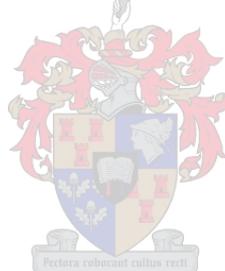


The Legal Regulation of Construction Procurement in South Africa

by

Allison Megan Anthony

Thesis presented in fulfilment of the requirements for the degree Master of Laws in the Faculty of Law at Stellenbosch University



Supervisor: Professor P Bolton

Faculty of Law

Department of Public Law

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Declaration

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Abstract

In order for the government to function, it needs goods and services. It may acquire these goods and services by using its own resources, or by contracting with outside bodies. The latter method is generally referred to as public or government procurement.

Government procurement usually contributes a large deal to a country's economy and is therefore of great importance. With South Africa's political transformation in 1994, the construction industry was used as the model for public sector procurement reform. The industry regulates all infrastructure and constituted 3.8% of the country's gross domestic product (GDP) in 2011 with the private sector as its biggest client. The legal regulation of construction procurement in South Africa is therefore significant.

Section 217 of the Constitution¹ sets the standard for government procurement in South Africa. Section 217(1) provides that organs of state in the national, provincial or local sphere of government or any other institutions identified in national legislation when contracting for goods or services must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Organs of state are not prevented from implementing procurement policies which provide for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in terms of section 217(2). Section 217(3) in turn provides that national legislation must prescribe a framework in terms of which section 217(2) must be implemented.

The rules for construction procurement in South Africa are found in the Construction Industry Development Board (CIDB) Act² and the Regulations to the Act.³ The Construction Industry Development Board has been established by the Act and is empowered to regulate construction procurement in terms of the Act and to publish best practice guidelines for further regulation and development of construction procurement.

¹ Constitution of the Republic of South Africa, 1996.

² 38 of 2000.

³ Construction Industry Development Regulations Government Notice (GN) R8986 in Government Gazette (GG) 31603 of 14-11-2008.

This thesis aims to answer the question as to whether the legal regulation of construction procurement complies with section 217 of the Constitution. Chapter one sets out the research question to be answered, the hypothesis on which the thesis is based and the methodology employed. Chapter two establishes the constitutional standard for government procurement in South Africa and is the standard against which the rules discussed in subsequent chapters are tested. Following this, the procurement procedures in terms of which supplies, construction works and services are procured are described and analysed in chapter three. It appears that the Regulations to the CIDB Act exclude contracts for supplies and services in the construction industry. Therefore, the qualification criteria for construction works contracts are examined in chapter four. Thereafter, the evaluation and award of construction works, supplies and services contracts are explained and analysed in chapter five. Government procurement may further be used for objectives not directly connected to the main goal which is the procurement of goods and services at the best possible price. It may also be used for the promotion of socio-economic objectives, for example. Therefore, in the sixth chapter, the use of government procurement as a policy tool in the South African construction industry is discussed and analysed. The concluding chapter collectively refers to what was discussed in the preceding chapters including the conclusions and attempts to answer the research question as to whether the legal regulation of construction procurement in South Africa complies with section 217 of the Constitution.

Opsomming

Die staat het goedere en dienste nodig om te funksioneer. Dit kan hierdie goedere en dienste verkry deur die staat se eie bronne te gebruik, of dit kan instansies van buite kontrakteer. Daar word oor die algemeen na laasgenoemde metode verwys as staatsverkryging.

Gewoonlik lewer staatsverkryging 'n groot bydrae tot 'n land se ekonomie en dit is dus van groot belang. Met Suid-Afrika se politieke transformasie in 1994 is die konstruksiebedryf as die model voorgehou vir die hervorming van die staatsverkrygingstelsel. Die konstruksiebedryf reguleer alle infrastruktuur in die land en het in 2011 3.8% tot Suid-Afrika se Bruto Binnelandse Produk (BBP) bygedra, met die private sektor as die grootste kliënt in die bedryf. Dit is dus noodsaaklik dat staatsverkryging in die Suid-Afrikaanse konstruksiebedryf wetlik gereguleer word.

Artikel 217 van die Grondwet⁴ stel die standaard vir staatsverkryging in Suid-Afrika. Artikel 217(1) bepaal dat staatsorgane in die nasionale, provinsiale of plaaslike regeringsvertakkings, of enige ander instelling in nasionale wetgewing vermeld, wat vir goedere of dienste kontrakteer, sodanige goedere of dienste moet verkry ooreenkomstig 'n stelsel wat regverdig, billik, deursigtig, mededingend en koste-effektief is. Staatsorgane word verder nie verhinder of belet om staatsbeleid te implementeer wat voorsiening maak vir die bevordering van sekere mense, of kategorieë mense, wat ingevolge artikel 217(2) deur onbillike diskriminasie benadeel is nie. Artikel 217(3) bepaal dat nasionale wetgewing 'n raamwerk moet voorskryf ingevolge waarvan artikel 217(2) geïmplementeer moet word. Die Wet op die Ontwikkelingsraad vir die Konstruksiebedryf (Construction Industry Development Board Act)⁵ en die Regulasies tot die Wet⁶ omskryf die regsreëls vir staatsverkryging in die Suid-Afrikaanse konstruksiebedryf. Die Ontwikkelingsraad vir die Konstruksiebedryf het ingevolge hierdie Wet tot stand gekom en is gemagtig om staatsverkryging in die konstruksiebedryf te reguleer. Dit mag ook goeie praktykryglyne

⁴ Grondwet van die Republiek van Suid-Afrika, 1996.

⁵ 38 van 2000.

⁶ Construction Industry Development Regulations Goewermentskennisgewing R8986 in Staatskoerant 31603 van 14-11-2008.

publiseer vir verdere regulering en ontwikkeling van staatsverkryging in die konstruksiebedryf.

Hierdie tesis het ten doel om die vraag te beantwoord of die wetlike regulering van staatsverkryging in die konstruksiebedryf aan artikel 217 van die Grondwet voldoen. Hoofstuk een gee 'n uiteensetting van die navorsingsvraag wat beantwoord sal word, die hipotese waarop die tesis berus en die metodologie wat aangewend word. Hoofstuk twee omskryf die grontwetlike standaard vir staatsverkryging in Suid-Afrika en word as standaard gebruik waarteen die regsreëls vir staatsverkryging in die konstruksiebedryf in die daaropvolgende hoofstukke getoets word. Vervolgens word die verkrygingsprosedures ingevolge waarvan voorraad, konstruksiewerk en dienste verkry word, in hoofstuk drie bespreek en ontleed. Dit blyk dat die Regulasies tot die Wet op die Ontwikkelingsraad vir die Konstruksiebedryf (CIDB Act) kontrakte vir die verkryging van voorraad en dienste uitsluit. Gevolglik word die tendervereistes vir konstruksiewerk in hoofstuk vier bespreek. Vervolgens word die evaluering en toekenning van konstruksiewerk, voorraad- en dienskontrakte uiteengesit en ontleed in hoofstuk vyf. Dit blyk verder dat staatsverkryging gebruik mag word vir doelwitte wat nie direk verband hou met die primêre doel, naamlik die verkryging van goedere en dienste teen die beste prys, nie. Dit mag byvoorbeeld ook gebruik word vir die bevordering van sosio-ekonomiese doelwitte. Gevolglik word staatsverkryging as 'n beleidsinstrument in die Suid-Afrikaanse konstruksiebedryf in hoofstuk ses bespreek en ontleed. Die laaste hoofstuk gee 'n opsomming van wat bespreek is in vorige hoofstukke, maak gevolgtrekkings en probeer die navorsingsvraag beantwoord of die regsreëls wat staatsverkryging in die konstruksiebedryf reguleer, voldoen aan artikel 217 van die Grondwet.

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"It is important to recognize that our achievements not only speak well for us, they speak well for those persons and forces, seen, unseen, and unnoticed, that have been active in our lives"

Anne Wilson Schaefer

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LIST OF ABBREVIATIONS

ABE	Affirmable Business Enterprise
APP	Affirmative Procurement Policy
BBBEEA	Broad-Based Black Economic Empowerment Act 53 of 2003
CIDB	Construction Industry Development Board
CLOSA	Constitutional Law of South Africa
COST	Construction Sector Transparency Initiative
DFID	Department for International Development
EC	European Community
GBCSA	Green Building Council of South Africa
GG	Government Gazette
GN	Government Notice
HDI	Historically Disadvantaged Individual
IMIESA	Institute of Municipal Engineers of South Africa
JQR	Juta's Quaterly Review
LDD	Law, Democracy and Development
LGB	Local Government Bulletin
MFMA	Municipal Finance Management Act 56 of 2004
MSA	Municipal Systems Act 32 of 2000
NCDP	National Contractor Development Programme
OECD	Organisation for Economic Co-Operation and Development
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PER	Potchefstroom Electronic Law Journal
PFMA	Public Finance Management Act 1 of 1999
PPLR	Public Procurement Law Review

PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
RDP	Reconstruction and Development Programme
SAICE	South African Institution of Civil Engineers
SALJ	South African Law Journal
SAPL	South African Public Law
SARS	South African Revenue Service
SMME	Small, Medium and Micro Enterprises
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER ONE

INTRODUCTION

1 Background

The construction industry plays an important role in the South African economy.⁷ The industry regulates infrastructure in the country, involves many stakeholders and is therefore a large source of employment.⁸

In order to function, the government needs goods and services and may acquire these in different ways. It could make use of its own resources or procure these goods and services from private parties.⁹ Reference is made to public and private parties involved in construction procurement in the CIDB Act and prescripts.¹⁰ Therefore goods and services are procured from the private sector in the construction industry. Government procurement was estimated to amount to 21.77% of the gross domestic product (GDP) in 2002.¹¹ According to the Industrial Development Corporation's Department of Research and Information, the construction industry constituted 3.8% of the country's GDP in May 2011.¹² During 2007, the private sector was the major client in the construction industry

⁷ This has been acknowledged in legislation which was aimed at the transformation of the construction industry such as the Green Paper on Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry Government Gazette (GG) 18615 of 14-01-1998. The importance of the industry is also acknowledged in the preamble of the Construction Industry Development Board (CIDB) Act 38 of 2000.

⁸ The complex nature and involvement of multiple parties can be seen in the definition of "construction industry" in s 1(h) of the CIDB Act. It is defined as "the broad conglomeration of industries and sectors which add value in the creation and maintenance of fixed assets within the built environment". According to Statistics South Africa, approximately 540 000 people were employed in the industry at the end of June 2007. P Lehohla "Construction industry 2007" (2007) 1 23-25 <<http://www.statssa.gov.za/publications/Report-05-02-01/Report-05-02-012007.pdf>> (accessed 12-08-2011).

⁹ P Bolton *The Law of Government Procurement in South Africa* (2007) 1.

¹⁰ CIDB Code of Conduct GG 25656 of 31-10-2003 binds all parties involved in construction procurement including private and public parties. Chapter 3 of the CIDB Act establishes a register of contractors to, amongst other things, enable access by private parties and thus facilitate public sector procurement.

¹¹ D Audet "Government Procurement: A synthesis report" (2002) 2 *OECD Journal on Budgeting* 1 180 <<http://www.oecd.org/dataoecd/1/21/43506020.pdf>> (accessed 18-07-2011) under Government Procurement ratios in non-member countries by region. In 1996, procurement amounted to 14% of the GDP. See Bolton *The Law of Government Procurement in South Africa* 3.

¹² Anonymous "Economic Trends: Key trends in the South African economy" (2011) 5 <<http://www.idc.co.za/download-files/research-reports/Key%20trends%20in%20SA%20economy%20%202nd%20quarter%202011.pdf>> (accessed 18-07-2011).

contributing 72% to the industry's income. Parastatals defined by Statistics South Africa as major public entities contributed 15% and the government 13% to the industry's income.¹³

2 The meaning of construction procurement

Regulation 1 of the CIDB Act defines construction procurement as "procurement in the construction industry, including the invitation, award and management of contracts".¹⁴ A construction contract is generally considered to be a form of letting and hiring of services or work.¹⁵ In the South African procurement context, construction work is considered to be a part of services. There is therefore no additional or separate category for construction works.¹⁶ Within the construction industry, a distinction is made between construction works, services, supplies and disposals.¹⁷ These four categories thus constitute construction procurement.

Construction works are defined as "the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure".¹⁸ However, in terms of the Regulations to the CIDB Act, construction works are divided into categories or classes which appear to exclude goods and services. These are defined in Schedule 3 to the CIDB Regulations. The first class is civil engineering works which involves *inter alia* the construction of bridges, the provision of water supply, drainage works and pipelines. The second class is electrical engineering

¹³ P Lehohla "Construction industry 2007" (2007) 10 <<http://www.statssa.gov.za/publications/Report-05-02-01/Report-05-02-012007.pdf>> (accessed 12-08-2011).

¹⁴ Construction Industry Development Regulations GN (Government Notice) R8986 in GG 31603 of 14-11-2008. According to Watermeyer in his paper "Public construction procurement in a global economy" presented at the Knowledge Construction Joint International Symposium of CIB Working Commissions in Singapore, October 2003 <<http://www.ssinc.co.za/Files/Doc/RBWPapers/T3-3.pdf>> (accessed 29-07-2011) procurement constitutes the provision of supplies, services or engineering and construction works or any combination thereof, the disposal of moveable property, the hiring or letting of anything and the acquisition or granting of any rights. This definition is broader than that in the Regulations and the generally accepted definition of procurement which constitutes only acquisition, and not disposal. This is discussed further in chapter 2.

¹⁵ C Du Toit *Project management and the law: practical guidelines for management of engineering and building contracts* (2008) 41.

¹⁶ See further chapter 2 para 5.

¹⁷ CIDB Standard for Uniformity in Construction Procurement May 2010 published in GG 33239 of 28-05-2010. Disposals are not defined in the Standard for Uniformity but is indicated as a separate category in CIDB Practice note 13 "Identifying a construction works contract" February 2008 2.

¹⁸ S 1(j) of the CIDB Act.

works involving infrastructure which refers to the generation, transmission and distribution of electrical equipment. The third class is electrical engineering involving electrical installation in buildings. General building works as a fourth class refers to the construction of buildings. The fifth class, mechanical engineering works, provides for *inter alia* boiler installations, air-conditioning and mechanical ventilation. The last class provides for specialist works which are identified and defined by the CIDB and may constitute the demolition of buildings and engineering infrastructure and blasting.

