public opening of tenders.

#### **4.27. Environmental Issues**



### *i. Discussion*

Organs of State can encourage their suppliers, service providers and contractors to behave in an environmentally friendly way by integrating their concern for the environment with their procurement activities.

Organs of State should implement policy which will influence the behaviour of vendors to:

- comply with all environmental legislation
- offer less environmentally damaging products and services
- develop products from recycled materials.

Procurement policy may require vendors to provide proof of their commitment to environmental protection. This may take the form of statements on the steps companies are taking to reduce their impact on their environment, or alternatively to demonstrate that they are not in breach of any statutory requirements relating to the environment.

### *ii. Proposals*

Organs of State should:

- buy only from vendors who are in compliance with all environmentally-related legislation
- promote environmental awareness amongst suppliers, service providers and contractors
- favour procurement of less environmentally damaging products
- discriminate in favour of products made from recycled materials
- require that suppliers limit packaging to the minimum necessary to protect the items supplied
- favour products which provide information about their effect on the environment
- develop the environmental awareness of government officials
- develop and maintain a database of vendors in which information relating to their environmental conduct is retained
- develop and promote a code of conduct for vendors
- develop a policy with respect to the use of products containing asbestos

Suppliers, service providers and contractors should:

- comply with the requirements of all environmental legislation
- require that their suppliers and sub-contractors in turn comply with all environmental legislation
- consider the environmental impact of their products over their full life cycle from 'cradle to grave'
- minimise the use of energy, non-renewable resources, hazardous chemicals and toxic substances
- maximise the use of recycled materials
- minimise the production of waste
- dispose of all wastes in an environmentally responsible manner

- not offer products or packaging containing CFCs, HCFCs, halons, carbon tetrachloride and other ozone depleting substances.
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## **5. CONCLUSION: THE WAY FORWARD**

Studies have indicated that government expenditure is of such significance that it is a vital component of economic and social progress and as such plays an important role in the transformation process. To overcome the legacy of discrimination and neglect, South Africa must, above all, create conditions for sustainable growth. Any new procurement policy needs to be sensitive to the urgent demands of addressing the present socio-economic imbalances within the context of a global economy and the need to apply accepted principles of good governance. Clearly, South Africa needs to create and adopt new and imaginative procurement policies that will address the country's requirements for equity and social upliftment while, at the same time, allowing it to be internationally competitive .

The aim of this Green Paper is to give all South Africans the opportunity to contribute to the change process that will have a profound effect on all. South Africa is facing enormous challenges, both locally and internationally, as it opens the economy to the combined impact of global investment and free trade regulations. It is envisaged that a coherent and adequately resourced procurement policy will contribute to the national objectives of:

- developing and utilising the country's human resources potential to the full
- a well-developed business sector capable of participating fully in the new South African economy
- an improved quality of life for all
- improved international competitiveness for South African economic activity

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This Green Paper sets out the key elements of the Government's new strategy for procurement. In addition, the evolving institutional framework through which the strategy should be implemented has also been outlined. It should be clear that all these proposed policies, institutions and systems cannot be developed without government adopting a vigorous approach to implement this framework. The government has put in place a process, involving public consultation, aimed at developing the best policies to achieve its goals. The Green Paper process, should result in the formulation of new Procurement Policy for South Africa, ultimately to be published as a White Paper.

It is recognised that the subject matter of this policy needs to be considered with other related Government policies and initiatives in an integrated and structured manner.

This Green Paper has sought to identify the key issues to be addressed by government policy and to suggest some of the available options. The Paper is designed to raise questions about these options, by discussing the merits or otherwise of adopting them, in an effort to stimulate public debate. It is not a statement of government policy, but outlines issues and options to which the South African public are invited to respond and make contributions that will eventually help shape government policy. The culmination of the process will be the publication of a White Paper and the beginning of legislative reforms pertaining to procurement.

Constructive participation will enable Government to respond more effectively to the needs of South Africa in this important area of reform. The Green Paper has drawn on the experience of other societies and nations who have grappled with similar issues. The common features include building on existing strengths and restructuring government policies and programmes to support the principles of Growth, Employment and Redistribution as outlined in the macro-economic strategy. However, ultimately, it is for all South Africans to determine the best course of action to meet the country's challenges and to accept joint responsibility for implementing the changes required.

The desired output of this process is to develop world class professional procurement policies and systems while ensuring the productive participation of previously disadvantaged persons in a manner that promotes entrepreneurship and the adoption of best practice within all South African businesses while improving international competitiveness.

Although policy choices are involved, the implementation of this new vision is the responsibility of all South Africans. There are no shortcuts if the country is to make the transition to full economic maturity.

#### **AFFIRMATIVE PROCUREMENT IN BRIEF**

Affirmative Procurement in a practical and pragmatic manner affirms the changed environment in South Africa, government's socio-economic objectives and the principles of the Reconstruction and Development Programme. It enables organs of State to operationalise policies in a targeted, transparent, visible and measurable manner when engaging in economic activity with the private sector, without compromising principles such as fairness, competition, cost efficiency and inclusion.

Affirmative Procurement comprises participative programmes aimed at the engagement of small, medium and micro enterprises owned by previously disadvantaged persons and the increasing of the volume of work available to the poor and the income generation of marginalised sectors of society.

Key elements associated with Affirmative Procurement are:

**1. The recognition that:**

- procurement may be used as an instrument of government

policy.

- value for money need not be a measure of monetary cost alone.
- goods, services and works can be procured both in terms of human resource and technical specifications.
- participation of targeted individuals, groups of people, communities and enterprises can be secured by means of a development objective / price mechanism, a human resource specification or a combination thereof.

**2. The use of development objective / price mechanism (points scoring tender adjudication procedure) as a means of:**

- measuring a tenderer's human resource and financial offer (i.e. value for money).
- adjudicating of tenders.
- ensuring that premiums, if any, paid in respect of socio economic or development objectives are within acceptable limits.
- favouring certain targeted individuals, groups, communities or practices without excluding those who fall outside of such target groups from tendering.
- encouraging the private sector to use their skill, knowledge and creativity in responding to socio economic and development objective challenges in a cost effective manner.

**3. The use of human resource specifications in order to:**

- define target groups
- set goals (targets), measured in monetary terms, which may be met by engaging the target groups in the pursuit of predetermined socio-economic / development objectives.
- provide for the measurement of key indicators to ensure that goals may be quantified and audited during the performance of the contract.
- set out how goals can be achieved, and the penalties which are to be applied should a contractor fail to achieve the contractual goal.

**4. The classification of contracts in order to facilitate standardisation in approach and the targeting of business enterprises/local resources**

**5. The use of the third tier of government in order to effect area bound (specific) targeting relating to marginalised sectors of society in construction projects.**

Affirmative Procurement has two main legs:

- A development component which ensures that the target group is capable of participation.
- A structured participation component which ensures that the target group is engaged in the provision of goods, services and works.

Affirmative Procurement, without resorting to set asides and price preferences can be used in an effective, efficient, transparent and cost

effective manner to:

- put in place a programme of affirmative action to address the deliberate marginalisation from economic, political and social power of previously disadvantaged individuals and sectors of society.
- develop small businesses, particularly those owned and operated by *black* entrepreneurs.
- provide jobs in a targeted manner on engineering and construction contracts.
- increase the number of employment opportunities per unit of expenditure.
- promote acceptable labour practices and standards.

Affirmative Procurement seeks to ensure that public funds are expended in a such a way that all segments of the South African population benefit from such expenditure through job creation and commercial activity. It makes the tender process accessible to the target group without guaranteeing work and links the flow of money into targeted business enterprises with a commitment flow of responsibility.

It has as its aim, in the long term to :

- promote development objectives with a focus on human resource development.
- provide opportunities for skill transfer, capacity building to acquire experience.
- encourage commitment to human resource development and social responsibility programmes within organisations to specifically, redress historical imbalances.
- facilitate growth in terms of the efficiency and effectiveness of delivery as well as numbers and size of business owned and controlled by previously disadvantaged individuals.
- ensure that emerging enterprises contribute to the tax base, engage workers who are affiliated to labour associations, adhere to safety regulations and reflect norms and standards in their business activities associated with those of developed countries.

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## **THE PILLARS OF PROCUREMENT REFORM**

### GENERAL

- The strategy of procurement should be to achieve continuing improvement in value for money, based on whole life cost and quality and to enhance the competitiveness of suppliers through the

development of world class professional procurement systems and practices.

- Organs of State should seek to embrace efficient and effective procurement practices and systems and so deliver the services which they are mandated to do in the required quantities and quality in compliance with Constitutional provisions.
- Government should focus beyond administrative and service role provisions in its procurement practices and take on the role of economic catalyst in the transformation process
- Organs of State when engaging in procurement activities should adhere to the preservation of the highest standards of integrity, objectivity, fairness, efficiency and professionalism.
- Success in the economic environment requires government to play a clear policy co-ordination role which is likely to have a wider application in the rest of the public sector, and indeed in the private sector.

#### SOCIO-ECONOMIC REFORM

- Public sector procurement should be structured in a manner that promotes economic reconciliation and competitiveness.
- The structuring of contracts should be such that small, medium and micro enterprise participation is maximised without compromising time, cost and quality.
- Value for money should not be based on least cost alone; it can include well defined socio-economic criteria which can be evaluated in a transparent and measurable manner.
- Targets should be set and delivery systems should be designed to facilitate one or more of the following :
  - The development of small, medium and micro enterprises particularly those owned and operated by previously disadvantaged persons;
  - The increasing of the volume of work available to the poor and the income generation of marginalised sectors of society;
  - Affirmative action to address the deliberate marginalisation from economic, political and social power of black people, women and rural communities and to empower communities and individuals from previously disadvantaged sectors of society;

subject to such targets being readily definable, quantifiable, measurable, auditable and verifiable.

- The policy of targeting must not compromise the principles of fairness, competition, cost-efficiency and inclusion, and should be subject to periodic review.
- The procurement process should be made accessible to the target groups, and structured in a simplified and user-friendly manner.
- The third tier of government should identify area bound targets and select associated delivery mechanisms.

- Organs of State should take cognisance of regional and local dynamics when implementing procurement policy and associated practices
- International competition should not prejudice local enterprises and should be used as an opportunity to develop and advance local industry through technology transfer and human resource development.

## **THE PILLARS OF PROCUREMENT REFORM**

### INSTITUTIONAL REFORM

- Procurement must comply with the provisions of the constitution, support macro economic policies, be an instrument of the transformation process and promote tax morality and improve labour standards.
- National legislation should prescribe a procurement framework which regulates procurement procedures, practices, documentation, policies, preferences and control measures in all organs of State.
- Procurement control and monitoring should be exercised by a national Procurement Compliance Office whose functions should be to ensure that procurement agencies comply with the national procurement legislation and framework and associated regulations.
- The Procurement Compliance Office should have five specialist arms which have functional responsibilities in respect of registration, administration, socio-economic affairs, technical matters and education and training respectively.
- Existing national and provincial Tender Board Acts and Local Government Ordinances pertaining to procurement, should be repealed; the existing State and Provincial Tender Boards should be disbanded.
- Offices of Tender Boards (as opposed to the Boards themselves) should be reconstituted as Procurement Offices responsible for central tendering and certain ad hoc contracts.
- Consumer organs of State should be authorised to act as Procurement Centres in order to procure goods, services and works, based on predetermined criteria.
- A code of conduct should be drafted to govern the actions of procurement officials and those engaged in providing goods, services and works.
- The Procurement Compliance Office should regulate and prescribe all documentation in order to achieve a uniform procurement system with standard tendering procedures and contract documentation.
- All enterprises which contract with organs of State should be registered and all targeted enterprises certified.
- Standards and specifications should result in appropriate quality being procured to satisfy user needs and should not be used to exclude emerging enterprises from participation.
- Parastatals should not unfairly compete with the private sector and should comply with the provisions of a National Procurement Framework.