Services in the construction industry are not defined in the Act or its Regulations. However, the CIDB Standard for Uniformity in Construction Procurement defines a services contract as “the contract for the provision of labour or work, including knowledge-based expertise, carried out by hand, or with the assistance of equipment and plant”.¹⁹ A distinction appears to be made between services in general and professional services.²⁰ Professional services in the construction industry involve the design and supervision of construction work for limited periods of time without the obligation of permanent employment,²¹ possessing superior knowledge, transfer of skills and upgrading of a knowledge base while executing an assignment and the provision of independent advice.²²

Supply contracts are “contracts for the provision of materials or commodities made available for purchase”.²³ Lastly, disposals have been described as contracts for “the divestiture of assets, including intellectual property and other rights and goodwill by any means, including sale, rental, lease, license, tenancy, franchise, auction or any combination thereof”.²⁴

¹⁹ 5.

²⁰ Professional services are procured in a similar way to general services, but additional factors are applicable. These are found in the CIDB Best Practice Guideline A7 “Procurement of professional services” December 2007 and are discussed in chapter 3.

²¹ These services are said to be required the most in the industry. CIDB Practice note 6 “Competitive selection of professional service providers” May 2007 1 3.

²² CIDB Practice note 6 2.

²³ CIDB Standard for Uniformity 5.

²⁴ R Watermeyer “A standardised approach to procurement” (2004) 29(10) *IMIESA* 13 16.

3 Legal regulation of government procurement in South Africa

3.1 Legislative framework for government procurement

Section 217(1) of the Constitution provides that when contracting for goods or services, organs of state in the national, provincial or local sphere of government or institutions identified in national legislation must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217(2) provides for the use of procurement as a policy tool. This provision states that subsection (1) does not prevent organs of state or institutions in subsection (1) from implementing 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. Section 217(3) prescribes a national legislative framework to be enacted in terms of which preferential procurement policies as contemplated in subsection (2) are to be implemented.

The law applicable throughout the procurement process is the private law of contract.²⁵ However, because the government is a party to the contract and is obligated to act in the public interest and deals with public funds, public law, or more specifically administrative law, is applicable as well.²⁶ Therefore, section 33 of the Constitution which protects the right to just administrative action applies to public sector procurement. Section 217(2) and (3) of the Constitution provide for the use of procurement as a policy tool. Public procurement is thus used to attain equity.²⁷ Section 9 of the Constitution which entrenches the right to equality is therefore also applicable.²⁸

The legislation applicable to procurement in general includes the Preferential Procurement Policy Framework Act (PPPFA)²⁹ and its Regulations³⁰ which regulate preferential procurement by providing a framework in terms of which preferential procurement policies

²⁵ Bolton *The Law of Government Procurement in South Africa* 16.

²⁶ C Ferreira "The quest for clarity: an examination of the law governing public contracts" (2011) 128(1) *SALJ* 172-173 sets out how the government as a party to the contract is different from a private contractant.

²⁷ This principle is found in section 217(1) and further discussed under para 7 of chapter 2.

²⁸ The link between equity and equality is discussed under para 6 of chapter 2.

²⁹ 5 of 2000.

³⁰ GN R502 in GG 34350 of 08-06-2011.

must be implemented. The 2001 Regulations have been replaced by the 2011 Regulations and is examined in greater detail in chapter six. At national and provincial government level, the Public Finance Management Act (PFMA)³¹ and its Regulations³² govern public finance in general and public sector procurement. The Local Government: Municipal Finance Management Act (MFMA)³³ with its Regulations³⁴ and the Local Government: Municipal Systems Act,³⁵ manage public finance and thus public sector procurement at local government level.

The Supreme Court of Appeal (SCA) has further held that the invitation, evaluation and award of government tenders is of an administrative law nature,³⁶ therefore the Promotion of Administrative Justice Act (PAJA)³⁷ applies. The Promotion of Access to Information Act (PAIA)³⁸ is also applicable as it regulates access to any information held by both the government and private parties. The Broad-Based Black Economic Empowerment Act (BBBEEA)³⁹ applies to preferential procurement in that it regulates black economic empowerment. Various National Treasury Practice Notes⁴⁰ are also published specifically for public procurement purposes. Since public procurement is of great economic importance, of potential application is the Competition Act⁴¹ since the purpose of this Act is *inter alia* the promotion of economic efficiency, the socio-economic welfare of South African citizens and the participation of small, medium and micro enterprises (SMMEs) in the economy.⁴² The Protected Disclosures Act⁴³ also finds application and lastly, the Prevention and Combating of Corrupt Activities Act⁴⁴ which is aimed at curbing corruption

³¹ 1 of 1999.

³² PFMA Public-Private Partnership Treasury Regulation 16 GN R1737 in GG 25773 of 28-11-2003; PFMA Supply Chain Management Treasury Regulation 16A GN R225 in GG 27388 of 15-03-2005.

³³ 56 of 2003.

³⁴ MFMA Municipal Supply Chain Management Regulations GN R868 in GG 27636 of 30-05-2005; Public-Private Partnership Regulations GN R309 in GG 27431 of 01-04-2005.

³⁵ 32 of 2000.

³⁶ See *Umfolozzi Transport (Edms) Bpk v Minister van Vervoer* 1997 2 All SA 548 (A) paras 552-553; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) para 23; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 5; *Metro Projects CC v Klerksdorp Municipality* 2004 1 SA 16 (SCA) para 12.

³⁷ 3 of 2000.

³⁸ 2 of 2000.

³⁹ 53 of 2003.

⁴⁰ For example, Practice Note Number Supply Chain Management (SCM) 1 of 2006 regarding tax clearance certificates of tenderers under the PFMA; Practice Note SCM 2 of 2006 regarding preferential procurement; National Treasury Practice Note 6 of 2007/2008 regarding the procurement of goods and services by means other than competitive tendering.

⁴¹ 80 of 1998.

⁴² S 2 of the Act.

⁴³ 26 of 2000.

⁴⁴ 12 of 2004.

in general and also in procurement processes is relevant. Legislation which regulate procurement in general also prescribe that the specific prescripts of the CIDB apply to construction procurement alongside the general legislation.⁴⁵

3 2 Legislative framework for public sector construction procurement

Legislation applicable to public sector construction procurement are those applicable to procurement in general, the CIDB Act, the Regulations to the Act and the prescripts issued by the CIDB. Section 2 of the Act establishes the CIDB as a juristic person and regulatory board for the construction industry and construction procurement in particular. The Act sets out the powers and functions of the board, it requires a register of contractors to be created for efficient procurement practices and to facilitate public sector construction procurement.

In terms of section 5(1)(vii) the CIDB must promote and implement policies aimed at procurement reform. Section 5(1)(viii) provides that the board may promote and implement policies and programmes aimed at standardisation of procurement documentation, practices and procedures. The board is empowered in terms of section 5(4)(b) to initiate, promote and implement national programmes aimed at the standardisation of procurement documentation, practices and procedures. Section 5(3)(c) of the Act further places an obligation on the CIDB to promote standardisation of the procurement process within the framework of the government procurement policy in order to advance the uniform application of policy in the construction industry.

A register has been established in terms of section 16(1) of the Act. The purpose of the register is to provide for efficient public sector procurement in the construction industry.⁴⁶ Contractors are registered in different categories which are determined based on their grading designations and their status as potentially emerging contractors.⁴⁷ Nine grading designations exist in which contractors are registered. All contractors must apply to the

⁴⁵ See PFMA Supply Chain Management Treasury Regulation 16A6.3 (a)(ii) and MFMA Municipal Supply Chain Management Regulation 1 under “other applicable legislation”.

⁴⁶ Chapter 3 of the CIDB Act.

⁴⁷ Contractor’s grading designations are specified in Regulation 11 and further explained in chapter 4.

CIDB to be registered in a specific category.⁴⁸ Section 18(1) of the Act provides that a contractor may not undertake, carry out or complete any construction work or portions of the work if such contractor is not registered with the CIDB and holds a valid registration certificate. A contractor who disobeys this requirement is guilty of an offence in terms of section 18(2) of the Act. There are, however, certain contractors who are exempt from registration.⁴⁹

4 Significance of this thesis

As noted, the construction industry contributes 3.8% to the country's GDP and plays a major role in South Africa's economic growth. The government as a client of the construction industry contributed 28% to the income of the industry in 2007, therefore a large amount of public funds is involved. At the end of 2007, purchases in the construction industry further amounted to 48% or approximately R78 million of its total expenditure.⁵⁰ Moreover, the courts have been inundated with procurement disputes relating to construction specifically.⁵¹ The Supreme Court of Appeal has noted that the courts are "swamped with cases concerning complaints about the award of contracts".⁵²

Legislation pertaining to public procurement has been extensively analysed,⁵³ however, academic analysis of public sector procurement in the construction industry specifically is limited.

⁴⁸ Regulation 7(1) of the Construction Industry Development Board Regulations.

⁴⁹ See Regulation 4.

⁵⁰ P Lehohla "Construction industry 2007" (2007) 1 7 <<http://www.statssa.gov.za/publications/Report-05-02-01/Report-05-02-012007.pdf>> (accessed 12-08-2011).

⁵¹ See for example *Babereki Consulting Engineers (Pty) Ltd v M and F Contractors CC* (580/11) [2011] ZANHC 10 (17 June 2011); *Group YWO Enterprise CC v Construction Industry Development Board* (44681/08) [2009] ZAGPPHC 124 (5 August 2009); *GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works* 2007 4 All SA 992 (D); *Haw and Inglis Civil Engineering (Pty) Ltd v Member of the Executive Council: Police, Roads and Transport, Free State Provincial Government* (5972/2009) [2010] ZAFSHC 51 (28 May 2010); *Mamlambo Construction CC v Port St Johns Municipality* (1876/2008) [2010] ZAECHC 21 (24 June 2010); *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 3 All SA 549 (SCA); *Mpumalanga Steam and Boiler Works CC v Minister of Public Works* (22023/08) [2010] ZAGPPHC 128 (30 September 2010); *Scribante Construction (Pty) Ltd v Coega Development Corporation (Pty) Ltd* (2478/06) [2006] ZAECHC 117 (20 July 2006).

⁵² *Groenewald NO v M5 Developments (Cape) (Pty) Ltd* 2010 5 SA 82 (SCA) para 1.

⁵³ See for example Bolton *The Law of Government Procurement in South Africa*; G Penfold & P Reyburn "Public Procurement" ch 25 in S Woolman, T Roux, J Klaaren, D Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed. (OS: 12-03 2011); S De la Harpe *Procurement Law: A comparative analysis* PhD thesis University of South Africa (2009).

Two commentators, in particular, have written on public sector construction procurement. The first commentator, Gounden, addresses the progress made on preferential procurement in his doctoral thesis.⁵⁴ It is an empirical study testing the success of preferential procurement in the construction industry and contains little legal analysis of the legislation or case law involving construction procurement.

The second commentator, Watermeyer, has written a number of articles and papers on construction procurement in the public sector.⁵⁵ Like Gounden, however, he has done limited legal analysis of the scope and effect of the legislation dealing with construction procurement.

The literature available on construction procurement further contains empirical studies from an economic perspective or information aimed at practical solutions in the engineering profession and pertains primarily to preferential procurement. The legal aspects relating to requirements in the pre-award stage of the procurement process in the construction industry such as qualification criteria and the procedures and methods used to award tenders and evaluation criteria therefore largely remain unexamined. Consequently, there is a lack of legal literature on construction procurement when considering the economic importance of the construction industry and the constitutionalisation of public sector procurement in section 217 of the Constitution.

⁵⁴ S Gounden *The Impact of the Affirmative Procurement Policy in the South African Construction Industry* PhD thesis University of Natal (2000).

⁵⁵ See *inter alia* R Watermeyer "A generic and systemic approach to procurement: a case for an international standard" (2005) 14(1) *Public Procurement Law Review* 39-61; "Implementing preferential procurement policies in the public sector in South Africa" (2003) 45(3) *Journal of the South African Institution of Civil Engineering* 11-22; "Public construction procurement in a global economy" presented at the Knowledge Construction Joint International Symposium of CIB Working Commissions in Singapore, October 2003; "Developing the local construction industry through the delivery and maintenance of construction works" a paper presented at the Engineering and Development Conference, Association of Consulting Engineers, Nigeria, Abuja 8-9 November 2010; R Watermeyer, SM Gounden, DR Letchmiah & S Shezi "Targeted procurement: A means by which socio-economic objectives can be realized through engineering and construction works contracts" (1998) 40(4) *South African Institution of Civil Engineers* 15-25; R Watermeyer "Facilitating Sustainable Development through Public and Donor Regimes: Tools and Techniques" (2004) 1 *Public Procurement Law Review* 30-55; "The use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects" (2000) 5 *Public Procurement Law Review* 226-250; "Transparency issues in government procurement" (2005) 83(2) *The Structural Engineer* 18-20; "South African standards for construction procurement" (2005) 83(4) *The Structural Engineer* 15-18; "Rethinking government procurement" (2005) *Civil Engineering* 28-29; "The use of procurement as an instrument of local economic development" a paper presented at IMIESA Biannual Conference, Kempton Park, October 1999.

Therefore, contributing to legal literature on construction procurement is what the current research aims to do.

5 Methodology

As previously noted, section 217 of the Constitution is the standard for government procurement in South Africa. As is discussed in chapter three, public sector construction procurement is subject to section 217 and as such the rules governing construction procurement must comply with this standard.

As a point of departure, the thesis establishes the constitutional standard for government procurement in South Africa. In order to do so, the meaning of the phrase “contract for goods or services” in section 217, the organs of state bound by the section and the meaning of the principles is set out. The rules of the pre-award and award stage of the construction procurement process are then explained. In doing so, an analysis of the legislation governing public sector construction procurement is conducted. More specifically, the rules regulating the procurement methods and procedures used in the construction industry are evaluated, including those used to implement preferential procurement and those which govern the pre-qualification of tenderers and the evaluation and award of tenders. These rules are analysed in order to determine whether they comply with the constitutional provisions. Reference is also made to books, theses, journal articles, government publications and case law. Overall, the thesis aims to evaluate whether the rules regulating the procurement procedure in the construction industry comply with the principles of fairness, equity, transparency, competition and cost-effectiveness in section 217(1) and to make suggestions for the development of the rules regulating construction procurement to ensure that section 217 is complied with.

6 Structure of the thesis

The thesis will examine the construction procurement process from the solicitation of tenders to the evaluation and award of tenders.