- A comprehensive training and skills development programme should be embarked upon to ensure that procurement officials have the necessary procurement skills.
- Measures should be taken to ensure that the effects of the WTO's Code on Government Procurement do not impact negatively on the overall objectives of South African socio-economic reform.
- In the interim, a preference system for local content, or an offset policy with a bias towards export promotion, should be used to support the local economy in the face of foreign competition.

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### **INVITATION TO COMMENT**

The Ministries of Finance and Public Works welcome any comment, criticism or concern on the proposals made for the reform of the public procurement process from all interested parties. Please address your correspondence to:

**The Secretariat : Procurement Reform**  
**Private Bag X49**  
**PRETORIA**  
**0001**

**Fax. (012) 323 4669**  
**e-mail. [procure@gov.za](mailto:procure@gov.za)**

**Comments should reach the Secretariat on or before 30 June 1997.**

*Machiavelli (1514):*

*"It should be borne in mind there is nothing more difficult to arrange, more doubtful of success and more dangerous to carry through than initiating changes in a state's constitution.*

*The innovator makes enemies of those who prospered under the old order and only lukewarm support is forthcoming from those who would prosper under the new."*

A lack of response from those who are earmarked to benefit from Procurement Reform would indicate that the same is true in this case.

### **ACKNOWLEDGEMENTS**



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- Sivi Gounden - Deputy director General, Public Works Department
- Jan Breytenbach - Chief Director, Office of the State Tender Board

Task Team:

- Deen Letchmiah - Consultant
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Other organisations:

- Various central and provincial departments
- Various short term local consultants
- Labour representatives, business sector, professional organisations and institutions, international experts and the like.

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## 4. Specific Aspects of Procurement Reform

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## 4.1 Introduction

Public Sector procurement is an instrument of Government policy. The setting of new policies to serve socio-economic objectives, the changed environment, and good governance require a review of the detail of the procurement system. If this is not done, new policies will not be able to produce the desired results. At the same time, government needs to be able to govern in an efficient and effective manner. Procurement should facilitate and not frustrate organs of State in their functioning and the discharge of their obligations.

The validity of current public procurement practices needs to be examined, and certain practices need to be revised, some housekeeping is necessary and issues which have never been satisfactorily resolved, need to be addressed.

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Procurement activities may for practical reasons be considered as falling into one of the three following categories:

<p><b>goods:</b> being the supply of raw materials or commodities made available for general sale.</p>	<p><b>services:</b> being the provision of labour and/or knowledge based expertise.</p>	<p><b>engineering &amp; construction works:</b> being the provision of a combination of goods and services, including building and engineering infrastructure, arranged for the development and provision of an asset or refurbishment of an existing asset.</p>
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The principles of procurement are, generally, applicable to all three types of activity; the details, however, may change. The discussion and proposals presented below, examines, as far as possible, issues in a non category specific manner.

Engineering and Construction Works procurement is, normally, more complex than that for Goods and Services as this type of contract requires elements of both Goods and Services to be combined and arranged for the performance of the contract. Construction contracts require assets to be constructed in a specific location, and have requirements which are very industry specific. For these reasons, and because the construction industry's role in public sector procurement is significant, some of the issues which need to be addressed in construction projects specifically are also raised.

## **4.2 Value for money**

### *i. Discussion*

Value for money, in the context of human resource development, is discussed in Chapter 3. The technical component of value for money also needs to be re-examined.

Organs of State will need to embrace disciplines such as value engineering (i.e. the structured and continuous approach to developing a common understanding of a project's aims and requirements together with all aspects of function, design, construction and operation) to enable the best functional balance between cost, reliability and performance, and, hence, value for money to be achieved.

Procurement procedures should encourage tenderers to offer alternative designs, techniques or proposals that offer better value for money. Proposals which enhance the intrinsic quality without affecting monetary savings should, also, be considered.

### *ii. Proposals*

- Organs of State should, where appropriate, embrace the discipline of value engineering.
- Tenderers who submit alternative tenders based on performance specifications, should not necessarily be required to submit, in addition, tenders without qualification or modification.

## **4.3 International competition (Foreign Tenders)**

### *i. Discussion*

Most of South Africa's industries are not yet in position to compete on a par with their international counter-parts. There are a number of reasons for this state of affairs, particularly the fact that South African industries have not gone through the full development cycle experienced by other developed economies. Accordingly, many South African industries would find it very difficult to compete both locally and abroad if all forms of preference and support for locally manufactured products were to be abolished.

Whilst State regulatory policy should aim to achieve its goals in an international context, it must also take into consideration the support and development of local industry, and the creation of job opportunities. The policy must respond to key issues of national priority such as the upliftment of previously disadvantaged sections of the community, whilst also reflecting on issues pertinent to international trading, and how these issues will be managed. Industry must become competitive both on the local and international markets.

Local industry can be protected in a number of ways including:

- The imposition of restrictive tariffs on all goods of foreign origin.
- The institution of non-tariff based controls on importation (i.e. Import Control).
- The provision of preferences for local supply based on local content.
- The application of affirmative (targeted) procurement practices.

Price-based preferences invariably raise the issue of value for money, particularly where the price differences between imported and locally produced goods are significant. Such preferences are, furthermore, often in conflict with international trade agreements.

Contract strategies and the packaging of contracts can also be used to tip the scales in favour of the local industry. The size of contract, early warnings to prospective local suppliers of forthcoming tenders, and technical assistance programmes can all play a part in ensuring, that local tenderers have a fair chance of winning contracts.

Targeted procurement practices can be effectively used, particularly on construction projects, to ensure that there is significant local content. The objective can be achieved without resorting to the conventional restrictive trade practices as all tenderers, including foreign tenderers will be required to deliver in terms of technical and human resource specifications.

Both technology transfer and human resource development are crucial to the advancement and development of local industry. South Africa's policies ought to ensure that the country enjoys the maximum benefit of foreign participation by incorporating a requirement for technology transfer and human resource development as integral conditions for foreign tenders.

A single, broad and comprehensive policy may be easier to manage than numerous narrowly defined policies. An offset policy is an ideal instrument through which all requirements can be achieved. Technology transfer and human resource development can be used as credits for the required offset value under an offset contract. Alternatively, it could be a requirement that foreign tenderers meet their offset requirements through purchases or services sourced from small, medium and micro enterprises.

To develop and formulate an offset policy, data would need to be gathered and analyzed. Accordingly, this is a medium to long term approach.

Since South Africa has joined the international trading community by signing the World Trade Organisation agreement, it is desirable to develop harmonised and

transparent procurement procedures, acceptable to local and foreign tenderers, which make provision for value for money and competitiveness, with special emphasis on meeting the principles of the Reconstruction and Development Programme and the socio-economic objectives of government. It is, however, important that South African industries move rapidly to a position where they can compete on par with other world economies. An export orientated policy which is consistent with international trading norms might be the key to developing local industries to the required level of competitiveness.

#### *ii. Proposals*

- The current preference system for local content should be continued and be extended to professional service contracts.
- Specific attention should be paid to the selection of contract strategies, the packaging of contracts and the setting of human resource goals in order to maximise local content.
- The continuation of the preference system should not rule out the adoption of broader policies in the future which may be easier to manage and which can yield increased benefits. One of these policies could be an offset policy. An offset policy can be comprehensive, covering many issues, yet be easy to manage, since the responsibility for satisfying the offset agreement requirements rests with the seller (foreign tenderer). An offset policy has an inherent bias towards export promotion, which is an indirect, but more effective way of supporting local industry.
- In order to simplify tender documentation, streamline administrative procedures and focus protective measures, preference systems should be linked to the categorisation of contracts and applied only to specific sub-categories of contracts.
- Foreign labour should be utilised only in circumstances where the requirements cannot be met by using local labour. Government procurement policy should ensure that this policy is respected by the those tenderers who respond to government tenders.
- The appointment of international specialists should be conditional upon the transfer of skills to their South African successors.
- Foreign tender participation should be based on, *inter alia*, value for money and on the promotion of international competitiveness.
- Foreign tenderers should be used for the development and benefit of local industry. Both technology transfer and human resource development should be linked to such tenders in order to ensure that South Africa enjoys the maximum benefit from foreign tenders.

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### **4.4 Impact of the World Trade Organisation Agreements (WTO - formerly GATT)**

#### *i. Discussion*

The World Trade Organisation (WTO - formerly GATT) is the body that regulates international trade. It fulfills three main functions, viz:

- it is the preeminent forum for negotiating multilateral trade agreements which, in effect, regulate national trade-related economic policies;
- it contains established legal instruments governing international trade; and
- it possesses *Dispute Settlement Procedures* to resolve trade friction between Members.

South Africa, a Founder Member of GATT, is classified in the WTO as a *developed* country and there is some debate as to whether South Africa should seek to be reclassified as a *developing* country. Although South Africa has never formally sought reclassification, it negotiated favourable conditions and extended implementation periods in several of its sensitive economic sectors during the Uruguay Round of the GATT. Thus, while WTO rules regulate international trade practises and procedures, there is significant scope to negotiate specific terms and conditions that cater for national interest and priorities.

Unlike most of the WTO agreements to which South Africa is committed as part of the WTO's single undertaking principle, the Agreement on Government Procurement is plurilateral and extends obligations only to Members that are signatory to its provisions. South Africa has, to date, not signed the Agreement and there are expectations that the Government will come under increasing pressure from its main trade partners to do so.

In responding to the pressure, South Africa should adopt a balanced approach that recognises not only potential costs, but also the potential benefits that accession to the Agreement on Government Procurement may provide. It is critically important to recognise that the issue of government procurement will remain on the multilateral negotiating agenda and the challenge is to engage the issue in a way that promotes South Africa's national interests. Moreover, Government needs to take cognisance that once it has defined its interests in this area, it is possible to negotiate the terms of accession to the Agreement in a manner that is not inconsistent with national priorities.

The Agreement on Government Procurement recognises that 'entities', which encompass governments and agencies controlled by them, are significant buyers of goods and services. Given the growing significance of this market (several billion dollars), a potential benefit of accession to the Agreement is that it will permit South African firms to tender for valuable government contracts issued by other Member countries. The purchases of governments and their agencies around the world cover a range of goods and services that may be of interest to South African firms.

Counter arguments suggest that accession to the Agreement will preclude the Government from applying preferences in awarding contracts on the basis of national development priorities; to promote local business (including SMMEs) and to encourage *black* economic empowerment. The argument is that foreign firms will be successful in tendering for South African Government procurement contracts and may supplant smaller, less competitive South African suppliers.