Chapter two establishes the constitutional standard for government procurement in South Africa. The standard set in this chapter is the standard against which the rules regulating construction procurement are tested in the ensuing chapters. An analysis of section 217 of the Constitution is conducted and involves a discussion regarding the definition of government or public procurement within the South African context and the organs of state bound by section 217. The chapter further explains the meaning of the words “contracts for”, “goods” and “services” in section 217(1) of the Constitution in order to determine the types of contracts covered by the section. Next, the meaning of the principles in section 217(1) is explained. The principles of fairness, equity, transparency, competition and cost-effectiveness are explained separately with reference to books, journal articles and case law. Lastly, the use of public procurement as a policy tool is examined. The scope of application of the Preferential Procurement Policy Framework Act is established and the implementation of preferential procurement in terms of the Act is discussed.

Chapter three examines the procurement procedures used in the construction industry. The aim of this chapter is to describe and analyse the procedures used in construction procurement and to determine whether they comply with a system which is fair, equitable, transparent, competitive and cost-effective.

Firstly, the procedures used in general public procurement as discussed by Arrowsmith, Linarelli and Wallace and referred to by Bolton are explained. The procedures used in the construction industry are in fact based on these general public procurement procedures and are slightly adapted according to the requirements of the industry.

A distinction is made between formal and informal procedures. The former implies that stricter, more formal rules apply and the latter that more flexible rules apply, usually in the case of lower value contracts. Formal procedures are in turn divided into open tendering and restricted tendering. Informal procedures, on the other hand, include requests for proposals, requests for quotations and competitive negotiation.

Three primary procedures in terms of which supplies, services and construction works are procured in the construction industry are found, which are explained and analysed in this

chapter. The CIDB has embarked upon changing the procurement of professional services in the construction industry. A system similar to that used for construction works contracts is suggested.

No specific procedures are indicated for the disposal of assets in the construction industry. CIDB prescripts merely indicate that disposals should be done in accordance with the PFMA. Framework agreements are also provided for and must be used in accordance with the rules stated in the CIDB prescripts.

The constitutionality of the procurement procedures used in the construction industry is done by means of an analysis. Each procedure is analysed individually in terms of the five principles found in section 217(1).

Chapter four sets out the qualification criteria for contractors in the construction industry. In order for contractors to tender for construction contracts, they must be placed on the Register of Contractors. Contractors are graded according to their works and financial capability. The grading designation they are placed in, determines the maximum amount which they may contract for. The Register is applicable to contracts for the procurement of construction works only. It therefore does not apply to the procurement of services, whether general or professional and also does not include the procurement of supplies.

The qualification criteria for grading designations two to four are discussed first, followed by the criteria for contractors in grading designations five to nine. The grading designations for joint ventures are discussed next. A Register of Projects is established by the CIDB Act in terms of which all public sector construction works contracts above the value of R200 000 or private sector contracts and contracts executed by entities found in Schedule 2 to the PFMA with a value exceeding R10 million must be registered. The rules regarding the Register are discussed in this chapter.

It appears that further qualification criteria for the invitation of tenders or expressions of interest for construction works contracts must be complied with in terms of the Regulations to the CIDB Act. These are discussed next. Thereafter, the suggested qualification criteria

for the procurement of professional services are explained. Lastly, the extent to which the qualification of construction works contractors and the suggested qualification criteria for the procurement of professional services comply with section 217(1) of the Constitution is examined.

Chapter five concerns the rules which regulate the evaluation and award of construction contracts. The evaluation process through to the award of a contract is discussed based on the sequence provided in CIDB prescripts. The rules governing the opening of tenders, determining whether tender offers are complete and responsive, evaluating tender offers and performing a risk analysis are explained. Then, the preparation of an evaluation report, the tender committees which facilitate the procurement process are discussed and the conditions under which a tender may be cancelled are explained. In order to establish the constitutional compliance, the rules regulating the evaluation and award of construction contracts are analysed in terms of the five principles found in section 217(1) of the Constitution.

Chapter six examines the use of procurement as a policy tool in the construction industry. Section 217(2) provides that organs of state may implement procurement policies for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination. Subsection (3) in turn provides that a national legislative framework must be enacted in terms of which this preference is to be allocated. The Preferential Procurement Policy Framework Act has been enacted for this purpose and provides for a point system in terms of which preference may be awarded.

The 2011 Regulations to the PPPFA have recently been promulgated and bring about a number of changes in the allocation of preference points in government contracts. The 2001 and 2011 Regulations are discussed in this chapter with specific regard to the changes that have been brought about. The implications of the 2011 Regulations on the construction industry are accordingly examined.

Preference as implemented in the construction industry is explained and reference is made to recent and future developments in the industry with regard to preference. Next, the constitutional compliance of preferential construction procurement is established. Firstly, the preference policy as implemented in construction contracts is tested against section 217(1) of the Constitution. Thereafter, preferential construction procurement with reference to section 217(2) and (3) is discussed.

Chapter seven is the concluding chapter and establishes that the rules governing public sector construction procurement largely comply with the principles in section 217(1) of the Constitution. However, a number of practices do reduce compliance with the constitutional requirements. It is further established that the methods used to implement procurement as a policy tool appear to comply with sections 217(1) and (2) overall, but in some respects fall foul of section 217(3).

CHAPTER TWO

CONSTITUTIONAL STANDARD FOR GOVERNMENT PROCUREMENT IN SOUTH AFRICA

1 Introduction

Section 217 of the Constitution⁵⁶ is the standard for government or public procurement in South Africa. Section 217(1) provides that 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. Section 217(2) further provides that subsection (1) does not prevent organs of state or institutions mentioned in the section from implementing a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. In terms of section 217(3), a national legislative framework must be enacted which provides for a framework in terms of which subsection (2) is to be implemented.

The aim of this chapter is to establish the constitutional standard for government procurement in South Africa. The standard set in this chapter will be the standard against which the rules regulating construction procurement will be tested. An analysis of section 217 will be conducted in order to establish which entities are bound by the provision, which transactions are contemplated in section 217, the meaning of the principles of fairness, equity, transparency, competition and cost-effectiveness and the use of preferential procurement.

Firstly, the definition of public procurement will be looked at. The entities bound by the procurement provisions will then be established. The meaning of “contracts” and “goods and services” will be discussed and the meaning of the five principles in section 217 will be explained. Lastly, the use of procurement as a policy tool will be examined.

⁵⁶ Constitution of the Republic of South Africa, 1996.

2 The meaning of public procurement

As noted in chapter one, the government needs goods and services in order to function. It may acquire these goods and services in different ways. It could use its own resources, referred to as “in-house” provision,⁵⁷ or it could make use of outside bodies.⁵⁸ The latter method is what is considered to be public procurement.⁵⁹

As noted, public procurement is generally defined as the purchasing of goods and services from an outside body.⁶⁰ It is said to refer to the acquisition of goods and services by public bodies such as government departments and municipalities.⁶¹ Penfold and Reyburn⁶² note that since procurement refers to “acquisition”, the phrase “contracts for goods or services” as used in section 217(1) would probably not include instances where the state is providing the goods or services. They argue that this interpretation is in line with the heading of section 217, “Procurement” which they state implies only the procurement (meaning “acquisition” or purchasing) of goods or services by public bodies and not the supply of such goods or services.⁶³ Bolton notes that in the South African context, this narrow interpretation of “procurement” would be an unfortunate exclusion and not warranted. She submits that “procurement” for the purposes of section 217 includes the acquisition of goods or services and the sale and letting of assets by the state.⁶⁴ De la Harpe⁶⁵ supports Bolton’s view and notes that there is no reason why a broad interpretation should not be afforded to section 217. He refers to the Local Government: Municipal Finance Management Act (MFMA),⁶⁶ the Public Finance Management Act (PFMA)⁶⁷ and Treasury Regulation 16A.7⁶⁸ which provide for the alienation or letting of

⁵⁷ P Bolton *The Law of Government Procurement in South Africa* (2007) 1.

⁵⁸ 1.

⁵⁹ S De la Harpe *Procurement Law: A comparative analysis* PhD thesis University of South Africa (2009) 18 para 2.1.

⁶⁰ S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement* (2000) 1.

⁶¹ 1.

⁶² G Penfold & P Reyburn “Public Procurement” in S Woolman, T Roux, J Klaaren, D Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed. (OS: 12-03 2011) 25-1 25-7, 25-8.

⁶³ 25-8 footnote 1. A supply of goods or services would for example be a contract between a public utility and the end-user or a contract for the purchase of a state asset. See Penfold & Reyburn “Public Procurement” in *CLOSA* 25-8. See also G Quinot “*The Law of Government Procurement in South Africa* by P Bolton” (2007) 6 *PPLR* 466 who supports this view.

⁶⁴ Bolton *The Law of Government Procurement in South Africa* 67-68.

⁶⁵ De La Harpe *Procurement Law* 27 para 2.2.2.

⁶⁶ 56 of 2004.

⁶⁷ 1 of 1999.

goods or assets. Both the MFMA and PFMA reiterate the principles found in section 217(1) of the Constitution,⁶⁹ and are thus subject to section 217. He states that there should therefore be no distinction between the acquisition or lease of goods for the government and the selling or letting thereof by the government despite the fact that section 217 does not directly refer to the sale or letting of goods and services.⁷⁰ It is further noted that the aim of section 217(2), which is to remedy past injustices, should equally apply to the sale and letting of state assets and services.⁷¹

There has, however, been conflicting case law on the matter. The court in *SA Metal Machinery Co (Pty) Ltd v City of Cape Town*⁷² for example held that a request for proposals for the sale of state assets were valid. The case was decided on the premise that the MFMA was applicable to the facts and thus section 217 of the Constitution. The court therefore treated the sale of state assets as public procurement. However, in a recent judgment, the court held in *CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality, Oudtshoorn Municipality v CSHELL 271 (Pty) Ltd*⁷³ that a distinction must be made between the disposal of property and the procurement of goods and services. The court further explicitly held that neither section 217 of the Constitution, nor the PPPFA and its Regulations make reference to the disposal of capital assets and more particularly, the disposal of immovable assets.⁷⁴ At the same time, the court held that the award of a tender constitutes administrative action and decided the matter in terms of section 14 of the MFMA which provides for the disposal of capital assets.⁷⁵ Based on the consistent academic commentary, however, public procurement should be regarded as the acquisition, sale and letting of state assets.

Furthermore, Watermeyer⁷⁶ notes that procurement may be defined as the process which creates, manages and fulfils contracts relating to the provision of supplies, services or

⁶⁸ Supply Chain Management Regulation of the Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the PFMA, Government Notice (GN) R225 in Government Gazette (GG) 27388 of 15-03-2005.

⁶⁹ See s 38(1)(a)(iii) and s 51(1)(a)(iii) of the PFMA and s 14(5) and s 90(5) of the MFMA.

⁷⁰ De la Harpe *Procurement Law* 27-28 para 2.2.2.

⁷¹ De la Harpe *Procurement Law* 29 para 2.2.2.

⁷² 2011 1 SA 348 (WCC).

⁷³ (1427/2011) [2012] ZAWCHC 25 (30 March 2012) 12 para 33.

⁷⁴ Para 36.

⁷⁵ Para 38.

⁷⁶ R Watermeyer "A generic and systemic approach to procurement: the case for an international standard" (2005) 14(1) *PPLR* 39 39.

engineering and construction works, the hiring of anything, disposals and the acquisition or granting of any rights and concessions. This is much broader than the generally accepted definition of procurement consisting of acquisition only and supports the view that it should include the sale and letting of goods or services.

It is further noteworthy that Regulations 5 and 6 of the 2001 PPPFA Regulations provided for a point system in the case of contracts for the sale and letting of assets. However, the 2011 PPPFA Regulations do not provide for these contracts. This amendment has been noted as unfortunate since preference plays an important role in contracts for the sale and letting of state assets.⁷⁷

3 Organs of state bound by section 217 of the Constitution

Section 217(1) provides for the contracting of goods or services by organs of state in the national, provincial or local sphere of government or any other institution identified in national legislation. Section 239 of the Constitution defines an organ of state as:

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

It has been noted that an “organ of state” for the purposes of section 217 should be read as referring to those bodies in section 239(a) of the Constitution and those controlled by the government in such a manner that they are considered to be in the national, provincial or local sphere of government.⁷⁸ Penfold and Reyburn are of the view that in order for organs of state which exercise a public power or perform a public function to be bound by section 217, such organs of state would have to be controlled by the government. The rationale for this is that the purpose behind public procurement is the regulation of public

⁷⁷ P Bolton “New Preferential Procurement Regulations released” (2011) 13(3) *LGB* 7.

⁷⁸ Penfold & Reyburn “Public Procurement” in *CLOSA* 25-6.

funds and not the control of public power. Therefore, organs of state not controlled by the government would not be bound by section 217.⁷⁹

Section 239(b) does not refer to organs of state in a sphere of government. Organs of state as in section 239(b) would therefore not be bound by section 217 of the Constitution since they are not organs of state “in the national, provincial or local sphere of government” as required by section 217.⁸⁰

The Supreme Court of Appeal (SCA) in *Transnet Ltd v Goodman Brothers (Pty) Ltd*⁸¹ has, however, decided that Transnet was an organ of state in terms of section 33 of the Constitution which provides for the right to just administrative action. Transnet had advertised a tender for the provision of wrist watches. Goodman Brothers had previously provided Transnet with wrist watches for three years but was not awarded the tender. Goodman Brothers requested Transnet to provide reasons as to why it was not awarded the tender based on its right to reasons as a requirement of just administrative action. The court held that Transnet was performing a public service and function and exercising all the powers of a government department.⁸² The state was found to be the only member and shareholder of Transnet and therefore controlled Transnet which was obliged to act in

⁷⁹ In the access to information context, the control of the government over the World Cup Organising Committee was considered in *M & G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd* 2011 5 SA 163 (GSJ) in deciding whether the body in question was indeed a public one. The court held that for the media to gain access to information relating to the procurement of goods and services for the World Cup, the court had to decide whether the functions performed by the World Cup Committee were of a private or public nature. The media (applicants) would have access to the information only if the functions performed were of a public nature. The Committee was found to be a public body based on two factors. The court held that based on the presence of eight cabinet members on the Committee and the expenditure of public funds, the Committee was involved in procurement activities which were of a public nature and therefore of public interest and were accordingly obliged to make the requested information available. The court held at 202 para 235 that the mere existence of the cabinet ministers indicated “significant control” (meaning government control or involvement) of the Committee and thus strongly contributed to the Committee being public. The court further held at 203 para 241 that if public funds are handled and disbursed by the Committee, this would be “sufficient to constitute its activities as public”. Throughout its judgment the court emphasises the importance of the presence of public funds and this being a decisive factor in deciding whether the entity was a public one. Quinot JQR Public Procurement 2010 (2) 2.2 is of the view that because the court held that public funds arise from taxation, information relating to public procurement will always be of a public nature and therefore subject to the provisions of the PAIA which relate to public bodies.

⁸⁰ De la Harpe is of the view that despite the fact that section 239(b) does not expressly refer to those public bodies “in the national, provincial or local sphere of government”, the phrase ought to be applicable to section 239(b). Therefore, section 217 will apply to organs of state which exercise a public power or perform a public function in terms of the Constitution or a provincial constitution, or exercise a public power or perform a public function in terms of any legislation as long as these organs of state are in the national, provincial or local sphere of government. See De la Harpe *Procurement Law* 38 para 2.2.3.

⁸¹ 2001 2 BCLR 176 (SCA) paras 37-39.

⁸² Para 37.

the public interest. Transnet in calling for, evaluating and awarding the tender was thus performing an administrative action and obliged to provide Goodman Brothers with reasons for the award to a different tenderer. Transnet as a state-owned enterprise, is of course an organ of state as defined in section 239 of the Constitution⁸³ and is also bound by section 217(1) since it is found in Schedule 2 to the PFMA which reiterates the principles found in section 217(1) of the Constitution in sections 38(1)(a)(iii) and 51(1)(a)(iii) of the Act.⁸⁴

In defining “organ of state” as in section 239 of the Constitution, the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*⁸⁵ held that the Independent Electoral Commission (IEC) was not an organ of state in the national sphere of government. The Commission was created by chapter 9 of the Constitution as a state institution so as to be separate from the government.⁸⁶ The court held that the IEC performed functions in terms of national legislation, but was not subject to executive control.⁸⁷ The Commission was therefore not an organ of state in the national sphere of government. The IEC is an entity found in Schedule 1 of the PFMA and is therefore bound by section 217 of the Constitution.

The phrase “any other institution identified in national legislation” in section 217(1) of the Constitution is to be interpreted as referring to those entities identified in national legislation as entities to which section 217(1) applies.⁸⁸ This would include those public bodies regulated by the PFMA which as noted, reflects the principles found in section 217(1) of the Constitution.⁸⁹ Such entities are departments, entities in Schedules 2 and 3 to the PFMA such as Transnet, Telkom, Eskom and South African Airways (Pty) Ltd,⁹⁰ constitutional institutions and provincial departments.⁹¹ It has been noted that institutions

⁸³ Paras 37-38.

⁸⁴ These sections provide that an accounting officer must provide for a procurement system which is fair, equitable, transparent, competitive and cost-effective. Public entities such as Transnet were not bound by the 2001 PPPFA Regulations. However, public entities are, in terms of Regulation 2 of the 2011 PPPFA Regulations, obligated to act in terms of the Act and its Regulations.

⁸⁵ 2001 3 SA 925 (CC) 936-940 paras 22-31.

⁸⁶ 940 para 31.

⁸⁷ 940 para 31.

⁸⁸ Penfold & Reyburn “Public Procurement” in *CLOSA* 25-7; Bolton *The Law of Government Procurement in South Africa* 65.

⁸⁹ Bolton *The Law of Government Procurement in South Africa* 65.

⁹⁰ See also *Hoffmann v South African Airways* 2001 1 SA 1 (CC) 15 para 23 where the court established SAA as an organ of state.

⁹¹ S 3 of the PFMA.

regulated by the PPPFA and the Regulations thereto⁹² will also be bound by section 217 since the primary aim of the Act and its Regulations is to give effect to section 217(3) of the Constitution.⁹³ Regulation 2(1) of the 2001 Preferential Procurement Regulations provides that the Regulations are applicable to organs of state as defined in the PPPFA. An organ of state is defined in section 1 of the PPPFA as (a) a national or provincial department as defined in the Public Finance Management Act 1 of 1999, (b) a municipality as contemplated in the Constitution (c) a constitutional institution defined in the Public Finance Management Act (d) Parliament (e) a provincial legislature (f) *any* other institution or category of institutions included in the definition of “organ of state” in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which the Act applies. Regulation 2(1) of the 2011 Regulations state that they will be applicable to organs of state as in section 1(iii) of the PPPFA and all public entities listed in Schedules 2, 3A, 3B, 3C, 3D of the PFMA and municipal entities.

State-owned enterprises or parastatals, fall within the ambit of section 217 since they are found in the PFMA. They are, however, not bound by the PPPFA since they are excluded from the definition of an organ of state in section 1(iii) of the Act. It has been stated that state-owned enterprises are involved in strategic development delivery and that this should not be impeded by subjecting these entities to the restrictive framework provided for in the PPPFA.⁹⁴ Under the 2011 Preferential Procurement Regulations, however, state-owned enterprises are bound by the PPPFA.⁹⁵ A court or judicial officer would not be bound by section 217 as indicated in section 239(b)(ii) of the Constitution.

Organs of state for purposes of section 217 are therefore departments of state or administration in the national, provincial or local sphere of government and those institutions identified in national legislation to which section 217 applies.

⁹² GN R725 in GG 22549 of 10-08-2001.

⁹³ Bolton *The Law of Government Procurement in South Africa* 65.

⁹⁴ P Bolton “The regulation of preferential procurement in state-owned enterprises” (2010) 1 *TSAR* 101 108.

⁹⁵ See Regulation 2.

4 The meaning of “contracts for” in section 217(1)

It has been noted that the word “contracts” as used in section 217(1) should be read to include a call for tenders or procurement negotiations prior to the conclusion of a contract irrespective of whether such a call for tenders or negotiations subsequently result in a contract.⁹⁶ If pre-contractual activities (such as negotiations or a call for tenders) were not included, organs of state would not be bound by section 217 unless a contract was concluded.⁹⁷ Watermeyer⁹⁸ writes that procurement is the process which creates, manages and terminates contracts and therefore encompasses the activities preceding and following the conclusion of a contract. He further notes that procurement activities commence when the need for procurement has been identified and ends when the transaction has been completed.⁹⁹ Arrowsmith is of the view that procurement can be described in both broad and narrow terms.¹⁰⁰ Broadly, it refers to the entire contracting process from tender specifications to the administration and termination of the contract. In the narrow sense, procurement refers to only tender specification and the award of a contract.

Of note is that Regulation 1 of the Construction Industry Development Regulations¹⁰¹ defines construction procurement as “procurement in the construction industry, including the invitation, award and management of contracts”. It is therefore accepted that the phrase “contracts for” as used in section 217 of the Constitution includes pre-contractual activity such as the drafting of tender specifications, the invitation of tenders, tender

⁹⁶ Penfold & Reyburn “Public Procurement” in *CLOSA* 25-7.

⁹⁷ Penfold & Reyburn “Public Procurement” in *CLOSA* 25-7. Bolton *The Law of Government Procurement in South Africa* 66 supports this view and notes that this would defeat the purpose of a “fair, equitable, transparent, competitive and cost-effective” process as required in s 217(1) of the Constitution. She also notes that this interpretation is in line with the decision in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) para 22 where the court held that “contracts for goods and services” must be given a broad interpretation so as to include “negotiates for”.

⁹⁸ R Watermeyer “Potential procurement strategies for construction industry development in the SADC region” proceedings of the Second International Conference on Construction Industry Development, Botswana National Construction Industry Council, in association with the Faculty of Engineering Technology, University of Botswana under the auspices of CIB, Botswana, 2000 <<http://www.ssinc.co.za/Files/Doc/RWBpapers/T4-5.pdf>> (accessed 13-08-2011).

⁹⁹ R Watermeyer “Rethinking government procurement” (2005) *Civil Engineering* 28 28. He specifies the process of procurement as including establishing what is to be procured, deciding on the procurement strategy, establishing the pricing and targeting strategy and procurement procedure, soliciting tender offers, evaluating tender offers, awarding the contract, administering the contract and confirming compliance with requirements.

¹⁰⁰ S Arrowsmith *The Law of Public and Utilities Procurement* 2 ed (2005) 1.1.

¹⁰¹ Construction Industry Development Regulations GN R8986 in GG 31603 of 14-11-2008.

evaluations, the award of tenders and the administration of contracts. The phrase would also include procurement methods such as tendering, quotations, a request for proposals or expressions of interest, single-source tendering and competitive negotiation.¹⁰²

5 The meaning of “goods” and “services” in section 217(1)

The distinction between goods and services is said to be that which is tangible or intangible.¹⁰³ “Goods” are considered to be those which are tangible such as furniture, stationery or computers for example. “Services”, on the other hand, are said to be intangible such as legal advice and construction work.¹⁰⁴ De la Harpe is of the view that “goods” would constitute material and immaterial property, movable and immovable property.¹⁰⁵

The procurement (acquisition and disposal) of immovable property is regulated by public procurement legislation. At national and provincial government level, Regulation 16.1 of the PFMA Regulations states that the term “state property” “includes all movable and immovable property belonging to the state as well as intellectual property rights vested in the state”. As noted, the PFMA reiterates the principles found in section 217(1) of the Constitution, therefore subjecting immovable state property at national and provincial government level to section 217. Regulation 16A7 provides for the sale and letting of state assets. Regulation 16A7.3 specifically provides that all immovable state property must be sold at market-related value, unless the relevant treasury provides otherwise. Regulation 16A7.4 similarly provides that the letting of immovable state property must be at market-related value, unless the relevant treasury approves otherwise. It is added in the Regulation that no state property may be let free of charge without the prior approval of the relevant treasury. Regulation 21.3 of the PFMA furthermore provides that gifts or donations of immovable property by or to the state must be done with the relevant treasury’s approval and reasons for the donation or gift must be given as well.

¹⁰² These procurement methods will be analysed in chapter 3.

¹⁰³ Bolton *The Law of Government Procurement in South Africa* 65.

¹⁰⁴ 66.

¹⁰⁵ De la Harpe *Procurement Law* 23 para 2.2.1.

The Government Immovable Asset Management Act¹⁰⁶ provides for the management of immovable state assets at national and provincial government level. The purpose of the Act is to *inter alia* ensure accountability and transparency regarding the acquisition and disposal of immovable property and the optimisation of service delivery.¹⁰⁷ It further provides for best value for money to be attained and for consideration of the government's socio-economic objectives, including black-economic empowerment and wealth redistribution in the disposal of immovable property in section 5 of the Act. The objectives of the Act are therefore synonymous with those of public procurement. As in the case of section 217, organs of state as in section 239(a) of the Constitution are bound by the Act. However, a department or administration in the local sphere of government is excluded.

At local government level, sections 14 and 90 of the MFMA provide for the disposal of capital assets and make reference in section 14(5) and section 90(5) to the principles found in section 217(1). The MFMA Municipal Asset Transfer Regulations¹⁰⁸ regulate the transfer and disposal of capital assets by municipalities and municipal entities and the granting by municipalities and municipal entities of the right to use, control or manage capital assets in Regulation 2(1)(a) and (b). "Capital asset" is defined in Regulation 1(1)(a) as including any immovable asset such as land, property or buildings.

The MFMA which regulates financial management at local government level, as noted, is applicable to public sector procurement. Consequently, the Municipal Asset Transfer Regulations and therefore immovable state property at local government level are subject to section 217. Similar to national and provincial government, the Supply Chain Management (SCM) Regulations of the MFMA in Regulation 40(2)(b)(i) also provide for the sale of immovable property at market-related value, except where the public interest or plight of the poor demand otherwise. The court in *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality*¹⁰⁹ did not take this Regulation into account when it decided that section 14 of the MFMA did not require capital state assets to be sold at market-related value and that it would be appropriate for a municipal council to donate property if "community value" could be derived from doing so.¹¹⁰ The court held

¹⁰⁶ 19 of 2007.

¹⁰⁷ See s 3 of the Act.

¹⁰⁸ GN R878 in GG 31346 of 22-08-2008.

¹⁰⁹ (18763/2007) [2008] ZAGPHC 52 (18 February 2008).

¹¹⁰ See 12 para 33.

that the requirements in section 14 were procedural and not substantive.¹¹¹ The court further held that section 14 provides for market-related value to be “considered” and that it was thus not mandatory for the property to be sold as such. It did not, however, take into account the obligation placed on municipalities to stipulate in their supply chain management policies that immovable property may be sold at market-related value only in terms of MFMA SCM Regulation 40(2)(b)(i).¹¹² Recently, there have also been several news reports on the alleged circumvention of public procurement provisions in the lease of immovable state property.¹¹³

According to De la Harpe, “services” can include any kind of work, ranging from cleaning services to professional services, such as that of a banker for example. He further notes that it may at times be difficult to distinguish between “goods” and “services” and that a wide interpretation should be given to both terms, as, he argues, the purpose of section 217 is to provide for principles which would regulate all government procurement and not to limit these principles with a narrow interpretation of “goods” and “services”.¹¹⁴ De la Harpe is furthermore of the view that “goods or services” are wide enough to include “works” or “construction” and that no additional category is needed for this.¹¹⁵

¹¹¹ See 12 para 30.

¹¹² See JQR Public Procurement 2008 (1) 2.4.

¹¹³ See “Public Protector sets record straight” 21-04-2011 <<http://www.fin24.com/Economy/Public-protector-sets-record-straight-20110421>> (accessed 14-11-2011); “Drive to recover state property” 01-06-2011 <<http://www.fin24.com/Economy/Drive-to-recover-state-property-20110601>> (accessed 14-11-2011); “Maladministration alleged in saps lease” 14-07-2011 <<http://www.fin24.com/Economy/Maladministration-alleged-in-Saps-lease-20110714>> (accessed 14-11-2011).

¹¹⁴ De la Harpe *Procurement Law* 23 para 2.2.1.

¹¹⁵ De la Harpe *Procurement Law* 23-24 para 2.2.1. International instruments, however, regard goods, works or construction and services as three separate categories. The 1994 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services provides for three separate categories for goods, construction and services. See <<http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>> (accessed 09-11-2011). The 2011 UNCITRAL Model Law on Public Procurement was adopted on 01-07-2011 and replaces the 1994 version. It defines “public procurement” in Chapter 1 Article 2(j) as “the acquisition of goods, construction or services by a procuring entity”, therefore making a distinction between goods, construction and services. See <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf> (accessed 09-11-2011). Furthermore, the World Bank in the January 2011 Procurement Guidelines also distinguishes between goods, works and non-consulting services. See <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLs_English_Final_Jan2011.pdf> (accessed 09-11-2011). Regulations 5 and 6 of the 2011 Preferential Procurement Regulations provide for a point system in terms of which preference should be awarded to contractors. In terms of the Regulations, a procuring body may award points for the acquisition of goods, services and/or works. This differs from the 2001 Regulations which refer to a point system for tenders or procurement and not for goods, works or services. See Regulations 3 and 4 of the 2001 Regulations. The new Regulations seem to therefore follow the approach adopted by international legal instruments with regard to the classification of procurement into goods, works and services as opposed to goods and services as generally used in South Africa.