In addition, the potential (negative) effects of the Agreement may be to:

- weaken the country's balance of payments situation;
- lessen the utilisation of installed production capacity;
- downscale the creation and maintenance of job opportunities;

- weaken the socio-economic principles of the RDP;
- lessen the ability to maintain an Offset policy; and
- make the government procurement system inaccessible to disadvantaged persons.

These effects need to be thoroughly researched before any definite conclusions can be drawn. In any event, the constraints imposed on Members by the Agreement are not absolute as there is considerable scope for the negotiation of exemptions and exclusions; Governments may list (or specify) which entities will be covered by the Agreement; entities are entitled to maintain their own specific lists of permanent suppliers. There is also provision for selective tendering.

The Agreement specifies that it only applies to procurement contracts valued at SDR 150 000 or more. Governments can therefore establish their own independent criteria in awarding contracts valued at less than this amount. It would, accordingly, be valuable to explore whether this threshold can be negotiated upward or not. If South Africa were to secure developing country status in acceding to the Agreement, it would qualify for Special and Differential Treatment which permits measures to, amongst other things:

- safeguard the balance of payments;
- promote SMMEs (infant industries); and
- revitalise rural and underdeveloped (sub-national) regions.

In addition, Members that participate in regional arrangements (SADC) are able to negotiate exclusions on the basis of, for example, promoting regional industrial development. In short, the Agreement contains degrees of flexibility that need to be examined.

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## *ii. Proposals*

- South Africa should not adopt an intransigent or dogmatic approach to the issue of public sector procurement. While it may be opportune to resist accession to the Agreement at this time, it is important that South Africa begins to engage the issue directly and to define its interest empirically.
- It is also important to recognise that the issue will not disappear from the multilateral trade agenda. In this regard it should be noted that at the WTO Ministerial Meeting, held in Singapore in December 1996, Ministers agreed to establish a Working Group to conduct a study on transparency in government procurement practises, taking into account national policies and to develop elements for inclusion in an appropriate agreement. As the principle of transparency and due process are enshrined in the Constitution, the WTO process should pose no threat to South Africa.
- A broad, long term strategy will need to be formulated. In formulating this strategy, more research is required to analyse and calculate:
  - the potential for foreign firms tendering for government contracts;
  - the potential benefits that may flow from successful tendering by South African firms in foreign countries.
- In addition, a detailed analysis of the Agreement on Government Procurement and how it has been implemented in other countries should be undertaken.

The aim would be to explore the scope of flexibility contained in the Agreement and the full range of options that may be available to Governments. It is also vital to recognise the advantages that flow from developing country status. If South Africa's trading partners are keen to secure this country's accession, it may provide the leverage to accede on a developing country basis (either formally or informally). This option needs to be explored. South Africa may also accede to the Agreement gradually. It could open up to foreign competition on a case-by-case basis weighing up the overall (socio-economic / efficiency) costs and benefits.

#### 4.5 Appointment of consultants

##### *i. Discussion*

Consultant appointments can be broadly classified in terms of certain characteristics which may affect the extent to which specific selection criteria and specifically price, may appropriately be used in the selection process. The two extreme poles of the spectrum of consulting assignments can be defined as follows:

- **Routine assignments** i.e. tasks of a straightforward nature involving, in the main, standard technologies in terms of which inputs are relatively well known and can be readily defined.
- **Conceptual, complex and multi-disciplinary assignments** i.e. those assignments that call for considerable innovation, creativity and skills, frequently outside a single discipline. Examples include policy development, project management, technically complex assignments, restructuring, expert advice, strategic planning, and research and development. Such assignments are broadly characterised by both unknown and ill-defined inputs and outputs, with the appointment's impact on the end product very uncertain.

In routine assignments, price can play a significant role in the selection process, whereas in conceptual, complex and multi-disciplinary assignments, the use of price as a selection criteria should be less significant.

The calling for open tenders under all circumstances, even for routine assignments, is neither in an organ of State's nor the consultant's interests. Apart from an organ of State's costs in preparing and adjudicating such tenders and the consultant's costs in submitting tenders, such practices will favour the established large consultancies who have greater capacity to absorb the costs. Medium and small companies and, in particular, emerging consultants, are at a distinct disadvantage. Elaborate and complex adjudication systems are required for the satisfactory adjudication of tenders for consulting services.

A major problem with competitive tendering relates to the definition of the scope of services to be performed. Consultants cannot price their services if these are ill defined. In research and development, policy formulation, human resource development, community-based developments and the like, the scope of services can seldom be well defined prior to the commencement of the project or commission.

For engineering and construction projects, life cycle costs are most critical and are largely dependent on design quality. Any potential saving in the design fee would form only a minuscule portion of the life cost of the project and should not be



allowed to jeopardise the best value for money option on the project as a whole. Likewise, the costs of policy research are trivial relative to the impacts of policy decisions on the nation. The selection of consultants on the basis of price alone may well lead to unsatisfactory, or even disastrous outcomes which could, in all likelihood, have been avoided at insignificantly greater overall cost.

International experience regarding competitive tendering for professional services has been mixed. In the United States of America, legislation was introduced as far back as 1972 to outlaw competitive tendering for professional services on construction projects. Contracts are awarded in terms of an Act which requires government to negotiate contracts on the basis of demonstrated competence and qualification for the type of services required, at fair and reasonable prices; the principle being that contracts are awarded to the most qualified firm and not the least costly. In the United Kingdom, surveys have indicated that where competitive fees (lowest price) was the criteria for award, clients on engineering and construction contracts got less value for money, as consultants were reluctant to consider alternatives, produced simpler designs, resisted client changes, spent less resources on education and training etc. Current thinking is to opt for the awarding of contracts on the basis of a quality / price mechanism, in terms of which price, depending upon the nature of the services required, accounts for from 15% to 50% of the points allocated.

The World Bank has no requirement for competitive tendering for consulting services and recommends that selection be based primarily on quality. Price forms part of the selection process only where projects are of a routine nature, and proposals are judged to lead to comparable outputs.

The principle factors which the World Bank suggests that should be used when deciding upon appointments are:

- The adequacy of the work plan submitted by the consultant in response to a brief (scope of work).
- The consultant's general experience in the field of assignment.
- The qualifications and competence of the personnel proposed for the assignment.
- The relationship the consultant has with the client.

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The specific needs of emerging consultants owned and controlled by previously disadvantaged individuals must be taken into account. Although this group of consultants may demonstrate competency, they are likely to lack experience which can only be obtained through the granting of appointments.

Current practices which are being pursued to facilitate the participation of emerging consultants and to reward consultants who have been proactive in developing previously disadvantaged individuals within their companies or developing capacity in emerging consultancies, include insisting that all work be performed in association with such enterprises, accelerated roster systems, joint venture requirements, and the scoring of adjudication points. Information provided by established firms in support of human resource development and social responsibility programmes is extremely difficult to verify and is seldom called for. Furthermore, such criteria

frequently favour the large firms who, for various reasons relating to scale of operation, have more scope and opportunity to meet such criteria, particularly as their contributions are seldom measured in terms of their turnovers. Thus, although such systems may achieve their objectives in providing work for emerging consultants and rewarding pro-active established consultants, it is vulnerable to window-dressing and fronting and generally favours the larger consultancies.

Many organs of State have established panels of consultants who have the necessary experience and expertise to provide routine services e.g. auditing, design, contract administration, legal advice, etc. Certain appointments made to firms on these panels have resulted in strong relationships which have endured for long periods and a number of these panels have not incorporated any new panelists from the time that they were originally constituted.

Insofar as auditing appointments are concerned, calls have been made for the rotation of audits so as to prevent relationships between the auditor and auditee becoming "too comfortable" as this may result in a loss of independence. The office of the Auditor General in New Zealand applies the practice of compulsory rotation of audit firms every three years. The practice of rotation on a five year cycle is also enforced in Switzerland, both in the private and public sectors.

Organs of State, other than those functioning at national level, often require consultants to maintain local offices within their areas of jurisdiction. In many instances such offices do not, in fact, perform the work using their own resources. Instead they pass it through to associated offices in other centres. This practice is very difficult to monitor and the consequence is that appointments to consultants with local offices do not necessarily lead to local economic development.

Given the efficiency and speed of current modes of information transfer, the desirability of consultants being required to maintain local offices, which may be mere facades, is questionable. It may, in fact, be submitted that the requirement for maintaining a local office is a form of local preference, which works against free trade within the country and is, therefore, in conflict with the constitution.

Under certain circumstances, particularly where work of a highly specialised nature is required, it may be advantageous to approach a particular firm, or individual consultant, rather than to conduct a selection process. Such appointments would, normally, be desirable where the particular consultant has been closely involved in work similar to that required, or has expertise not widely available. Appointments of this nature are unavoidably open to abuse and criteria and policy in respect of sole service providers needs to be formulated.

There is a need in regard to construction projects to have available standard sets of interlocking professional appointment documents which not only govern the conditions of the appointment but also set out, as far as possible, the services to be performed by consultants and the relationships which such consultants have with construction contractors and other consultants. This is particularly necessary to enable "non-traditional" consultants e.g. training managers, mentors, project facilitators, contract compliance monitors, etc. to be appointed to ensure that development objectives are met and to describe the services required of consultants where non-traditional contract delivery options or new forms of contracts are utilised on projects.

## *Proposals*

- Any system for engaging consultants should not be elaborate to the extent that it is unwieldy to administer and cause delays in making appointments; neither should it sacrifice time and cost for quality. It should furthermore take cognisance of:
  - the erratic stop / start nature of projects
  - imbalances in supply
  - budgeting constraints
  - lack of exposure and experience
  - increased administrative work loads
  - window dressing and fronting
  - cost of tendering both in terms of direct client costs and consultant costs
  - scale of project
  - lack of detailed information on a project
- Officials of organs of State should prepare terms of reference (scope of work) in as clear, unambiguous and precise a manner as the nature of the project will permit.
- The following basic criteria should form the point of departure for the appointment of consultants :
  - competence
  - fairness of work allocation
  - price insofar as it does not affect quality.
  - capacity to deliver
- Appointments should be made on the most appropriate of the following methods:
  1. **tariff appointments** (fixed scales of fees or prescribed rates ) :
    - invite two or three firms of similar sizes or capabilities drawn from a data base, using a method that over a period of time will afford all those on the list an opportunity of participation, to submit proposals and make the appointment on the basis of the quality offered;
    - make appointments from a rotating roster in respect of routine assignments; or
    - make appointments from a panel of consultants with the aim of ensuring that those on the panel have equitable / balanced work loads commensurate with their abilities and capabilities.
  2. **competitive tendering** :
    - invite tenders from a short list of consultants who have similar capabilities, capacity and experience, appropriate for the required service which is to be performed, selected from a comprehensive data base in such a manner that over a period of time all those on the data base will have an opportunity to tender; or
    - invite any interested firm to tender on the basis of a quality / price mechanism and reject any tenderer who does not meet a minimum quality threshold.

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- The competitive tendering route should only be followed if the terms of reference / scope of the work can be adequately defined.

- The basis upon which firms are selected and invited to submit proposals / tenders should be documented and submitted for review to the Procurement Compliance Office.
- Quality should be measured in terms such as competency, available project specific expertise, stated approach, methodology and qualifications of key personnel.
- The criteria for admittance to panels / data bases should be made public and firms complying with such requirements should be permitted to make application to join such panels on an ongoing basis.
- Selection on the basis of quality, should not necessarily mean the best quality available, but quality appropriate for the assignment.
- Quality selection criteria should be clearly stated in enquiry documents.
- The scoring of quality should be clearly stated in adjudication documents and should be such that, should parties who were not part of the original adjudication team score submissions, a similar result would be obtained.
- Auditing appointments should be rotated.
- Firms of consultants owned and controlled by previously disadvantaged individuals whose turnovers are within predetermined limits, should be afforded accelerated work opportunities. Accelerated work opportunities for such firms should be achieved by means of one or more of the following:
  - by rotating the target group consultants at a faster rate in roster systems.
  - by setting participation goals on large scale appointments in terms of human resource specifications to ensure that the target group consultants are engaged either as sub-consultants for distinct portions of the work or as joint venture partners.
- Ongoing, non project specific appointments should be made for a specific period of time.
- Procedures should be put in place in research and policy development appointments to control the end product.
- Standard appointment documents and standardised documentation relating to the services which are to be performed should be prepared in respect of routine assignments.
- Contracts with consultants should specify the type and terms of professional liability insurance cover, commensurate with the nature of the assignment, which is to be maintained by the consultants.
- The appointment of sole service providers should be permitted, subject to adequate justification on the grounds of the scarcity of their skills and experience, value for money being obtained, and the likelihood that the outcome of the assignment would be compromised without such a selection.
- The practice of affording preference, or confining appointments to consultants maintaining offices within a specific geographic area should, in general, be discontinued. Only where it can be demonstrated that clear advantages would accrue to the organs of State by the use of local consultants should the selection be confined to them.
- Procurement Offices and Centres should report on a regular basis to the Procurement Compliance Office regarding all appointments of consultants. Particulars of the scope and nature of assignments, the terms of appointment and remuneration, the estimated fee amounts and the departments, or sections requesting the appointments should be furnished.

#### **4.6 Language**

### *i. Discussion*

Currently, national standards are written in technical language. As standards have become, more internationalised, the technical languages of international standards, viz. English, French and Russian, tend to dominate world wide. Of these, only English is of importance to South Africa. In the past all national standards were translated into Afrikaans. In the case of compulsory standards, this is still the case, as prescribed to the South African Bureau of Standards by the Department of Justice.

Insofar as general conditions of contract are concerned, documents are currently available in both English and Afrikaans. Difficulties have been experienced in the past when tenderers competing for a specific contract have been given the option of drawing documents in either of the two languages, as errors have inevitably crept into the documentation. These errors have, in some instances, resulted in inequitable tenders being received.

The problems relating to the provision of documentation in any of the official languages other than English and Afrikaans should not be underestimated as the necessary technical language does not exist and would have to be developed. As contract documents must convey technical information and requirements in an unambiguous manner, the preparation of documentation in a number of languages would be very difficult and fraught with dangers.

### *ii. Proposals*

- All contract documentation should be prepared in English, the international language of business.
- Guidance notes / summaries of principal features of contracts should be prepared in official languages other than English, where appropriate, and be issued without prejudice to tenderers.
- Provision should be made to assist tenderers with regard to technical translations.

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## **4.7 Parastatals as suppliers**

### *i. Discussion*

Parastatals are those institutions which are directly or indirectly controlled by the State. Parastatals are often perceived to have an unfair advantage in competing for contracts with the private sector on various grounds, for example, they price on the basis of operating costs alone, they have tax concessions, they are not obliged to earn an adequate return on their investment and they undercut the prices of competitors despite making losses.

Where parastatals are permitted to compete with the private sector, it is necessary to develop criteria that allows the private sector to compete with parastatals in an equitable manner.

### *ii. Proposals*

As a general rule, parastatals should be discouraged from tendering in competition with the private sector. Where parastatals tender in competition with the private sector, a percentage loading should be applied to parastatal tenders in much the same way as a percentage loading is applied to "protect" local suppliers against foreign suppliers.

#### **4.8 Registration of suppliers, service providers and contractors**

##### *i. Discussion*

There is a balance between fiscal discipline and nation building. In the context of developing emerging suppliers, service providers and contractors and integrating them into the mainstream of the economy, there needs to be a balance between cost effective creation of physical assets / supply of goods, services and works and the development of emerging business. Supplier / service provider / contractor registration is viewed by many as a means of reducing the State's risk exposure in engaging firms who have unproven capabilities or inadequate prior contractual experience.

Registration of contractors / service vendors is encountered in many countries. In some developed countries, contractor registration is used as a means of procuring goods, services and works by means of a qualification system. This system requires firms to qualify to be included on an approved list of tenderers. Public client bodies are able to access the list, draw up a schedule of firms which are suitable for a project (prequalify), and seek tenders from firms of equivalent size, capability and experience.

##### *ii. Proposals*

Registration in South Africa should be instituted as a means of:

- compiling a data base for the packaging of contracts and identifying target groups.
- regulating participation in public sector procurement.
- promoting good business practices and adhering to statutory regulations and requirements.
- censuring those who transgress codes of conduct, fail to meet their tax, levy or service charge obligations, or obtain work in a fraudulent manner.

Non-registered suppliers, service providers and contractors should not be permitted to participate in public sector procurement activities. Registration should be subject to the observance of a code of conduct which should, *inter alia*, require that signatories undertake to:

- tender only on projects which they are capable of executing with the resources they are able to marshal in accordance with the terms and conditions of the contract;
- remunerate staff in accordance with relevant labour legislation;
- pay UIF, Workman's compensation, service charges, VAT, income tax and other taxes as appropriate.

- adhere to safety and health regulations in so far as their workers are concerned.
- engage subcontractors under fair conditions of contract and require them to adhere to labour standards.
- not engage in Dutch auctioning in the engagement of subcontractors (i.e. the practice of hawking prices around in order to drive prices own).
- adhere to environmental standards.

## **4.9 Life cycle costing**

### *i. Discussion*

The prime objective of public sector procurement is to achieve best value for money. Best value for money in the context of a technical component in procurement is the optimum combination of whole life cost and quality to meet a user department's requirements and not the lowest short term cost. Whole life cost takes into account all aspects of cost over the lifetime of the asset, including capital, maintenance, management and operating costs.

For complex procurements, whole life costs may be very different from and only loosely related to initial price. In the case of capital assets, the greater part of the whole life cost is normally incurred after purchase, the purchase price frequently being as little as 20% of the total cost.

Goods which are not wholly consumed in the course of their use will have to be disposed of. When some assets are no longer needed, they may have a resale value. Accordingly, many factors need to be taken into account in an integrated procurement process.

In engineering and construction projects, life cycle costs are most important and are very dependent on design quality. Design quality is about providing, within the available resources, added value over and above the merely adequate. The procurement system needs to be structured so that quality designs and not lowest cost design is procured, as the work of the designer has a significant impact on life cycle costing.

### *ii. Proposals*

- Emphasis should be placed on economy over time, not on short term savings.
- Appropriate quality should be determined on the basis of whole life costs as opposed to initial cost or lowest price.
- Comparative tenders should be evaluated in terms of standards methods and procedures.
- High quality as opposed to least cost lower quality designs should be procured in engineering and construction projects where life cycle costs overshadow initial costs.

## **4.10 Quality**

### *i. Discussion*

ISO 8402 defines quality as *the total characteristics of an entity that bear on its ability to meet stated and implied needs*. Quality may be regarded as conformance to stated requirements (specification) rather than fitness for purpose. It is achieved by executing a contract to the stated requirements. Quality can be managed and given visibility by means of one or more of the following:

- Quality assurance e.g. SABS ISO 9000 and other such certification schemes.
- Total Quality Management
- Development of personnel
- Bench marking

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The South African Bureau of Standards has a product certification scheme called the Mark Scheme. If a manufacturer is prepared to manufacture commodities in accordance with the requirements of a mark specification and to apply the required quality control measures to his factory, he may apply to the SABS to use the applicable certification mark on his commodity. Of the some 3500 SABS specifications, about 700 have been declared mark specifications. There are currently, approximately 3000 permit holders.

SABS ISO 9000 has strong support in some areas and forms the basis for most certification schemes. It has, however, been strongly criticised for being over-bureaucratic, expensive, vulnerable to variable interpretation, inappropriate for small firms and existing as a goal rather than a means to an end. Nevertheless, it is an appropriate basis for effective management of quality notwithstanding its reliance on paperwork. Currently, approximately 1500 firms have been certified.

Small firms have experienced some difficulties with the SABS ISO 9000 scheme. They have argued for a simplification of the standard and have complained about the cost of certification. There is no doubt that the cost of certification as a proportion of turnover for a small firm is significantly greater than for a large firm.

In engineering and construction works contracts, many of the problems with quality originate from poor design. A poor design may give rise to additional costs both in the construction process and on future maintenance. To ensure that suitable quality standards are maintained over time, particular care must be taken in the manner in which design commissions are awarded. Incentives may need to be provided so as to achieve high value designs.

Small and emerging manufacturers have particular problems in achieving quality, depending, however, upon how quality is measured and defined. Current practice is to define quality in terms of certain accepted criteria and to measure such acceptance in terms of prescribed test methods and procedures. These are usually set out in SABS specifications or test methods which have, to a large extent, been formulated or drafted with the approval of industry and industry-related research and development organisations.

It may be argued that these standards have been drafted to suit the formal industry, and are framed around plant-based methods of manufacture and medium to large scale enterprises which have a reasonable degree of technical competency and testing resources. In addition, the test methods and procedures for quality assurance



are generally written for a scale of operation where sufficient quantities for statistical purposes are manufactured, and the cost of testing by external authorities (or that associated with the establishment of in-house laboratories) can be written off against the volume of the article which is manufactured.

Failure by a small scale manufacturer to comply with one of the requirements of these specifications, albeit a relatively minor lack of compliance, means that compliance with a SABS specification cannot be claimed. Thus, in effect, many of the current specifications present a barrier to entry to small scale entrepreneurs and exclude their participation in particular markets.

## *ii. Proposals*

Quality should be procured on a contract specific basis by means of one or more of the following strategies:

- The full and proper specification of requirements.
- Improving, reviewing and updating procurement documentation on a regular basis.
- Taking cognisance of whole life costing in the adjudication of tenders.
- Utilising techniques such as value engineering when deciding upon procurement strategies.
- Prequalifying tenderers where exceptional quality is required.
- According preferences to tenderers who offer products which have the SABS mark or Agrément certification or are manufactured in accordance with quality assurance specifications such as SABS ISO 9000 providing that such measures do not exclude products which may otherwise be acceptable.
- Requiring tenderers to submit their plans for maintaining and improving quality together with their tenders, or to operate in accordance with Total Quality Management Principles, should such measures be deemed necessary to achieve the desired outcome.
- Awarding contracts in terms of a quality / price mechanism which evaluates both the price and quality of the offer.
- Accepting tenders only from those firms whose names appear on a quality register.
- Requiring consignment inspection.