6 The meaning of the principles

Section 217(1) of the Constitution requires organs of state to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. These principles must be applied as a “system”, and are “interconnected and interrelated”.¹¹⁶ The weight of each principle may at times differ, but they should be balanced to ensure overall compliance with section 217(1).¹¹⁷ In what follows, the meaning of the principles in section 217(1) will be established. Next, the use of procurement as a policy tool will be looked at, including the scope of application of the PPPFA and the implementation of preferential procurement under the PPPFA.

6.1 Fairness

Fairness in the public procurement context is said to generally refer to procedural fairness.¹¹⁸ Procedural fairness has two requirements namely *audi alteram partem*¹¹⁹ and *nemo iudex in sua causa*.¹²⁰ It relates to the relationship between the organ of state and tenderers and the relationship between the organ of state and the tenderers in relation to each other.¹²¹ The first relationship requires that sufficient access to the procurement process is provided by the organ of state, that tender opportunities should be publicly available, tenderers should be familiar with all the rules applicable to the process and should be allowed sufficient participation.¹²² With regard to the second relationship, organs of state should treat tenderers fairly in relation to each other, meaning that no tenderer should have an advantage above another. This could be the case where a tenderer is afforded more time than others to submit an offer for example.¹²³ Bolton maintains that since public procurement is of an administrative law nature, fairness in this context refers

¹¹⁶ Bolton *The Law of Government Procurement in South Africa* 56.

¹¹⁷ 56.

¹¹⁸ 47.

¹¹⁹ This refers to the right of both parties to be heard.

¹²⁰ This is known as the rule against bias.

¹²¹ Bolton *The Law of Government Procurement in South Africa* 47. Arrowsmith et al *Regulating Public Procurement* 463 write that the words “bid” and “tender” have the same meaning. They note that “bid” is used in the USA and by the World Bank, whereas “tender” is used in the English version of the European Community (EC) procurement directives. “Tenderers” or “bidders” are therefore those parties who partake in the tendering process in order to secure a contract. The terms used in this thesis will be “tender” and “tenderers”.

¹²² 48.

¹²³ 48.

to procedural fairness. She is, however, of the view that although fairness in the public procurement context refers to procedural fairness, it cannot be entirely separated from substantive fairness.¹²⁴ De la Harpe also states that fairness does not have to be limited to procedural fairness and may have a substantive meaning.¹²⁵ Both Bolton¹²⁶ and De la Harpe¹²⁷ refer to *S v Ntuli*¹²⁸ where the court held that fairness refers to substantive fairness where not only procedural fairness is adhered to but also the notions of basic fairness and justice. Quinot¹²⁹ is of the opinion that fairness constituting only procedural fairness is an unnecessarily limited view and should include substantive fairness.¹³⁰

According to Watermeyer, fairness constitutes the impartial offer and acceptance of a tender without bias and where all tenderers have had access to the same information.¹³¹ He states that the process should provide for redress to dissatisfied tenderers and that the terms of the contract should not unfairly prejudice the interests of the parties.¹³²

The court in *Du Preez v TRC*¹³³ held that procedural fairness when adjudicating a matter entails that the person should be given reasonable and timeous notice and should be informed of the substance of the allegations against such person. Sufficient detail should be provided so that the person is adequately informed. What is sufficient detail will depend on the circumstances of the case.¹³⁴ The court held further that the duty to act fairly concerned only whether the manner in which the decision was taken was fair and not whether the decision itself was fair.¹³⁵ In *Metro Projects CC v Klerksdorp Local Municipality*¹³⁶ an unsuccessful tenderer submitted that it was unfairly overlooked for the tender and was denied the opportunity to make representations when a fresh call for tenders was advertised. The court held that procedural fairness included affording tenderers the opportunity to make representations. The court held that it may be fair in

¹²⁴ Bolton *The Law of Government Procurement in South Africa* 47.

¹²⁵ De la Harpe *Procurement Law* 276 para 5.3.2 (b).

¹²⁶ Bolton *The Law of Government Procurement in South Africa* 46.

¹²⁷ De la Harpe *Procurement Law* 276 footnote 260.

¹²⁸ 1996 (1) SA 1207 (CC) para 1.

¹²⁹ Quinot (2007) *PPLR* 465.

¹³⁰ See G Quinot "The developing doctrine of substantive protection of legitimate expectation in South African administrative law" (2004) 19 *SAPL* 543-570 for a discussion on substantive fairness with regard to the *audi alteram partem* principle specifically.

¹³¹ Watermeyer (2005) *Civil Engineering* 29.

¹³² Watermeyer (2005) *Civil Engineering* 29.

¹³³ 1997 3 SA 204 (A).

¹³⁴ 234.

¹³⁵ 231.

¹³⁶ 2004 1 SA 16 (SCA) 21.

certain circumstances to ask a tenderer to clarify an ambiguity in its tender, to allow the tenderer to correct an obvious mistake and to ask for further details from tenderers to enable proper evaluation of tenders. As in the *Du Preez* case, the court held that what is fair must be decided on the circumstances of the case.¹³⁷

Fairness is said to be intertwined with the principle of equity.¹³⁸ Bolton is of the view that fair treatment in the procurement process, specifically fair treatment between private parties is to be understood in light of South Africa's past discriminatory practices.¹³⁹ The Constitutional Court has held that the right to equal treatment in section 9 of the Constitution refers to substantive equality as opposed to formal equality.¹⁴⁰ This means that socio-economic circumstances are considered when section 9 of the Constitution, which entrenches the right to equality, is applied. Bolton submits that because of this, organs of state may in certain circumstances treat tenderers differently.¹⁴¹ She is of the view that in order to ensure fair treatment of tenderers, sufficient access to the procurement process means assisting tenderers to understand the requirements of the process so as to ensure that all tenderers receive equal and therefore fair treatment in the procurement process.¹⁴² Substantive equality also means that tenderers may receive preference when tenders are evaluated.¹⁴³

In *GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works*¹⁴⁴ the applicant alleged that it had been unfairly treated in the tender process. The case related to the qualification criteria of the tender.¹⁴⁵ The tenderer alleged that the tender documents were unclear and caused it to submit a tender without the necessary documents. The tender was subsequently found to be "administratively non-responsive"¹⁴⁶ and thus rejected. The court found that the published specifications for the tender were insufficient and led to the applicant being unfairly disqualified. The court noted that:

¹³⁷ Para 13.

¹³⁸ Bolton *The Law of Government Procurement in South Africa* 45.

¹³⁹ 48-49.

¹⁴⁰ *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 53.

¹⁴¹ Bolton *The Law of Government Procurement in South Africa* 48.

¹⁴² 49.

¹⁴³ 49.

¹⁴⁴ 2007 4 All SA 992 (D).

¹⁴⁵ This refers to the criteria a tenderer must fulfil in order to tender for a contract and serves as an indication to the procuring entity that the tenderer will be able to perform in terms of the contract.

¹⁴⁶ Para 45.

“a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal”.¹⁴⁷

The court further noted that undue emphasis on form rather than substance facilitates corrupt practice and is inimical to fairness, competitiveness and cost-effectiveness and leads to transparency being only an artificial criterion where distinction is made between tenderers based on compliance with formalities.¹⁴⁸

6.2 Equity

Equity as found in section 217 is said to refer to addressing the inequalities of the past.¹⁴⁹ Organs of state should therefore when applying section 217 use procurement as a policy tool.¹⁵⁰ It has been noted that the word “equitable” in section 217(1):

“generally refers to the equalling of disparate groups in South Africa. Equity is a measure that compares one group with another, for example, black with white, rural with urban, rich with poor and women with men. Instead of treating all groups exactly the same, groups who face different levels of resources and development should receive different treatment...It means that in each case, account should be taken of the different levels of resources and development of different groups...Thus, equity can be said to be aimed at improving the position of vulnerable groups in South Africa”.¹⁵¹

In the past, groups in South Africa were denied access to the public procurement process.¹⁵² The reference to equity in section 217(1) is therefore said to be aimed at

¹⁴⁷ Para 63.

¹⁴⁸ Para 63.

¹⁴⁹ Bolton *The Law of Government Procurement in South Africa* 52.

¹⁵⁰ 52. The use of procurement as a policy tool has been referred to as a “secondary” objective of public procurement. The “primary” objective would be the procurement of goods or services on competitive terms in order to fulfil a need. Secondary objectives are referred to as such since they are considered to be unrelated to the primary objective. However, in recent times the term “horizontal” rather than “secondary” has been used. The term “secondary” has been found to be problematic for several reasons. Firstly, the distinction between primary and secondary objectives presupposes that the goods or services acquired are necessarily obtained for either a primary or secondary reason. In other words, the procurement of goods or services in a particular case may have been done not only for the fulfilment of a need but also for policy reasons. Secondly, the term “secondary” may imply that such policies are of limited importance. Horizontal policies may in a particular procurement be the main reason for the procurement. Thirdly, it has been noted that secondary policies might “de-normalise” the pursuit of horizontal policies by implying that these policies are irrational, not legitimate or a departure from the primary purpose of public procurement. On the contrary, these practices have been found to be common in procurement activities and contribute to the effective functioning of a procurement system. See S Arrowsmith & P Kunzlik *Social and Environmental policies in EC procurement law: new directives and new directions* (2009) 13-14.

¹⁵¹ Bolton *The Law of Government Procurement in South Africa* 50-51.

¹⁵² 52.

correcting the inequalities of the past.¹⁵³ Equity is thus linked to affirmative action integrated in section 9 of the Constitution which provides for the right to equality. As noted, the Constitutional Court in *Harksen v Lane*¹⁵⁴ interpreted equality as “substantive” equality.¹⁵⁵ This means that the socio-economic circumstances of individuals are taken into account when section 9 is applied.¹⁵⁶ Equality as in section 9 of the Constitution and accordingly in section 217, therefore refers to a substantive concept of equality.

According to De la Harpe, equity also encompasses more than addressing inequalities and includes fairness and the rights of tenderers to be treated equally.¹⁵⁷ He notes that there is no standard test or formula to determine what is equitable, therefore all circumstances must be taken into account. These would include the nature of the parties’ rights, those of the government and the public in general. The general tone and purpose of section 217 is to be considered and that of the Constitution as a whole.¹⁵⁸

Watermeyer is of the view that the only grounds for not awarding a contract to a responsive tenderer¹⁵⁹ are blacklisting, lack of capability or capacity, legal impediments and conflicts of interest when referring to equity.¹⁶⁰ This is also the interpretation afforded to the word “equitable” when used in the construction industry.¹⁶¹

6 3 Transparency

Transparency in section 217 is generally considered to refer to “a system that is ‘open’”.¹⁶² The reason for the inclusion of transparency in section 217 is for interested parties to have confidence in the public procurement system.¹⁶³ De la Harpe notes that it is one of the

¹⁵³ 52.

¹⁵⁴ 1997 11 BCLR 1489 (CC) para 53.

¹⁵⁵ The same interpretation was followed in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) 23 para 41 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) 60 para 35, 62 para 41.

¹⁵⁶ Bolton *The Law of Government Procurement in South Africa* 52.

¹⁵⁷ De la Harpe *Procurement Law* 280 para 5.3.2 (c).

¹⁵⁸ De la Harpe *Procurement Law* 208-281 para 5.3.2 (c).

¹⁵⁹ An acceptable (or responsive) tender is defined in s 1 of the PPPFA as a tender which “in all respects complies with the specifications and conditions of tender as set out in the tender document”.

¹⁶⁰ Watermeyer (2005) *Civil Engineering* 29.

¹⁶¹ CIDB Practice note 5 “Evaluating tender offers” May 2007 1 3.

¹⁶² Bolton *The Law of Government Procurement in South Africa* 54.

¹⁶³ 54.

most important principles and that information should be available at all times throughout the procurement process in order to give effect to transparency.¹⁶⁴ It promotes openness and accountability on the part of the government and assists good decision making, prevents corruption and promotes competition.¹⁶⁵ Allen is of the view that transparency is a cornerstone of a fair procurement system since more tenderers are willing to compete when they are fully aware of the rules to be applied.¹⁶⁶ This in turn will increase competition in the procurement process.

According to Watermeyer, transparency means that the procurement process and criteria on which a tender is based should be publicised¹⁶⁷ and that any decisions and reasons for the decisions should be publicly available.¹⁶⁸ He states that it should be possible to verify that the publicised criteria were applied.¹⁶⁹ He notes further that a transparent procurement system allows for an adjudication process where challenges can be made and for compensation to be awarded where appropriate relating to the preparation and submission of a tender.¹⁷⁰

¹⁶⁴ De la Harpe *Procurement Law* 424 para 6.6.1. W Wittig "A framework for balancing business and accountability within a public procurement system: approaches and practices of the United States" (2001) 3 *PPLR* 139 140 writes that the degree of transparency as applied in the USA, indicates the effectiveness of the public procurement system. He notes that "[t]ransparency in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed". He further notes that transparency at the very least requires that sufficient information is released for the tenderers to know exactly how the procurement process will function. Transparency is characterised by well-defined regulations and procedures which are open and clear to the public, complete information should be available and there should be equal tendering opportunity for all tenderers.

¹⁶⁵ De la Harpe *Procurement Law* 286 para 5.3.2 (d). D Wallace "The changing world of national procurement systems: global reformation" (1995) 2 *PPLR* 57 59 writes that transparency in general which would include record keeping, notice and publication of the award promotes public awareness of the procurement process and competition.

¹⁶⁶ R Allen "Integrity: Maintaining a level playing field" (2002) 2 *PPLR* 111 112.

¹⁶⁷ He states that this information should be communicated to tenderers and those responsible for processing the tender offers. See R Watermeyer "South African standards for construction procurement" (2005) *The Structural Engineer* 15 18.

¹⁶⁸ Allen supports the view that tenderers should be informed of the reasons for the decision. He states that if tenderers are informed of the result and the reasons for the award, they will be more likely to believe that the decision was fair and will have an opportunity to improve on their product. See Allen (2002) *PPLR* 112-113. The right to reasons is not provided for in section 217 of the Constitution. However, since public procurement is of an administrative law nature, the right to reasons would be protected under section 33 of the Constitution which provides for the right to just administrative action including the right to written reasons. Section 32 of the Constitution could also assist as it provides for the right of access to information.