The criterion in applying such strategies should be that:

- The measures are justifiable.
- The measures will lead to a quantifiable improvement or level in quality.
- The resultant quality is appropriate to satisfy end user requirements as opposed to the best quality available.
- The measures should not promote captive markets.

Prequalification should not be utilised to limit competition or to reserve work for specific groupings. It should only be used to achieve an appropriate level of quality.

Organs of State should consider alternative forms of testing to confirm compliance and relax standards, where appropriate, to facilitate the participation of emerging or local enterprises.

Strategies to overcome difficulties relating to small scale manufacture should include:

- monitoring of the performance of manufacturers by the State in terms of sampling plans.
- the establishment of centralised testing centres.
- formulation of specifications which describe product properties in terms of their physical properties rather than by reference to a series of standards.
- the development and specification of simple site (point of manufacture) tests which confirm the acceptability of products for their intended purpose.
- a review of testing and acceptance tests, criteria and norms.
- the setting of appropriate standards for different applications of a manufactured article.
- education and training of manufacturers.

#### **4.11 Measures to combat corruption**

##### *i. Discussion*

In the context of public procurement, corruption usually comprises fraudulent behaviour by persons concerned with the procurement process leading to losses for an organ of State. Usually, there is some form of collusion between the buying and the selling side: responsible officials on the public procurement side request or are induced to accept favours from tenderers or contractors. Such practices are often, but not always, criminal; they are always immoral and improper in terms of good procurement practice. Fraudulent actions are sometimes confined to one side of the procurement transaction, such as when tenderers collude to "rig" tenders or when officials misappropriate public property, or assets.

Corrupt actions within organs of State may include:

- preparing slanted specifications
- approving inappropriate tenders
- tampering with tenders
- breaching confidentiality
- taking bribes
- lax contract administration
- use of position to obtain a private benefit.

Corrupt actions by suppliers / service providers / contractors may include:

- collusion
- influencing the choice of procurement method and technical standards
- inciting breaks of confidentiality
- influencing the work of evaluators
- offering of bribes
- over or under invoicing
- "fast pay" action
- inaccurate disclosures

Competition and transparency serve to combat corruption to some extent. Other measures, however, need to be instituted to minimise corruption.

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#### *ii. Proposals*

The following preventative measures should be adopted:

- The establishment of codes of conduct for suppliers / service providers / contractors and procurement officials.
- The publicising of anti-corruption programmes by means of staff training and meetings.
- The institution of routine check points at the pre-award stage, or in the post-award stage, on the measurement of performance by contractors or on contract amendments.
- The performance of internal audits on specific items.
- The implementation of a "whistle-blower" system which allows and even encourages officials to inform on each other regarding instances of fraud or misconduct.
- The encouragement of strict observance of procurement regulations, particularly those relating to the documentation of the processes.
- The provision in tender documents for the disqualification of tenderers who attempt to influence the award of tenders.
- The deregistration / de-barring of offending suppliers / service providers / contractors from participation in public sector procurement for a period of time.
- The provision of opportunities for suppliers / service providers / contractors to raise objections concerning the status / practices of their competitors.

### **4.12 Early payment cycles**

#### *i. Discussion*

Access to finance is one of the most urgently felt needs among emerging businesses. The specific problem of delayed payment to suppliers and contractors often aggravates the financial position of small enterprises and further hampers their access to funds. Although the present tendering conditions provide for payment within 30 days, the actual period is often significantly longer than this.

#### *ii. Proposals*

- Payment systems should be streamlined and rationalised.
- Electronic payment systems should be introduced.
- The audit procedures of interim payments in engineering and construction works contracts should be revised.
- Interest at rates above the bank overdraft rates should be paid to suppliers / service providers / contractors in respect of overdue payments.

### **4.13 Financing of suppliers, service providers and contractors**

### *i. Discussion*

One of the major challenges facing many small, medium and micro enterprises and emerging companies is their inability to attract sufficient debt and equity capital to fund the growth of the enterprise. As enterprises succeed in obtaining larger contracts their ability to internally finance themselves diminishes. Many of these firms, while still growing, have not reached the creditworthy stage usually required by traditional financing sources. Others, having utilised their existing credit lines, find that their bank is unwilling to extend them further credit, even for the performance of a contract.

### *ii. Proposals*

The procurement system should make provision for:

- Mechanisms to facilitate factoring of payment certificates.
- Cession agreements with suppliers.
- Early payment cycles.
- Appointment of project administrators to facilitate early payment cycles in engineering and construction works contracts, where this measure is justifiable.
- Making monies available to third party management support providers to enable them to facilitate payments on a fortnightly basis to emerging contractors in certain engineering and construction works development programmes.

## **4.14 Period contracts**

### *i. Discussion*

The contract strategy for period contracts in the past has tended to favour the maximisation of the quantities of goods, services and works required, the contract period and the geographic area served by such contracts. This policy is generally not conducive to small, medium and micro enterprise participation and does not geographically spread economic activity. There is accordingly a need to revisit the policy relating thereto and to unbundle such contracts.

A contract strategy in respect of single versus umbrella (multi-activity) contracts or facilities management needs to be determined. Furthermore, attention needs to be paid to the determination of the optimum contract period, as long period contracts:

- afford departments and providers of goods, services and works greater time and incentive to understand and co-operate with one another.
- allow suppliers to recover the cost of any investment (e.g. training, plant or new technology) required for the contract.

In circumstances where delay in delivery can result in consequential costs being incurred or where the commodity is not always available, consideration needs to be given to the awarding of contracts to two or three suppliers / service providers to permit consumer organs of State to have some flexibility. The most favourable tender will be accorded preferred contractor status and the secondary and tertiary

contractors would only be approached should the preferred contractor be unable to supply or deliver. Consideration can also be given to implementing a system of performance guarantees in terms of which a cash deposit is provided at the commencement of a contract by the preferred contractor. This cash deposit can then be used to compensate the State for any cost premiums arising from non-performance.

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#### *ii. Proposals*

Period contracts, in order to permit small, medium and micro enterprise participation, should be structured taking cognisance of the following :

- Contracts should procure items in quantities suitable for execution by small, medium and micro enterprises as prime contractors
- Human resource specifications can be used as a tool for unbundling.
- Small, medium and micro enterprises who match prices of large contractors / service providers / suppliers could be permitted to provide such items as alternative suppliers.

Period contracts can be used as a means of equipping emerging contractors / manufacturers with plant. In some circumstances, contracts should be awarded to two or three suppliers / service providers with one of these contractors being accorded preferred contractor status.

### **4.15 Emergency Procurement**

#### *i. Discussion*

Situations arise from time to time, wherein life, property and human well-being are threatened and rapid action is required to remedy, or alleviate, the situation, which may have resulted from among others :

- a natural event, such as a flood, or an earthquake
- the failure of a facility or service
- an accident
- war or civil commotion
- failure, over an extended period, to carry out essential maintenance and upgrading of a facility.

When a situation requiring rapid remedial action arises in respect of a facility for which an organ of State is responsible, it is essential that such organ should have readily available the means of procuring the services of competent contractors, suppliers and service providers in the shortest possible time. The extent and nature of the services required will probably be known only in broad terms, but this cannot be permitted to delay the commencement of delivery.

Criteria need to be set and certification systems to be put in place to ensure that this system of procurement is not abused and only used in specific circumstances.

## *ii. Proposals*

A Rapid Delivery Procurement System should be established which :

- enables contracts to be awarded within one month of permission being obtained to proceed, whilst being transparent, equitable, fair, cost effective, and competitive.
- not place organs of State at undue risk with respect to failure to deliver, cost overruns or cost premiums.
- be flexible enough to accommodate Reconstruction and Development Programme principles and socio-economic objectives.
- be easily audited.
- assign clear responsibilities for the parties which are involved.

The criteria warranting the use of the Rapid Delivery Procurement System for an emergency should be that one, or more of the following conditions exist, or there should be an imminent danger of it about to exist :

- The possibility of human injury or death.
- The prevalence of human suffering or deprivation of rights.
- The possibility of damage to property, or suffering and death of livestock and animals.
- The interruption of essential services, including transportation and communications facilities.
- The possibility that the security of the State could be compromised.
- The possibility of serious damage occurring to the natural environment.
- The possibility that failure to take necessary action may result in the State not being able to render an essential community service.
- The prevailing situation, or imminent danger, should be of such a scale and nature that it could not readily be alleviated by interim measures, in order to allow time for normal procurement systems to be used.
- Available details of the nature and extent of the work and services required should be insufficient to permit an accelerated, or normal procurement system to be used.

The accounting officer in the organ of State wishing to utilise Rapid Delivery Systems should certify that the emergency meets the abovementioned requirements.

## **4.16 Stimulation of local economies**

### *i. Discussion*

Local economic development is an area of great promise, but which is fraught with difficulties owing to the skewed nature of the South African economy. The major factor in this imbalance is the economic dominance of large corporations. Perhaps the most serious consequences is the limit to ongoing, sustainable job creation.

While small businesses have burgeoned in recent years, they have concentrated on the retail sector. This is due to the limited availability of technical skills, lack of access to primary resources (such as land and capital) and price controls on raw

materials which reduce the competitiveness of small firms. The challenges confronting proponents of local economic development are enormous.

Clearly government has to focus beyond administrative and service provision roles and take on the role of economic catalyst. Such a function should lead to new practices in procurement which will promote the development of small manufacturing, service and construction enterprises.

Preferences, in the past, have been utilised to protect regional industries in much the same manner as the local tenderers are afforded protection from foreign tenderers. Such practices can, however, have severe impacts on neighbouring areas, as such preferences cause market distortions. Typically, those protected by such preferences inflate their prices in the local economy and dump their products at lower prices in neighbouring areas. Furthermore, such preferences are difficult to administer.

The selection of contract strategies, the packaging of contracts and the employment of affirmative procurement practices can, on the other hand, tip the scales in favour of the local economy. In particular, Affirmative Procurement which seeks to engage the participation of small, medium and micro enterprises is to a large extent self targeting towards local enterprises.

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#### *ii. Proposals*

- Contract strategies, the packaging of contracts and affirmative procurement practices should be used to stimulate local industries.
- Preferences outside of a National Procurement Framework for local suppliers, service providers and contractors or local content, designed to advantage those located in specific geographical areas over neighbouring regions within the boundaries of South Africa, should not be permitted.
- Local authorities should implement contractor / manufacturer development programmes in their areas of jurisdiction in order to develop target group enterprises who are capable of participating in participation programmes.
- Local authorities should interface with national and provincial organs of State in respect of engineering and construction contracts, in order to secure the contract strategy, and delivery and targeting options which best serve the local economy on contracts put out by such bodies.
- Local and regional authorities should establish data bases of local suppliers, service providers and contractors in order to award contracts having a low financial value to such enterprises where a less formal tendering system is permitted.

### **4.17 Contracts having low financial values**

#### *i. Discussion*

The present system of obtaining telephonic or verbal price quotations (no tenders are invited) for contracts under a certain value - R20 000 in the case of the State Tender Board (usually from a minimum of three suppliers), excludes many of the emerging small, medium and micro enterprises. The system is dependent on a data base of

approved suppliers. Any business not on the approved list is excluded from the market.

#### *ii. Proposals*

- Suppliers of goods and services falling into this category of contract should register with the relevant Procurement Office / Centre for the category of goods and services for which they wish to be registered.
- New applications for such registration should be advertised in the press and data bases should be updated at regular intervals.
- Quotations should be invited from a number of suppliers on a rotating basis.

### **4.18. National Standards**

#### *i. Discussion*

National Standards, in the current South African context, is the collective term for Specifications, Codes of Practice and Test Methods which are published by the South African Bureau of Standards as national documents.

Standardisation is becoming more and more internationalised. The Agreement on Technical Barriers to trade within the WTO Agreement of Tariffs and Trade is also very explicit in its requirements for the harmonisation of standards on a regional and international basis. These trends are given further impetus by the massive harmonisation exercise currently underway in the European Union (EU). A similar drive is expected to take place within the Asia - Pacific Economic Community (APEC) in the near future.

South Africa cannot stand aloof from these developments. International trade is vitally important. Accordingly, standards should become more internationalised. In the electro-technical sector about 40% of the national standards have been aligned with International Electro-Technical Commission's (IEC) standards. In the non-electro-technical field approximately 15% have been aligned with the International Organisation for Standardisation's (ISO) standards, and in the telecommunications field, virtually all national standards are aligned with the international standards, mostly European Telecommunication Standards Institute's (ETSI) standards.

Construction standards have historically been based on British standards. As Britain has now become part of the European Union, it follows that construction standards should be aligned with that of the European Union. (The cement industries have already adopted the European standard and are manufacturing according to this specification, SABS EVN 197-1, and have adopted the nomenclature for cement contained therein).

#### *ii. Proposals*

- Standards should become more internationalised.
- Construction material standards should become increasingly aligned with those of the European Union.



## 4.19. Labour Issues

### *i. Discussion*

Contractors, suppliers and service providers are, in so far as their labour is concerned, responsible for complying with the provisions of various pieces of legislation such as: the Labour Relations Act.; the Workmen's Compensation Act; Unemployment Insurance Fund; and Occupational Health and Safety Act. Compliance with such legislation has a direct cost impact on suppliers. Frequently, unscrupulous employers fail to comply in order to maximise profits, or have insufficient capital to meet these financial commitments.

Labour standards have traditionally been enforced through courts of law, either in terms of criminal proceedings, or in terms of civil proceedings. Inspectors have been empowered to confirm and enforce compliance with such standards. The system is, for various reasons, cumbersome, ineffectual and time consuming. Frequently, cases are inconclusive or result in a warning, a suspended fine or an insignificant fine being handed down.

Criminal proceedings should not be the primary mechanism to encourage and enforce compliance with labour-standards. There should be a range of remedies available to encourage and enforce compliance in an expedient manner, some of which could relate to the procurement system.

On engineering and construction works contracts, because of the historic distinction between the building and construction industries, minimum wages differ between the industries. The problem is further complicated by the collapse of Industrial Councils in some regions. The Framework Agreement for Labour Intensive Construction and Community-based Public Works Programmes further complicates matters. For example, at present, two companies, the one allied to the building industry and the other to the civil engineering industry could quite easily be tendering for a building development. The civil engineering contractor is required to price for his locally recruited labour being paid the rates determined for the Magisterial district in question, whereas the building contractor can price his tender using the same labour but on the minimum *going rate* should the area not be covered by an Industrial Council. If another project "just up the road" is being administered in terms of the Framework Agreement, there is yet another wage rate for the same activities. Likewise, different wage rates and service conditions may exist on Community-Based Public Works Programmes which are administered by the community.

It is submitted that the status quo does not permit fair and equitable tender price comparisons to be made, is confusing, does not lead to the development of sustainable community enterprises and encourages contractors to engage subcontractors or *informal sector* enterprises who do not observe minimum wages, in order to remain competitive. A common wage order for all those engaged in construction activities, which takes account of regional and project specific variations and is based on the classification of job activities within which there may be grades of skill, would go a long way to resolving the aforementioned problems. Payment linked to productivity as opposed to time spent on the job could be permitted for categories of work for which labour may be substituted for machines in order to create jobs e.g. excavation activities, construction of road base courses, surfacing of roads, etc.

In countries where discrimination has been practised, particularly on racial lines, affirmative action programmes have been implemented to reinforce both equal employment and business opportunities with a view to removing disparities in employment practices and business ownership between different groups of people, usually on the basis of race and gender. Affirmative action, when properly applied, should reinforce equal opportunity concepts and should not imply "preferential treatment" or "reverse discrimination". Affirmative action endeavours to ensure that all segments of society have the same opportunity to participate on the basis of open competition and to advance according to relative ability.

Various proposals have been made regarding employment equity in so far as public sector procurement is concerned. These include:

- Deregistration of contractors who do not have employment equity programmes or continue to embrace discriminatory employment practices.
- Prequalifying tenderers on the basis of compliance with employment equity requirements.
- Selecting tenderers for the award of contracts on the strength of their equity programmes/plans
- According preferences to tenderers who have implemented employment equity programmes in their companies.
- Requiring all tenderers to specify the following in their tenders in order to assess the usefulness of the tendering process in furthering broader social aims:
  - the number of employment opportunities created, levels of remuneration, and probable race and gender of employees;
  - the nature and extent of probable human resource development;
  - the race and gender of owners and managers.

Some have argued for quotas and targets to be established in terms of national legislation to implement affirmative action. Others in turn have argued for companies to become companies which may be viewed as being progressive in their orientation and conduct.

What needs to be established is which route will best serve the interests of employment equity viz., tax incentives, procurement activities or legislation or a combination thereof. Furthermore, the practicalities associated with the implementation of employment equity by means of such routes needs to be established. For example, should it be decided to accord preferences in public sector procurement for aspects of employment equity, employment equity will have to be defined, quantified, measured and audited in order to establish compliance during the performance of the contract in such a manner that companies of different sizes are not unfairly treated. (Small companies, because of their size in terms of turnover and employee complement may subscribe to employment equity principles but may take years to implement such policies due to low turnovers in their employee complement and slow growth in the size of the company).

#### *ii. Proposals*

- Suppliers, service providers or contractors who abuse labour standards should be disciplined by being deregistered and excluded from participating in public sector procurement for a period of time.

- Contracts in contractor development programmes should be awarded to emerging contractors only after an independent party has verified that the sum tendered has the potential to meet minimum labour standards.
- A common wage order applicable to all engineering and construction works projects, which is flexible enough to accommodate payment on the basis of outputs in specific circumstances, should be strived for in order to remove market distortions and enable tenderers to tender on an equitable basis.
- Employment equity should be linked to procurement only in instances where it can be adequately defined, quantified, measured, verified, audited and be implemented in a manner in which companies of different sizes are equitably treated.

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#### **4.20. Short term service contracts**

##### *i. Discussion*

Where there is a shortage of particular skills in an organ of State or a short term crisis has developed, short term service contracts for some particular service may be required. Procurement in such circumstances can be very sensitive.

##### *ii. Proposals*

Short term service contracts should embrace the following set of principles:

- The contract should make provisions for technology transfer and capacity building.
- The service provider should follow sound environmental principles.
- Officials and employees of organs of State should not be prejudiced by such appointments.
- Service providers should be accountable to the people they service and be responsive to the needs and problems of users.

The performance of service providers should be monitored, and only those service providers who have the competence, capacity and availability of suitable personnel be entrusted with such contracts.

#### **4.21. Subcontracting issues**

##### *i. Discussion*

Subcontractors have very little negotiating power with prime contractors due to the fact that there is always a "next job syndrome"; non payment by the prime contractor; and victimisation.

Some of the problems expressed by subcontractors include the "Hawking" of prices submitted to prime contractors by them in order to obtain lower prices from others (i.e. the practice of Dutch Auctioning); the risk of non-payment; the use by prime contractors of hard earned subcontractors' monies as an interest free overdraft

facility and prime contractor bodies frequently representing subcontractor interests at forums.

Invariably, as employers only have a relationship with the prime contractor, they regard subcontracting issues to be the prime contractor's problem and of no concern to them. Subcontracting is an effective means of involving small, medium and micro enterprises in public sector procurement activities. As such, the plight of subcontractors cannot be ignored. Accordingly, measures need to be taken to address the shortcomings in the current subcontracting arrangements, particularly in respect of engineering and construction works contracts. Such measures could include some or all of the following:

- The establishment of Trust Funds or other such secured payment routes.
- Mechanisms to deal with late payments.
- Protection against prime contractor insolvency.
- Outlawing of Pay-when-Paid practices; the use of unfair set-off; provisions which seek to prevent access to adjudication or frustrate its conclusions.
- Introduction of fair conditions of subcontract.
- Introduction of Alternative Dispute Resolution procedures in standard forms of subcontract.

#### *ii. Proposals*

- The conditions of subcontract should be regulated in public sector procurement in order to ensure that subcontractors are engaged in terms of fair conditions of contract.
- Contractors who contravene the proposed provisions contained in the code of conduct relating to subcontractors should be deregistered.
- Secured payment routes should only be considered should the other measures which have been proposed not address the root causes of late, or non- payment.

### **4.22. Allocation of risk and change management**

#### *i. Discussion*

Risk cannot be eradicated, but can be managed; it is better to be proactive rather than reactive. Organs of State should identify and assess procurement risk on a case by case basis. As a general rule, the aim should be to allocate risks to those best able to manage them provided that the cost of transferring them to that party does not exceed the cost of retaining them. In many cases, this will be the supplier, contractor or service provider. Transferring risk to these parties may provide them with an incentive to improve their performance. Forcing them to accept risks which they have no chance of managing is, however, likely to be both costly and futile. Where there is doubt about where a risk should be, organs of State should compare the cost of transferring it with the cost of retaining it themselves.

In engineering and construction works contracts, the risks which need to be considered include construction risk; delays, performance and operational risks; commercial risks; and political, legal and financial risks in various forms. Risk management can involve:

- identifying preventative measures to avoid a risk or to reduce its effects.
- proceeding with a project stage-by-stage, initiating further investigation to reduce uncertainty through better information.
- considering risk transfer in the contract strategy, with attention to the motivational effects, and the control of risk allocations.
- considering risk transfer to insurers.
- setting and managing risk allowances in cost estimates, programmes and specifications.
- establishing contingency plans to deal with risks should they occur.

Risk management will not remove all risk from projects; its principal aim is to ensure that risks are managed most efficiently. Inevitably, certain risks will have to be borne by organs of State. Allowances for residual risks should be made in estimates of time and cost.

Contract documents are tools for managing risks. Their purpose is to determine the consequences of particular risks which have been identified. Contracts should accordingly clearly define the respective responsibilities of the parties and be flexible enough to deal with inevitable changes. The management of changes to requirements presents a special challenge. The importance of the clear allocation of risk and the management of change cannot be underestimated, particularly in contracts of a developmental nature, where third party management support is involved. Clear guidelines in this regard are required.

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#### *ii. Proposals*

- Organs of State should identify and assess procurement risk on a case by case basis.
- Risks should be allocated to the party best able to manage them.
- The State should bear the cost of risks where the cost of transferring them is greater than that of retaining them.
- Organs of State should exercise risk management in a proactive manner and should make budgetary allowances to cover residual risks.
- Contract documentation should clearly and unambiguously assign risks to the contracting parties.