¹⁶⁹ Watermeyer (2005) *Civil Engineering* 28-29. De la Harpe supports the view that access to information is fundamental to a transparent procurement system at 424 para 6.6.1. R Watermeyer in "Transparency issues in government procurement" (2005) *The Structural Engineer* 18 19 notes that a transparent procurement system is characterised by the documentation of clear rules and the ability to verify that the rules used throughout the process were applied.

¹⁷⁰ Watermeyer (2005) *The Structural Engineer* 19.

A goal of transparency in government procurement Watermeyer notes is that business is conducted in an impartial and open manner.¹⁷¹ Trepte writes that the purpose of transparency can be determined based on the relationship of the parties involved in the procurement process.¹⁷² The first relationship is that between the government and the procuring public body. The purpose of transparency in this case is control over the public body so that it acts in the best interest of the government. Furthermore, the actions of the public body have to be controlled to ensure that the proper procurement procedures are followed. The second relationship is that of the public body and the tenderers. This relationship requires that sufficient information be provided to the public body to enable it to make a well-informed procurement decision so as to attain value for money. Information the public body would require would for example be the quality of the goods or services that are procured and the ability of the tenderer to perform the contract. The third and last relationship is that of the tenderer and the public body where the public body is expected to apply the criteria advertised. This would include timely publication of all information so that tenderers have sufficient time to prepare and correctly apply all criteria.

6 4 Competition

The principle of competition is said to be intertwined with cost-effectiveness.¹⁷³ It involves the achievement of value for money and suggests that an organ of state when acting in terms of section 217, should obtain the best possible value for money.¹⁷⁴ Trepte notes that economic efficiency is an expected natural outcome of the free market.¹⁷⁵ In order to achieve this, perfect competition must be ensured.¹⁷⁶ De la Harpe is of the view that competition is never absolute and must be balanced with other requirements and the

¹⁷¹ R Watermeyer "Project Synthesis Report: Unpacking transparency in Government Procurement – Rethinking WTO Government Procurement Agreements" CUTS Centre for International Trade, Economics and Environment, CUTS International, Jaipur, India, 2004 1 4.

¹⁷² P Trepte *Regulating Procurement* (2004) 393.

¹⁷³ Bolton *The Law of Government Procurement in South Africa* 40.

¹⁷⁴ 40. It is noted that even though s 217(1) appears to be set in peremptory terms, using a procurement method other than a competitive system does not mean that value for money is not attained. The principle of cost-effectiveness sometimes limits competition in that contracting for goods or services may be effected by other means if a contract is below a certain threshold.

¹⁷⁵ This is also referred to as a private or open market based on individual freedom where providers of goods and services and consumers alike choose whether to contract or not and how they participate in contracting. For example, employees may choose which trade union to belong to or may change employers. In the case of providers they may choose to expand their businesses or not. See Bolton *The Law of Government Procurement in South Africa* 2.

¹⁷⁶ Trepte *Regulating Procurement* 389.

particular circumstances.¹⁷⁷ He states that in order to achieve true competition, the most practical and cost-effective solution in the circumstances must be ensured. This can be done by using the appropriate procurement procedure and allowing for a procurement process where all tenderers are assured that they compete for the same product and will be evaluated according to the same criteria.¹⁷⁸ He further notes that competition refers to a procurement process where the evaluation committee is confronted with a number of comparable offers. This means that the invitation to tender must be clear and unambiguous, the criteria for the tender should be understandable and precise and provide sufficient detail so as to ensure responsive tenders.¹⁷⁹

According to Watermeyer, a competitive system is a system which “provides for appropriate levels of competition to ensure cost-effective and best-value outcomes”.¹⁸⁰ De la Harpe defines best-value as taking into account the life cycle of the product or service that is procured and not only the price thereof.¹⁸¹

Competition in the public procurement context refers to a system where a choice can be made between various options and the aim is to attain the most viable deal.¹⁸² The primary method of procurement is that of tendering.¹⁸³ Procurement by means of tendering is, however, not the only method through which sufficient competition and value for money can be achieved.¹⁸⁴ Other methods of procurement that may potentially be employed include quotations from potential tenderers, negotiation with potential tenderers or competitive negotiations as found in the construction industry.¹⁸⁵ It may at times be necessary to use an alternative procurement procedure. This will occur in the case of emergencies when time-consuming tendering procedures would not be viable, and would

¹⁷⁷ De la Harpe *Procurement Law* 289 para 5.3.2 (e).

¹⁷⁸ De la Harpe *Procurement Law* 289 para 5.3.2 (e).

¹⁷⁹ See s 1 of the PPPFA.

¹⁸⁰ Watermeyer (2005) *Civil Engineering* 29.

¹⁸¹ De la Harpe *Procurement Law* 287 para 5.3.2 (e).

¹⁸² Bolton *The Law of Government Procurement in South Africa* 42.

¹⁸³ 42.

¹⁸⁴ Bolton *The Law of Government Procurement in South Africa* 42; De la Harpe *Procurement Law* 288 para 5.3.2 (e).

¹⁸⁵ CIDB Practice note 12 “The competitive negotiations procedure” February 2008 2. De la Harpe *Procurement Law* 288 para 5.3.2 (e) refers to alternative procurement methods such as the use of list suppliers (this occurs when potential suppliers are placed on a list by an organ of state and used for procurement purposes on a rotation basis) and electronic procurement. Electronic procurement is referred to as “electronic reverse auction” in the 2011 UNCITRAL Model Law on Public Procurement and is defined in Chapter 1 Article 2(d) as “an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids”.

consequently not give effect to cost-effectiveness.¹⁸⁶ Cost-effectiveness may also require that tendering as a procedure is not used where the cost of the goods or services that are procured is not proportional to the expense involved in the tendering process. Alternative procurement procedures as mentioned may then be more appropriate.

Allen is of the view that in order to ensure true competition, tenderers must have confidence in the procurement process. He notes that tenderers will only compete for a contract if they stand to benefit from the process. Therefore, a system which ensures fair treatment of tenderers will achieve maximum competition.¹⁸⁷

6 5 Cost-effectiveness

Cost-effectiveness, or value for money is generally a concern for organs of state when procuring goods and services. Penfold and Reyburn state that under section 217 as opposed to section 187 of the Interim Constitution,¹⁸⁸ price is no longer the only criterion for determining a winning tenderer, thus other factors must be taken into account. They are of the view that price is, however, still the most important factor.¹⁸⁹

Cost-effectiveness is said to apply throughout the procurement process.¹⁹⁰ De la Harpe is of the view that cost-effectiveness becomes relevant at the time the need for procurement becomes apparent until the outcome of the process so as to ensure value for money.¹⁹¹ He notes that the procurement method used must be proportional to the time, nature, size and value of the procurement.

¹⁸⁶ Bolton *The Law of Government Procurement in South Africa* 44; De la Harpe *Procurement Law* 289 para 5.3.2 (e).

¹⁸⁷ Allen (2002) *PPLR* 111.

¹⁸⁸ Constitution of the Republic of South Africa Act 200 of 1993.

¹⁸⁹ Penfold & Reyburn "Public Procurement" in *CLOSA* 25-1.

¹⁹⁰ 25-1.

¹⁹¹ De la Harpe *Procurement Law* 290 para 5.3.2 (f). Value for money he describes as a combination of whole-life costs and quality to meet the needs of the organ of state. Whole-life costs he notes include all costs over the entire lifetime of the asset such as capital, maintenance, management operating costs and disposal costs. See De la Harpe *Procurement Law* 291 footnote 329.

According to Watermeyer¹⁹² a cost-effective procurement system is a system which is standardised and sufficiently flexible to attain best value for money with regard to quality, timing and price and the minimal resources available to manage the procurement process effectively. He states that in the past, the tenderer with the lowest financial offer was awarded the tender as this was considered to represent value for money. This narrow interpretation of value for money, Watermeyer notes, does not allow for development objectives, nor does it acknowledge socio-economic factors.¹⁹³

In the South African context, two general factors appear to constitute cost-effectiveness. These are the capability or ability of potential tenderers and the submission of tax clearance certificates by tenderers.¹⁹⁴ Capability or ability can be said to refer to the tenderers' qualifications to perform the contract. This means that tenderers should be responsible and able to complete the work on time and satisfactorily.¹⁹⁵ Tenderers should further be able to perform satisfactorily in relation to each other. It is noted, however, that the capability or ability of tenderers should be interpreted broadly.¹⁹⁶ Tenderers must submit tax clearance certificates since those who are unable to pay taxes are most likely not able to perform properly in terms of the contract.¹⁹⁷

In order to ensure complete compliance with cost-effectiveness various factors should be taken into account. These include for example price, whole-life cost of the goods or service, the nature and quality of the goods or service, knowledge, capacity, the experience and track record of tenderers, after-sales service, availability of the relevant equipment, a sufficient number of trained personnel and the financial standing of tenderers.¹⁹⁸

¹⁹² Watermeyer (2005) *Civil Engineering* 29.

¹⁹³ R Watermeyer, SM Gounden, DR Letchmiah & S Shezi "Targeted Procurement: A means by which socio-economic objectives can be realized through engineering and construction works contracts" (1998) 40(4) *SAICE* 15 16.

¹⁹⁴ Bolton *The Law of Government Procurement in South Africa* 103. It is further stated that little guidance is given as to what exactly cost-effectiveness refers to. Legislation makes reference to only the two general factors.

¹⁹⁵ 103.

¹⁹⁶ 104.

¹⁹⁷ 105.

¹⁹⁸ De la Harpe *Procurement Law* 292 para 5.3.2 (f).

7 The use of public procurement as a policy tool

Section 217(2) of the Constitution provides that organs of state as stipulated in section 217(1)¹⁹⁹ are not prevented from implementing procurement policies which provide for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. Section 217(3) in turn provides for a legislative framework in terms of which these policies must be implemented. The PPPFA has been enacted for this purpose. Although section 217(2) is not set in mandatory terms since organs of state are “not prevented” from implementing a procurement policy, it is not considered to be problematic. The Constitution is meant to govern the country in the long term and the aim of the procurement provision is in the main to address past discriminatory policies and practices and is therefore an interim measure.²⁰⁰

Section 187 of the Interim Constitution provided for a procurement system which was fair, public and competitive. No reference was made to an equitable procurement system or the use of procurement as a policy tool, as found in sections 217(1) and (2) of the 1996 Constitution. It is therefore significant that equity and preferencing has been constitutionalised.

As noted, organs of state in terms of section 217(1) are obligated to contract for goods or services in accordance with a system which is *inter alia* “equitable”. It has been noted that the word “equitable” as used in section 217(1) refers to addressing inequalities brought about by South Africa’s past discriminatory policies and practices.²⁰¹ At the same time, the primary objective of procurement is said to be obtaining value for money.²⁰² That is, procuring goods and services at the best possible price. It can, however, be used for

¹⁹⁹ See para 3 of this chapter.

²⁰⁰ Bolton *The Law of Government Procurement in South Africa* 264.

²⁰¹ 52-53.

²⁰² 27. Arrowsmith defines the primary objective of procurement as the acquisition of goods or services fulfilling a particular function on the best possible terms. See S Arrowsmith *The Law of Public and Utilities Procurement* (2005) 19.1. She does, however, state that procurement can be used for purposes not connected to the primary objective. These are considered secondary objectives or recently referred to as horizontal objectives. See Arrowsmith & Kunzlik *Social and environmental policies in EU procurement law* 12.

secondary or horizontal objectives such as the achievement of socio-economic goals.²⁰³ Watermeyer²⁰⁴ notes that an outcome of using procurement as a policy tool is the promotion of equal opportunity.²⁰⁵ This is especially significant in South Africa in light of the country's history of discriminatory practices. Marginalised groups were given restricted access to property and public service²⁰⁶ and were as a result economically inactive. Government contracts were awarded to large, white-owned businesses causing a disadvantaged sector of small, black-owned businesses.²⁰⁷ Preferential procurement is thus used by the government to eradicate the effects of the past discriminatory practices to promote *inter alia* employment opportunities and improving socio-economic circumstances.

7 1 Scope of application of the Preferential Procurement Policy Framework Act (PPPFA)

As noted, the PPPFA has been enacted to give effect to section 217(3) of the Constitution which requires national legislation to provide for a framework in terms of which procurement as a policy tool must be implemented. Regulation 2 of the 2001 Regulations to the Act²⁰⁸ provides that the Regulations are applicable to organs of state as defined in section 1(iii) of the Act. An organ of state is defined in the Act as:

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- (b) a municipality as contemplated in the Constitution
- (c) a constitutional institution defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- (d) Parliament;

²⁰³ Other possible secondary objectives are environmental and industrial policies. Arrowsmith et al *Regulating Public Procurement* (2000) 237.

²⁰⁴ R Watermeyer "The use of procurement as an instrument of local economic development" A paper presented at the Institute of Municipal Engineers of South Africa Biannual Conference, Kempton Park, October 1999 <<http://www.ssinc.co.za/Files/Doc/RBWPapers/T3-2.pdf>> (accessed 26-11-2012).

²⁰⁵ He refers to procurement as a policy tool as "targeted procurement" which he states is used to provide employment and business opportunities for marginalised individuals. He further notes that targeted procurement affirms the government's socio-economic objectives and the principles of the Reconstruction and Development Programme (RDP). See Watermeyer, Gounden, Letchmiah & Shezi (1998) *SAICE* 17. According to Watermeyer, targeted procurement is based on three pillars which are the classification of contracts, the use of resource specifications and the awarding of contracts in terms of a development objective or price mechanism.

²⁰⁶ R Watermeyer "Potential procurement strategies for construction industry development in the SADC region" Proceedings of the second International conference on Construction Industry Development, Botswana National Construction Industry Council in association with the Faculty of Engineering Technology, University of Botswana under the auspices of CIB, Gaborone, Botswana 2000 <<http://www.ssinc.co.za/Files/Doc/RBWPapers/T4-5.pdf>> (accessed 13-08-2011).

²⁰⁷ S Gounden *The Impact of the Affirmative Procurement Policy in the South African Construction Industry* PhD thesis University of Natal (2000) 3.11.

²⁰⁸ Preferential Procurement Regulations GN R725 in GG 22549 of 10-08-2001.