### **4.23. Insurances**

#### *i. Discussion*

Insurance is not a substitute for effective risk management. Insurance is only intended to deal with measurable or known risks and shifts the impact of loss so as to reduce it. Insurance cannot deal with uncertainty itself and cannot prevent loss.

Most physical risks can be insured against. For example, in engineering and construction works contracts a contractor can have some of his risks covered by effecting insurance such as Contract Works Insurance; Public Liability Insurance; SASRIA Special Risks Insurance; Removal of Support insurance; general insurance cover for plant owned or hired by them; or Professional Indemnity Insurance.

Many standard forms of construction contracts require the contractor to effect Contract Works and Public Liability insurances and to extend such cover to subcontractors. Some require that in addition, contractors effect SASRIA and Removal of Support Insurance. Most National and Provincial Departments require contractors to effect the relevant insurances. On the other hand many public utilities and local authorities have their own Contractor's All Risk policies under which the majority of work put out to tender is automatically insured through their Principal Controlled Insurance which may comprise a mix of conventional and self insurance. In such cases, contractors need only to effect any supplementary insurance cover such as insurance of construction plant and equipment, including tools, office and other temporary structures and contents, except those intended for incorporation into the Works; insurance in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act of 1993; motor vehicle liability insurance; and insurances for the manufacture / fabrication of portions of the works at premises other than the contract site.

There are many advantages to both the State and emerging contractors / small, and micro enterprises should the State have Contractors All Risk policies under which the majority of work put out to tender is automatically insured by them. In contractor development programmes, insurance excesses can in some instances be higher than the amount of profit on labour only contracts and as a result can cause a contractor to incur financial losses to the extent that he cannot continue with the contract.

The State self-insures its own assets. As a result, many uncertainties exist regarding insurances on the renovation and repair of buildings and what cover contractors have when effecting repairs.

#### *ii. Proposals*

- Organs of State should either insure for procurement related physical risks, establish risk management programmes or make advance provision for losses associated with such risks.
- Suitable arrangements should be made to ensure that insurance related excesses in the case of emerging small and micro enterprises do not cause such businesses to fail.
- Organs of State should investigate the benefits of Principal Controlled Insurance for their given circumstances.

### **4.24. Guarantees**

#### *i. Discussion*

Client bodies are exposed to a certain amount of risk particularly in respect of engineering and construction works contracts, to the extent that contractors may fail to perform or provide a defective product. This can have direct financial implications in so far as rectification and completion of the works is concerned, and consequential financial implications resulting from the delayed occupation or possession of the assets that are created. Delayed completion also inevitably results in increased construction costs. As a result, client bodies require contractors to lodge a security guarantee and retain an amount from interim certificates in order to cover some of this risk. Prime contractors in turn, in order to minimise their risk, often require subcontractors to provide similar guarantees. (Guarantees are seldom called for by

the State Tender Board in respect of contracts involving the procurement of goods and services; certain local authorities require guarantees for most contracts involving goods and services).

A performance bond may be described as a three party contract between the employer, the contractor and the surety, guaranteeing performance by the contractor with a stated financial benefit in the event of non-performance. Retention is held by the employer as an insurance for the correction of defects not attended to by the contractor. Construction guarantees provided for in some private sector building contracts, covers more than a performance bond and effectively places insurance against failure to perform and failure to rectify defects at a single source.

Performance bonds should not be confused with retention monies which are intended to cover the cost of making good defects in construction. Performance bonds are intended to cover the additional cost of completing the works where the works are interrupted prior to their completion due to the termination of the contract for reasons which may include contractor insolvency, or failure to perform.

In so far as small, medium and micro enterprises / emerging construction businesses are concerned, this presents a significant financial hurdle to overcome in the pursuit of being awarded contracts. Furthermore, such enterprises, because of their greater risk factor presented to sureties, usually have to obtain their performance bonds at significantly higher rates than the large well established firms. Accordingly, they not only struggle to secure bonds, but have to do so at a cost premium.

Specific strategies and innovations are required to enable small, medium and micro enterprises / emerging construction businesses to obtain the necessary performance bonds. The provision of tender guarantees also needs to be considered, particularly where tenderers compete on the basis of both price and development objectives. Tender guarantees may also be necessary to afford organs of State some degree of protection from irresponsible tenderers. Such guarantees should, however, not be set so high as to discourage tenderers from tendering.

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#### *ii. Proposals*

- Performance guarantees should be commensurate with the degree of contractual risk to which organs of State are exposed.
- Tender guarantees which are not unduly high, should be called for in large and complex contracts in order to minimise the submission of irresponsible tenders.
- Performance guarantees should spread the cost of the risk of failure between the contracting parties and should not be set at such a level that all the State's costs relating to such failure are likely to be recovered.
- Adequate provision should be made in all engineering and construction works contracts to ensure that monies are available to rectify defects.
- Performance bonds in engineering and construction works contracts should be waived only in respect of low value, low risk contracts or where the risk of failure is carried in an acceptable manner by a third party.

#### **4.25. Training in construction projects**

### *i. Discussion*

It is generally acknowledged that the lack of skills is one of the four major constraints facing small and micro enterprises. Training in the construction industry has historically been indirectly linked to procurement through the Manpower Training Act of 1981 which permitted the minister to declare a scheme created by any group or association of employers, for the training of employees within given parameters, to be binding in respect of the industry in which they are engaged. This piece of legislation has led to the creation of Training Schemes managed by organisations who are empowered to levy compulsory payment from employers. Thus the cost of training is included in the contract price of participating employers.

In the construction industry, Training Schemes are administered by the South African Federation of Civil Engineering Contractors and the Building Industries Federation of South Africa. Participating contractors include the cost of levies in their tender prices in order to have access to training of their employees. Emerging contractors, not being members, do not price for training as they do not pay levies. As a result, they frequently have no access to industry-based training.

On projects which are designed to engage marginalised sectors of society in construction activities, the training costs are an order of magnitude higher than the aforementioned levies; typically allocations of between 5% and 10% of the contract price are called for. Such training raises a number of issues:

- should the funding of training be sourced from project budgets; if so should it be on a project specific or on a regional / provincial / national programme basis?
- who should control and oversee expenditure?
- who decides on what training should be procured and on what basis?
- how do you measure value for money provided by training providers?
- what type of training should be provided?
- how do you quantify training requirements for a particular project?

Another issue relating to procurement is that of value for money. The determination of value for money on a project specific basis is difficult to determine as the necessity and impact of such training in the long term is difficult to access, particularly where new capacity is generated.

### *ii. Proposals*

The distinction should be made between short term RDP-related development objectives, which are project-related but programme-driven, and the medium / long term human resource development of the industry. Training should be integrated with the product. As such training needs should be determined jointly by organs of State and industry. Training should be undertaken on a programmed approach and not on a project specific basis. Training should be regionalised and managed by implementing departments or their delegated agents in co-operation with employer bodies / associations on a provincial basis.

Training should be measured in terms of regional structured training plans (human resource development strategies) in order to establish value for money.



Accordingly, provision for training, except for on-the-job training, should not be made in construction contracts. The services of training providers should be procured in the same manner as that proposed for the appointment of consultants.

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#### **4.26. Adjudication of engineering and construction works tenders involving emerging / community contractors**

##### *i. Discussion*

Emerging / community contractors who undertake to perform certain construction functions and require third party management support to execute their contracts should be afforded some protection from tendering unrealistically low rates. The acceptance of unrealistically low prices will inevitably lead to failure of such contractors and increased costs to complete contracts. Furthermore, as labour is usually the largest cost component of such contracts, low tender prices will invariably translate into unacceptable wage payments to workers.

In most contractor development programmes outside of South Africa in sub-Saharan Africa, contractors are not selected by means of competitive tendering. A common way to select contractors for participation in programmes is to invite members of the public to fill out an application for training. Applications are processed and participants are selected on the basis of criteria which are dependent upon the objectives of the programmes. Graduates from training courses are then offered fixed-rate period contracts. Further fixed-rate period contracts are granted should they demonstrate satisfactory performance. This system has not succeeded in fostering an entrepreneurial spirit amongst contractors, who invariably remain entirely reliant for their livelihoods on work handed to them in this manner.

International donor bodies have tried to break out of this deadlock by insisting that contracts be awarded on the basis of competitive tendering and have advocated the acceptance of tenders on the basis of a banded price around an estimate, which is made known prior to the closing of tenders. Tendering consequently degenerates into "estimate plus" bidding.

##### *ii. Proposals*

Any system which is adopted to award contracts to emerging / community contractors should be based on the following:

- contractor selection should be on the basis of demonstrating credentials through the submission of tenders.
- prices should be controlled but not imposed.
- participants should learn to price work from the outset.

Tenders should be adjudicated in terms of an estimated price, prepared by a person responsible for either preparing the contract documentation or providing third party management support. Tenderers who price below a predetermined percentage below the estimate should be automatically rejected. Tenders should be awarded to the tenderer whose price is immediately above the cut off value. In the interests of

transparency the method of adjudication should be made known to tenderers. The estimate should, be kept secret and be only read out and recorded immediately prior to the public opening of tenders.

#### **4.27. Environmental Issues**

##### *i. Discussion*

Organs of State can encourage their suppliers, service providers and contractors to behave in an environmentally friendly way by integrating their concern for the environment with their procurement activities.

Organs of State should implement policy which will influence the behaviour of vendors to:

- comply with all environmental legislation
- offer less environmentally damaging products and services
- develop products from recycled materials.

Procurement policy may require vendors to provide proof of their commitment to environmental protection. This may take the form of statements on the steps companies are taking to reduce their impact on their environment, or alternatively to demonstrate that they are not in breach of any statutory requirements relating to the environment.

##### *ii. Proposals*

Organs of State should:

- buy only from vendors who are in compliance with all environmentally-related legislation
- promote environmental awareness amongst suppliers, service providers and contractors
- favour procurement of less environmentally damaging products
- discriminate in favour of products made from recycled materials
- require that suppliers limit packaging to the minimum necessary to protect the items supplied
- favour products which provide information about their effect on the environment
- develop the environmental awareness of government officials
- develop and maintain a database of vendors in which information relating to their environmental conduct is retained
- develop and promote a code of conduct for vendors
- develop a policy with respect to the use of products containing asbestos

Suppliers, service providers and contractors should:

- comply with the requirements of all environmental legislation
- require that their suppliers and sub-contractors in turn comply with all environmental legislation

- consider the environmental impact of their products over their full life cycle from 'cradle to grave'
- minimise the use of energy, non-renewable resources, hazardous chemicals and toxic substances
- maximise the use of recycled materials
- minimise the production of waste
- dispose of all wastes in an environmentally responsible manner
- not offer products or packaging containing CFCs, HCFCs, halons, carbon tetrachloride and other ozone depleting substances.

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## **5. CONCLUSION: THE WAY FORWARD**

Studies have indicated that government expenditure is of such significance that it is a vital component of economic and social progress and as such plays an important role in the transformation process. To overcome the legacy of discrimination and neglect, South Africa must, above all, create conditions for sustainable growth. Any new procurement policy needs to be sensitive to the urgent demands of addressing the present socio-economic imbalances within the context of a global economy and the need to apply accepted principles of good governance. Clearly, South Africa needs to create and adopt new and imaginative procurement policies that will address the country's requirements for equity and social upliftment while, at the same time, allowing it to be internationally competitive .