- (e) a provincial legislature;
- (f) any other institution or category of institutions included in the definition of “organ of state” in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies

It has been noted that the definition of organ of state in section 239 of the Constitution is broader than that in section 1(iii) of the PPPFA.²⁰⁹ Under this definition, entities such as municipal entities,²¹⁰ public entities²¹¹ and parastatals²¹² are excluded.²¹³ It has been said that the reason for the exclusion of parastatals from the definition is that they are involved in strategic developmental delivery and therefore need flexibility with regard to implementation of preferential procurement policies.²¹⁴ The new regulations to the PPPFA,²¹⁵ however, apply to organs of state as in section 1(iii) of the PPPFA and those entities in Schedule 2, 3A, 3B, 3C and 3D of the PFMA (as amended by Act 29 of 1999) as well as municipal entities. Therefore, those entities excluded under the 2001 Regulations are subject to the PPPFA and its 2011 Regulations. This will be examined further in chapter six.

7 2 Implementation of preferential procurement under the PPPFA

Section 2(1)(a) of the Act provides that organs of state (as defined in the Act) must implement their preferential procurement policies within a framework which provides for a

²⁰⁹ Penfold & Reyburn “Public Procurement” in *CLOSA* 25-14; Bolton *The Law of Government Procurement in South Africa* 267.

²¹⁰ A municipal entity is defined in s 1 of the Local Government: Municipal Systems Act 32 of 2000 as (a) a company, a co-operative trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of one or more municipalities, and includes, in the case of a company under such ownership control, any subsidiary of that company, or (b) a service utility.

²¹¹ A public entity refers to a national or provincial public entity in s 1 of the PFMA (as amended by Act 29 of 1999 s 1(h)). A national public entity is defined in s 1 of the PFMA as (a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is- (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament. A provincial public entity is defined as (a) a provincial government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is- (i) established in terms of legislation or a provincial constitution; (ii) fully or substantially funded either from a Provincial Revenue Fund or by way of a tax, levy or other money imposed by legislation; and (iii) accountable to a provincial legislature.

²¹² These are institutions which are directly or indirectly controlled by the state such as Telkom, Eskom and Transnet. See Bolton *The Law of Government Procurement in South Africa* 267.

²¹³ Bolton *The Law of Government Procurement in South Africa* 267.

²¹⁴ Penfold & Reyburn “Public Procurement” in *CLOSA* 25-14 footnote 3; Bolton *The Law of Government Procurement in South Africa* 268.

²¹⁵ Preferential Procurement Regulations GN R502 in GG 34350 of 08-06-2011.

preference point system. The total number of points that can be awarded is 100 points. The Act provides that 80 or 90 points are awarded for price and the remaining 10 or 20 are allocated for preference or “specific goals”.²¹⁶ The number of points (80 or 90) is determined based on the value of the contract.²¹⁷

Various changes to the implementation of preferential procurement have been brought about by the 2011 Regulations. These changes will be briefly mentioned here, and a detailed discussion will be provided in chapter six. According to the 2011 Regulations, the value of the contracts for which 80 or 90 points may respectively be awarded, has been increased.²¹⁸ The specific provision of a point system for the sale and letting of assets in the 2001 Regulations has further been excluded in the 2011 Regulations.

Instead of allocating points to a tenderer for being a Historically Disadvantaged Individual (HDI) or contracting or sub-contracting with an HDI as in the 2001 Regulations, the 2011 Regulations award preference points for a tenderer’s Broad-Based Black Economic Empowerment (BBBEE) status level.²¹⁹ The status level of a tenderer is determined based on a table indicated in Regulations 5(2) and 6(2).

In terms of the 2001 Regulations, functionality and price were evaluated together and given a combined score out of 80 or 90, depending on the value of the tender in question. The 2011 Regulations, however, provide for functionality as a “qualification criterion” after which points are allocated for price and will amount to 80 or 90 points.²²⁰

Regulation 10 of the 2001 Regulations provides for the cancellation and re-invitation of tenders. The 2011 Regulations provide for the same conditions under which cancellation

²¹⁶ S 2(1)(b)(i)-(ii). “Specific goals” for which 10 or 20 points are awarded, are defined in section 2(1)(d) of the Act as “(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994”.

²¹⁷ See Regulation 3-6.

²¹⁸ Regulations 5 and 6.

²¹⁹ See Regulations 5(2), 5(3) and 6(2), 6(3). The “B-BBEE status level of contributor” is defined in Regulation 1(d) as “the B-BBEE status received by a measured entity based on its overall performance using the relevant scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act”.

²²⁰ Regulation 4(5).

may take place, however, Regulation 8 provides that if one or more tenders received comply with the minimum threshold, all tenders must be evaluated in terms of the point system advertised.²²¹ Organs of state are also obligated to publish the decision to cancel a tender in terms of Regulation 8(5).

Regulation 15 of the 2001 Regulations provides for penalties in the case of preference obtained fraudulently or specified goals which are not performed in terms of the contract concluded. An organ of state may recover all costs, losses or damage suffered, cancel the contract and claim damages due to less favourable arrangements which arose from the cancellation, impose a fine on the tenderer and debar such tenderer from the procurement process for a maximum of ten years.²²² In terms of the 2011 Regulations, an organ of state is obligated to act against a tenderer who has fraudulently claimed or obtained its B-BBEE status level contribution or has not fulfilled any of the conditions of the contract. The organ of state may disqualify the person from the tendering process, recover all costs, losses or damage, cancel the contract and claim damages due to unfavourable arrangements resulting from the tenderer's actions, debar such tenderer for a maximum of ten years after the *audi alteram partem* principle has been applied and forward the matter for criminal prosecution.²²³

8 Conclusion

Public procurement is generally considered to refer to only the acquisition of goods or services. In the South African context, however, some commentators argue that public procurement should be regarded as the acquisition of goods and services by the government and the sale and letting of assets by the government.²²⁴ The process of public procurement furthermore includes the drafting of tender specifications, a call for tenders, negotiations or competitive negotiations in certain circumstances,²²⁵ the procurement methods such as tendering, the award of a tender and the administration of a contract.

²²¹ Regulation 8(1)(b) and 8(2)(b).

²²² Regulation 15(1)-(2)(d).

²²³ Regulation 13(1)-(2)(e).

²²⁴ De la Harpe *Procurement Law* 26-27 para 2.2.2; Bolton *The Law of Government Procurement in South Africa* 67-68; Watermeyer "A generic and systemic approach to procurement: the case for an international standard" (2005) 14(1) *PPLR* 39 39.

²²⁵ For a discussion on when negotiation may be appropriate in the public procurement process, see chapter 3.

Organs of state bound by section 217 are those in section 239(a) of the Constitution and those entities identified in national legislation as entities to which section 217 applies. When organs of state contract for “goods” as in section 217, they contract for tangible, movable or immovable, material or immaterial goods. When contracting for “services”, these would constitute intangible services and could range from cleaning services to professional services. There is no additional category for “works” in South African law, therefore construction work would generally be categorised as services.

The principles of fairness, equity, transparency, competition and cost-effectiveness in section 217(1) are said to be “interrelated and interdependent”. They operate as a system and must therefore always be complied with. The weight of each principle will, however, differ at times depending on the particular circumstances.

It has been noted that using public procurement as a policy tool may have beneficial results such as equalling disparate groups and eradicating the effects of past discriminatory policies and practices. The framework currently provided for in national legislation is a point system which allows for 10 or 20 points out of 100 (depending on the value of the contract) to be allocated for preference when tenders are evaluated. Certain entities which are bound by section 217 were not under the 2001 Regulations obligated to comply with the preferential procurement framework in the PPPFA. However, the 2011 Regulations apply to these entities such as municipal entities and public entities. It is therefore mandatory for these entities to implement a preferential procurement policy in accordance with the strict framework provided for in the PPPFA and its 2011 Regulations.

CHAPTER THREE

CONSTRUCTION PROCUREMENT PROCEDURES

1 Introduction

The aim of this chapter is to describe and analyse the procedures used in construction procurement and to determine whether they are implemented in accordance with a system which is fair, equitable, transparent, competitive and cost-effective as required by section 217 of the Constitution.

Standard methods of procurement created by the Construction Industry Development Board (CIDB) are used which are based on the methods used in general public procurement and are adapted to the specific needs of the construction industry. Three main procedures are found, namely the negotiation procedure, competitive selection and competitive negotiation procedures.

In this chapter, the legal regulation of construction procurement in South Africa will be looked at as well as the classification of construction contracts for purposes of construction procurement procedures. The general public procurement methods will be looked at, followed by the construction procurement procedures including the proposed procurement of professional services in the construction industry. Lastly, the constitutional compliance of the construction procurement procedures will be examined.

2 The regulation of construction procurement

As noted in chapter one, the legislation which regulates general public sector procurement is applicable to construction procurement. In addition, the Construction Industry Development Board (CIDB) Act²²⁶ and its Regulations²²⁷ have specifically been enacted for the regulation of the construction industry, including construction procurement. The Act establishes the Construction Industry Development Board which is responsible for *inter alia* the promotion of procurement reform and creating uniformity in procurement procedures.²²⁸ The CIDB is a public entity listed in Schedule 3 of the Public Finance Management Act (PFMA)²²⁹ and is therefore also bound by section 217 of the Constitution.²³⁰ The CIDB is empowered in terms of sections 4(c) and 5(4) of the CIDB Act to create a Code of Conduct in terms of which all parties involved in construction procurement must act as well as best practice²³¹ for the regulation of construction procurement. The CIDB has published a Standard for Uniformity in Construction Procurement²³² in which these best practice guidelines are included. The Standard for Uniformity is aimed at standard and uniform construction procurement practice as provided for in section 4(c) of the CIDB Act.

The objects of the CIDB are *inter alia* to improve public sector delivery management, promote best practice and performance of public sector clients and promote uniform application of policies in the construction industry throughout all spheres of the government.²³³ The CIDB thus performs a public function in terms of legislation. Therefore, all actions taken by the CIDB, including decisions taken in terms of the best practice guidelines may be taken on judicial review.²³⁴

²²⁶ 38 of 2000.

²²⁷ Construction Industry Development Regulations Government Notice (GN) R8986 in Government Gazette (GG) 31603 of 14-11-2008.

²²⁸ See s 5(1)(a)(vii)-(viii) of the Act.

²²⁹ 1 of 1999.

²³⁰ See chapter 2 para 3 for a discussion on the entities bound by s 217.

²³¹ Defined in s 1(a) of the Act as “a desirable or appropriate standard, process, procedure, method or system in relation to the delivery process and the life cycle of fixed assets”.

²³² Published in GG 33239 of 28-05-2010.

²³³ See s 4(c)(iv), s 4(d) and s 4(e) of the CIDB Act.

²³⁴ For a detailed discussion on judicial review of state commercial activity see G Quinot *State Commercial Activity* (2009); “Towards effective judicial review of state commercial activity” (2009) 3 *TSAR* 436-449.

3 Classification of construction contracts

In order for tenderers to be able to tender for a contract, they must be registered to perform a contract in the specific category for which the tender has been advertised. A tenderer may compete for contracts under more than one category if the tenderer has the capability to do so.²³⁵ A specific contract must be categorised first in order to determine which procedure is to be used. A prescribed table of categories and corresponding procurement procedures are used by the CIDB.²³⁶ Four different categories or classes of contracts can be distinguished.

The first category is for engineering and construction works. This category constitutes contracts for “the provision of a combination of supplies and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of structures, including building and engineering infrastructures”.²³⁷

The second category provides for supply contracts which are “contracts for the provision of materials or commodities made available for purchase”.²³⁸ The third category is for services other than professional services. These contracts are concluded “for the provision of labour or work, including knowledge-based expertise, services carried out by hand, or with the assistance of equipment and plant”.²³⁹ Contracts for professional services will be discussed separately in this chapter, as this category of contracts has additional factors and requirements.

The last category provides for disposals. No definition or description of disposals is provided for in the Act or Regulations. However, CIDB prescripts²⁴⁰ provide that disposals

²³⁵ Regulation 7(3).

²³⁶ CIDB Best Practice Guideline A2 “Applying the procurement prescripts of the CIDB Act in the Public Sector” December 2007 9.

²³⁷ CIDB Standard for Uniformity 4. A similar definition is given in s 1(j) of the CIDB Act for “construction works”. However, the definition in the Standard for Uniformity refers to structures and that in the Act, to fixed assets.

²³⁸ CIDB Standard for Uniformity 5.

²³⁹ CIDB Standard for Uniformity 5.

²⁴⁰ CIDB Best Practice Guideline A2 25-26.

are to be regulated in terms of section 42 of the PFMA.²⁴¹ Disposal contracts are contracts for “the divestiture of assets, including intellectual property and other rights and goodwill by any means, including sale, rental, lease, license, tenancy, franchise, auction or any combination thereof”.²⁴² According to Watermeyer, disposal contracts are awarded by using only the negotiation procedure, the open and qualified procedures under competitive selection and by means of public auction.²⁴³

4 Procedures generally used in public procurement²⁴⁴

Various procedures are generally used in public procurement. The categorisation of procedures by Arrowsmith, Linarelli and Wallace as referred to by Bolton will be used in this chapter.²⁴⁵ A distinction is made between formal and informal procurement procedures. The former implies that more rigid rules are in place by which goods and services are procured. Informal procedures, on the other hand, are more flexible and more often used in the case of lower value contracts. The procedures used in the construction industry are based on these general procedures and are slightly adapted to provide for the expectations of the industry.

²⁴¹ S 42 of the PFMA provides for accounting officers’ responsibilities when assets and liabilities are transferred.

²⁴² R Watermeyer “A standardised approach to procurement” (2004) 29(10) *IMIESA* 13 16.

²⁴³ Watermeyer (2004) *IMIESA* 16.

²⁴⁴ P Trepte *Regulating Procurement: understanding the ends and means of public procurement regulation* (2004) 270 refers to “procedures” and “methods” used in the public procurement context. He writes that “procedures” would refer to for example the open tendering procedure, and the “method” would describe the way in which a particular procedure is operated. In other words the two-envelope or two-stage systems or methods describe the way in which the tendering procedure is used. It would appear that in the construction industry, what is regarded as “methods” in general public procurement (such as tendering or single-source procurement) involve the manner of implementing the particular contract. For example, design-build as a means of implementing a contract is considered a “method” in the construction industry. Procedures are those employed to effect procurement such as the tendering or competitive negotiation procedures.

²⁴⁵ S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement* (2000) 459. Also see P Bolton *The Law of Government Procurement in South Africa* (2007) 132-137.