The aim of this Green Paper is to give all South Africans the opportunity to contribute to the change process that will have a profound effect on all. South Africa is facing enormous challenges, both locally and internationally, as it opens the economy to the combined impact of global investment and free trade regulations. It is envisaged that a coherent and adequately resourced procurement policy will contribute to the national objectives of:

- developing and utilising the country's human resources potential to the full
- a well-developed business sector capable of participating fully in the new South African economy
- an improved quality of life for all
- improved international competitiveness for South African economic activity

This Green Paper sets out the key elements of the Government's new strategy for procurement. In addition, the evolving institutional framework through which the strategy should be implemented has also been outlined. It should be clear that all these proposed policies, institutions and systems cannot be developed without government adopting a vigorous approach to implement this framework. The government has put in place a process, involving public consultation, aimed at developing the best policies to achieve its goals. The Green Paper process, should

result in the formulation of new Procurement Policy for South Africa, ultimately to be published as a White Paper.

It is recognised that the subject matter of this policy needs to be considered with other related Government policies and initiatives in an integrated and structured manner.

This Green Paper has sought to identify the key issues to be addressed by government policy and to suggest some of the available options. The Paper is designed to raise questions about these options, by discussing the merits or otherwise of adopting them, in an effort to stimulate public debate. It is not a statement of government policy, but outlines issues and options to which the South African public are invited to respond and make contributions that will eventually help shape government policy. The culmination of the process will be the publication of a White Paper and the beginning of legislative reforms pertaining to procurement.

Constructive participation will enable Government to respond more effectively to the needs of South Africa in this important area of reform. The Green Paper has drawn on the experience of other societies and nations who have grappled with similar issues. The common features include building on existing strengths and restructuring government policies and programmes to support the principles of Growth, Employment and Redistribution as outlined in the macro-economic strategy. However, ultimately, it is for all South Africans to determine the best course of action to meet the country's challenges and to accept joint responsibility for implementing the changes required.

The desired output of this process is to develop world class professional procurement policies and systems while ensuring the productive participation of previously disadvantaged persons in a manner that promotes entrepreneurship and the adoption of best practice within all South African businesses while improving international competitiveness.

Although policy choices are involved, the implementation of this new vision is the responsibility of all South Africans. There are no shortcuts if the country is to make the transition to full economic maturity.

#### **AFFIRMATIVE PROCUREMENT IN BRIEF**

Affirmative Procurement in a practical and pragmatic manner affirms the changed environment in South Africa, government's socio-economic objectives and the principles of the Reconstruction and Development Programme. It enables organs of State to operationalise policies in a targeted, transparent, visible and measurable manner when engaging in economic activity with the private sector, without compromising principles such as fairness, competition, cost efficiency and inclusion.

Affirmative Procurement comprises participative programmes aimed at the engagement of small, medium and micro enterprises owned by previously

disadvantaged persons and the increasing of the volume of work available to the poor and the income generation of marginalised sectors of society.

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Key elements associated with Affirmative Procurement are:

**1. The recognition that:**

- procurement may be used as an instrument of government policy.
- value for money need not be a measure of monetary cost alone.
- goods, services and works can be procured both in terms of human resource and technical specifications.
- participation of targeted individuals, groups of people, communities and enterprises can be secured by means of a development objective / price mechanism, a human resource specification or a combination thereof.

**2. The use of development objective / price mechanism (points scoring tender adjudication procedure) as a means of:**

- measuring a tenderer's human resource and financial offer (i.e. value for money).
- adjudicating of tenders.
- ensuring that premiums, if any, paid in respect of socio economic or development objectives are within acceptable limits.
- favouring certain targeted individuals, groups, communities or practices without excluding those who fall outside of such target groups from tendering.
- encouraging the private sector to use their skill, knowledge and creativity in responding to socio economic and development objective challenges in a cost effective manner.

**3. The use of human resource specifications in order to:**

- define target groups
- set goals (targets), measured in monetary terms, which may be met by engaging the target groups in the pursuit of predetermined socio-economic / development objectives.
- provide for the measurement of key indicators to ensure that goals may be quantified and audited during the performance of the contract.
- set out how goals can be achieved, and the penalties which are to be applied should a contractor fail to achieve the contractual goal.

**4. The classification of contracts in order to facilitate standardisation in approach and the targeting of business enterprises/local resources**

**5. The use of the third tier of government in order to effect area bound (specific) targeting relating to marginalised sectors of society in construction projects.**

Affirmative Procurement has two main legs:

- A development component which ensures that the target group is capable of participation.
- A structured participation component which ensures that the target group is engaged in the provision of goods, services and works.

Affirmative Procurement, without resorting to set asides and price preferences can be used in an effective, efficient, transparent and cost effective manner to:

- put in place a programme of affirmative action to address the deliberate marginalisation from economic, political and social power of previously disadvantaged individuals and sectors of society.
- develop small businesses, particularly those owned and operated by *black* entrepreneurs.
- provide jobs in a targeted manner on engineering and construction contracts.
- increase the number of employment opportunities per unit of expenditure.
- promote acceptable labour practices and standards.

Affirmative Procurement seeks to ensure that public funds are expended in a such a way that all segments of the South African population benefit from such expenditure through job creation and commercial activity. It makes the tender process accessible to the target group without guaranteeing work and links the flow of money into targeted business enterprises with a commitment flow of responsibility.

It has as its aim, in the long term to :

- promote development objectives with a focus on human resource development.
- provide opportunities for skill transfer, capacity building to acquire experience.
- encourage commitment to human resource development and social responsibility programmes within organisations to specifically, redress historical imbalances.
- facilitate growth in terms of the efficiency and effectiveness of delivery as well as numbers and size of business owned and controlled by previously disadvantaged individuals.
- ensure that emerging enterprises contribute to the tax base, engage workers who are affiliated to labour associations, adhere to safety regulations and reflect norms and standards in their business activities associated with those of developed countries.

## THE PILLARS OF PROCUREMENT REFORM

### GENERAL

- The strategy of procurement should be to achieve continuing improvement in value for money, based on whole life cost and quality and to enhance the competitiveness of suppliers through the development of world class professional procurement systems and practices.
- Organs of State should seek to embrace efficient and effective procurement practices and systems and so deliver the services which they are mandated to do in the required quantities and quality in compliance with Constitutional provisions.
- Government should focus beyond administrative and service role provisions in its procurement practices and take on the role of economic catalyst in the transformation process
- Organs of State when engaging in procurement activities should adhere to the preservation of the highest standards of integrity, objectivity, fairness, efficiency and professionalism.
- Success in the economic environment requires government to play a clear policy co-ordination role which is likely to have a wider application in the rest of the public sector, and indeed in the private sector.

### SOCIO-ECONOMIC REFORM

- Public sector procurement should be structured in a manner that promotes economic reconciliation and competitiveness.
- The structuring of contracts should be such that small, medium and micro enterprise participation is maximised without compromising time, cost and quality.
- Value for money should not be based on least cost alone; it can include well defined socio-economic criteria which can be evaluated in a transparent and measurable manner.
- Targets should be set and delivery systems should be designed to facilitate one or more of the following :
  - The development of small, medium and micro enterprises particularly those owned and operated by previously disadvantaged persons;
  - The increasing of the volume of work available to the poor and the income generation of marginalised sectors of society;
  - Affirmative action to address the deliberate marginalisation from economic, political and social power of black people, women and rural communities and to empower communities and individuals from previously disadvantaged sectors of society;

subject to such targets being readily definable, quantifiable, measurable, auditable and verifiable.

- The policy of targeting must not compromise the principles of fairness, competition, cost-efficiency and inclusion, and should be subject to periodic review.
- The procurement process should be made accessible to the target groups, and structured in a simplified and user-friendly manner.
- The third tier of government should identify area bound targets and select associated delivery mechanisms.
- Organs of State should take cognisance of regional and local dynamics when implementing procurement policy and associated practices
- International competition should not prejudice local enterprises and should be used as an opportunity to develop and advance local industry through technology transfer and human resource development.

## **THE PILLARS OF PROCUREMENT REFORM**

### INSTITUTIONAL REFORM

- Procurement must comply with the provisions of the constitution, support macro economic policies, be an instrument of the transformation process and promote tax morality and improve labour standards.
- National legislation should prescribe a procurement framework which regulates procurement procedures, practices, documentation, policies, preferences and control measures in all organs of State.
- Procurement control and monitoring should be exercised by a national Procurement Compliance Office whose functions should be to ensure that procurement agencies comply with the national procurement legislation and framework and associated regulations.
- The Procurement Compliance Office should have five specialist arms which have functional responsibilities in respect of registration, administration, socio-economic affairs, technical matters and education and training respectively.
- Existing national and provincial Tender Board Acts and Local Government Ordinances pertaining to procurement, should be repealed; the existing State and Provincial Tender Boards should be disbanded.
- Offices of Tender Boards (as opposed to the Boards themselves) should be reconstituted as Procurement Offices responsible for central tendering and certain ad hoc contracts.
- Consumer organs of State should be authorised to act as Procurement Centres in order to procure goods, services and works, based on predetermined criteria.
- A code of conduct should be drafted to govern the actions of procurement officials and those engaged in providing goods, services and works.
- The Procurement Compliance Office should regulate and prescribe all documentation in order to achieve a uniform procurement system with standard tendering procedures and contract documentation.
- All enterprises which contract with organs of State should be



- registered and all targeted enterprises certified.
- Standards and specifications should result in appropriate quality being procured to satisfy user needs and should not be used to exclude emerging enterprises from participation.
  - Parastatals should not unfairly compete with the private sector and should comply with the provisions of a National Procurement Framework.
  - A comprehensive training and skills development programme should be embarked upon to ensure that procurement officials have the necessary procurement skills.
  - Measures should be taken to ensure that the effects of the WTO's Code on Government Procurement do not impact negatively on the overall objectives of South African socio-economic reform.
  - In the interim, a preference system for local content, or an offset policy with a bias towards export promotion, should be used to support the local economy in the face of foreign competition.

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### **INVITATION TO COMMENT**

The Ministries of Finance and Public Works welcome any comment, criticism or concern on the proposals made for the reform of the public procurement process from all interested parties. Please address your correspondence to:

**The Secretariat : Procurement Reform**  
**Private Bag X49**  
**PRETORIA**  
**0001**

**Fax. (012) 323 4669**  
**e-mail. [procure@gov.za](mailto:procure@gov.za)**

**Comments should reach the Secretariat on or before 30 June 1997.**

*Machiavelli (1514):*

*"It should be borne in mind there is nothing more difficult to arrange, more doubtful of success and more dangerous to carry through than initiating changes in a state's constitution.*

*The innovator makes enemies of those who prospered under the old order and only lukewarm support is forthcoming from those who would prosper under the new."*

A lack of response from those who are earmarked to benefit from

Procurement Reform would indicate that the same is true in this case.

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- Various central and provincial departments
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- Labour representatives, business sector, professional organisations and institutions, international experts and the like.