4 1 Formal procedures

4 1 1 Open Tendering

This method is used when tenderers submit their tenders in response to an advertised call for tenders. This type of tendering is open to the public and is not limited in terms of the number of parties who may tender for the contract. Tenderers submit their tenders based on detailed specifications advertised in the call for tenders found in newspapers or electronic media.²⁴⁶ Late tenders, meaning those received after the date and time allocated for submission should not be considered and should be returned unopened where feasible.²⁴⁷ A date, time and venue should be provided for the opening of tenders. This is done in public so as to ensure fairness and transparency so that no tenderer is given the opportunity to adjust his/her tender or have additional time to submit a tender. The contract is awarded to the tenderer who submits a responsive tender and would best achieve value for money.²⁴⁸

Negotiations between the organ of state and tenderer(s) are generally prohibited, but may be allowed in certain circumstances.²⁴⁹ It has been noted that where tendering is used as a procurement procedure, negotiation is unnecessary since sufficient detail should be provided in the call for tenders. A tender is then considered to be either responsive or non-responsive, judged by the tender specifications. Allowing negotiation in these circumstances would compromise the integrity of the process.²⁵⁰ According to Arrowsmith, Linarelli and Wallace²⁵¹ demarcating the boundaries of negotiation in procurement methods is somewhat difficult. Although market related information from suppliers is necessary to enable organs of state to draft tender specifications, they note the danger of suppliers having an influence over government officials, thereby leaving room for corruption. They note further that in some procurement systems, a distinction is made

²⁴⁶ Bolton *The Law of Government Procurement in South Africa* 134-145.

²⁴⁷ 135.

²⁴⁸ Arrowsmith et al *Regulating Public Procurement* 460.

²⁴⁹ Bolton *The Law of Government Procurement in South Africa* 135. Negotiation in tender procedures may be allowed in specific procurement procedures for example in the case of competitive negotiations and will be discussed further in this chapter. It may also be permitted where the possibility of negotiation was stated in the tender documents beforehand.

²⁵⁰ Arrowsmith et al *Regulating Public Procurement* 489.

²⁵¹ 488.

between pre-tender and post-tender negotiations so as to determine how appropriate the communication may be.

4 1 2 Restricted Tendering

When restricted tendering is used as a procurement method, a request for proposals is advertised. It is different from open tendering in that only a limited number of tenderers are invited to tender based on their proposals. Those who submit responsive tenders and are most likely to perform the contractual duties are then invited to submit tenders.²⁵² Tender specifications are determined by tenderers and not the organ of state. Reducing the number of tenders received lessens the administrative burden on organs of state and may also be used where an unlimited or large number of tenders would be disproportionate to the value of the contract.²⁵³ It has also been stated that restricted tendering may be used for legislative, design, technological and/or safety reasons.²⁵⁴

Advertising a request for proposals may serve as a qualification process to ensure that tenderers not only offer but are also able to provide the goods or services procured.²⁵⁵ It has been noted that this method could be useful where the selected tenderer is no longer able to provide the goods or services. The organ of state can then look to other tenderers who submitted responsive tenders to perform the contract.²⁵⁶

4 2 Informal procedures

4 2 1 Request for proposals

This method of procurement is used when the organ of state is unable to create detailed specifications and require potential tenderers to submit cost and technical proposals.²⁵⁷

²⁵² Bolton *The Law of Government Procurement in South Africa* 135.

²⁵³ 136.

²⁵⁴ 136.

²⁵⁵ 136.

²⁵⁶ 136.

²⁵⁷ 133.

The potential tenderers therefore determine what the specifications of the tender will be. It would appear that quality is more important than price where this method is used due to the vast differences between proposals. The method is therefore more often used in the procurement of services.²⁵⁸ A request for proposals is said to be more flexible and provide for more discretion than tendering for example. It may also be used as a formal procedure when used as part of a tendering process.²⁵⁹

4 2 2 Request for quotations

This method of procurement is also referred to as the shopping method.²⁶⁰ It is used to procure goods of a low value which are readily available and for which no exact specifications are provided.²⁶¹ As opposed to a tender procedure, a request for quotations is a much more informal procedure since quotations may be solicited by telephone. The method does, however, leave little room for scrutiny.²⁶²

4 2 3 Competitive Negotiation

This method is mostly used in the case of an emergency where a more formal and time consuming method would not be cost-effective.²⁶³ Negotiations may be conducted with a sufficient number of potential providers. What a sufficient number will be will depend on the circumstances of the particular case.²⁶⁴ Competitive negotiations may also be used where an insufficient number of tenders were received in response to a tender call. An organ of state may then negotiate with those who submitted tenders and may require “best and final offers”.²⁶⁵

²⁵⁸ 133.

²⁵⁹ 133.

²⁶⁰ Arrowsmith et al *Regulating Public Procurement* 550.

²⁶¹ Bolton *The Law of Government Procurement in South Africa* 132.

²⁶² 132.

²⁶³ Arrowsmith et al *Regulating Public Procurement* 535 note that in the case of an emergency, it may be necessary to dispense with competition entirely and make use of single-source procurement. However, because of the lack of competition in the case of single-source procurement, competitive negotiation with a number of potential providers is desirable even where time will not permit for an advertisement to be published.

²⁶⁴ Bolton *The Law of Government Procurement in South Africa* 134.

²⁶⁵ 134.

Trepte notes that competitive negotiation would be appropriate where the market conditions are not favourable for the formal open tendering procedure or in the case of a complex project where discussions are necessary due to the technical complexity of the contract.²⁶⁶ He notes that like open tendering, competitive negotiations are still open and competitive since the tendering opportunity is advertised and open to all who are capable of performing the contract. The only difference he notes is that discussions or negotiations occur during the course of the procedure.²⁶⁷

5 Construction procurement procedures

Procurement procedures used in the construction industry are found in the CIDB Standard for Uniformity and are applicable to all contracts concluded in the industry. The CIDB is an entity bound by section 217, therefore the procurement procedures used must be fair, equitable, transparent, competitive and cost-effective.

5.1 Negotiation Procedure²⁶⁸

The CIDB prescripts indicate that this procedure is used where a tender offer is solicited from a single tenderer. The following discussion refers to the procedure in general procurement since CIDB prescripts indicate only that it is used where a single tenderer is involved.

The procedure is also referred to as single-source procurement and is used in instances where the goods or services are obtainable from only one provider.²⁶⁹ Due to the absence of competition where this procedure is used, it is open to abuse and should therefore be

²⁶⁶ Trepte *Regulating Procurement* 276-277.

²⁶⁷ 276. He states that the purpose of negotiations is to test the strengths and weaknesses of tenderers and not freely negotiate price. See Trepte *Regulating Procurement* 277.

²⁶⁸ Trepte *Regulating Procurement* 270 refers to this procedure as “direct contracting”. He submits that “direct contracting” is often confused with negotiation and implies that negotiation does not involve competition at all and that this is the result of incorrect use of terminology.

²⁶⁹ Trepte *Regulating Procurement* 283 is of the view that although this procedure usually involves only one provider, this is not always the case. He submits that “direct contracting” could be used with two or more suppliers and that this is more desirable since competition is one of the primary drivers of efficient procurement.

used in exceptional circumstances.²⁷⁰ This type of procurement is possibly also the least transparent since no advertisement would be made and no tender procedures where all tenderers are aware of the criteria that are applicable. Organs of state should therefore minimise the use of single-source procurement.²⁷¹

It has been suggested that this procedure be used where intellectual property rights are involved. This should, however, be used cautiously and where there is no other alternative.²⁷² It may also be necessary to suspend a tendering process where additional and unforeseen work needs to be done under an existing contract and cannot be separated from the main contract.²⁷³ The same applies to contracts where similar work must be performed under a contract previously awarded to the same contractor. It is noted that a time limit should be placed on such a case.²⁷⁴ Where amendments are made to existing contracts, the use of single-source procurement may be justified. However, if the nature of the amendments is such that an entirely new contract would be created, a public call for tenders may be the more desirable approach to follow.²⁷⁵ Trepte notes that an additional reason for using this procedure may be where for reasons of extreme urgency brought about by unforeseen events, the time limits permitted by the tendering procedure cannot be followed.²⁷⁶

5 2 Competitive Selection Procedure

This procedure is defined as the procurement procedure in which a contract is normally awarded to the contractor who submits the lowest financial offer or obtains the highest number of tender evaluation points.²⁷⁷ It is also the most comprehensive of the three main procedures. A distinction is made between the nominated procedure, open procedure, qualified procedure, quotation procedure, the proposal procedure using the two-envelope system, the proposal procedure using the two-stage system and the shopping procedure.

²⁷⁰ In single-source procurement, the contractor knows that he/she is the only source. There is no competitive market and therefore has no incentive to provide a competitive price. See Arrowsmith et al *Regulating Public Procurement* 537.

²⁷¹ Arrowsmith et al *Regulating Public Procurement* 537.

²⁷² Bolton *The Law of Government Procurement in South Africa* 171.

²⁷³ 172.

²⁷⁴ 172.

²⁷⁵ 172.

²⁷⁶ Trepte *Regulating Procurement* 286.

²⁷⁷ CIDB Standard for Uniformity 7.

5 2 1 Nominated Procedure

When this procedure is used, tenderers who satisfy prescribed criteria are placed on an electronic database. They are then invited to submit tender offers based on the criteria and their position on the database. Tenderers are repositioned on the database when appointed or when tenders are submitted.²⁷⁸

This procedure is similar to the general qualification list procedure where organs of state create a list of suitable contractors who satisfy certain criteria.²⁷⁹ Contractors are listed according to a maximum amount or they are graded according to the work they are able to perform.²⁸⁰ In order to ensure cost-effectiveness, contractors may be removed from the list if they fail to tender when invited to do so. Contractors may also be removed if they fail to comply with the necessary requirements for inclusion on the list. In the interest of competition and fairness, new contractors should be included on the list.

5 2 2 Open Procedure²⁸¹

In this procedure, tenderers may submit tender offers in response to an advertisement by the organisation to do so. This procedure is used for contracts with a value above R500 000. Invitations for tenders are placed in the Government Tender Bulletin and in other forms of media if necessary.²⁸²

When the open procedure is used, the procuring organ of state publicly advertises a call for tenders. Detailed specifications of the goods or services to be met by tenderers are contained in the call for tenders. The advertisement should be published in for example

²⁷⁸ CIDB Standard for Uniformity 7.

²⁷⁹ Bolton *The Law of Government Procurement in South Africa* 136. Factors considered to determine a contractor's suitability include for example the contractor's financial and technical capacity, the likelihood of strikes in the contractor's workplace which may cause a disruption in the performance of the contract. A further factor is the quality of goods or services the contractor is able to provide.

²⁸⁰ Bolton *The Law of Government Procurement in South Africa* 136.

²⁸¹ This is also known as open, public or sealed bidding or tendering. See Trepte *Regulating Procurement* 274. He refers to this procedure as the primary public procurement procedure with the most developed rules.

²⁸² CIDB Best Practice Guideline A2 24. These are price guidelines used in the industry as indicated in National Treasury Practice Note Supply Chain Management (SCM) 2 of 2005.

newspapers, trade journals and electronic media if possible.²⁸³ A closing date, time and details as to where tender documents can be obtained and submitted are provided.²⁸⁴ All tenders are opened at the same time and this is usually done in public. This is to ensure fairness and transparency in that no tenderer is given the opportunity to adjust its tender after gaining information regarding the tender of another. Therefore, as a general rule, tenders received after the submission date or late tenders are not considered and where feasible are returned unopened.²⁸⁵ Tenderers are also generally not permitted to change any information after the submission of tenders.²⁸⁶ The contract is awarded to the tenderer offering the best price or has achieved the highest points in a combination of price, quality and preference.²⁸⁷ Trepte is of the view that essentially two factors exist which justifies a departure from the open tendering procedure. Firstly, the estimated value of the contract and secondly specific circumstances which make the open tendering procedure impractical or impossible.²⁸⁸

5 2 3 Qualified Procedure

This procedure is used where a call for expressions of interest is advertised, after which only those who have expressed an interest, satisfy objective criteria and are selected to submit tender offers are invited to do so.²⁸⁹ This procedure is applied to contracts above R500 000, as in the case of the open procedure. Advertisements are placed in the

²⁸³ S De la Harpe *Procurement Law: A comparative analysis* PhD thesis University of South Africa (2009) 116 para 3.3.2 notes that wide publication of an invitation to tender enhances competition and efficiency.

²⁸⁴ In the construction industry specifically, all procurement documents must be available on the day the call for tenders is published. See CIDB Best Practice Guideline A3 "Applying the procurement prescripts of the CIDB in the Public Sector" August 2004 25.

²⁸⁵ Bolton *The Law of Government Procurement in South Africa* 134-135.

²⁸⁶ Tenderers may, however, be requested to make changes for the purpose of clarification or correction. See Trepte *Regulating Procurement* 273. In *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) 21 para 13 the court held that it may be fair to ask a tenderer to explain an ambiguity in its tender or to allow it to correct an obvious mistake. It may even be fair to ask for clarification or further details for proper evaluation in the case of a complex tender. The court further held that whatever is done must remain fair, transparent, equitable and cost-effective. In the construction industry, alterations to tender documents may not be made except to comply with instructions from the organ of state or where it is necessary to correct errors made by the tenderer. It is stated that all signatories to the tender offer shall initial all alterations made. See CIDB Standard for Uniformity 37.

²⁸⁷ Arrowsmith et al *Regulating Public Procurement* 463. S 2(1)(f) of the PPPFA provides that the contract must be awarded to the tenderer scoring the highest points unless objective criteria justify the award to another tenderer.

²⁸⁸ Trepte *Regulating Procurement* 271. CIDB Best Practice Guideline A2 25 states that in cases of urgency or emergency, institutions may dispense with an open tendering procedure and call only for quotations or any other manner which is found to be in the best interest of the state. Lack of proper planning should not be considered an urgent matter and the reasons for not using an open tendering procedure should be recorded and approved by the relevant accounting authority.

²⁸⁹ CIDB Standard for Uniformity 7.

Government Tender Bulletin and other media where applicable. Where it may not be feasible, a request for quotations may be advertised or the negotiation procedure may be made use of. The reasons for dispensing with this procedure must be approved and recorded.²⁹⁰

The qualified procedure is generally referred to as a competitive bidding or tendering procedure with pre-qualification.²⁹¹ Pre-qualification of tenderers restricts the number of tenders and this restriction is based on the qualifications of tenderers.²⁹² Trepte notes that this procedure may be used in two different ways. It may be either contract-specific or tenderer-specific. In other words, with regard to the latter, an organ of state may prefer to choose from a pool of potential tenderers to tender for the contract in order to maintain a list of potential suppliers in the event of a contract. In respect of a contract-specific procedure, the organ of state may want to identify the most suitable providers in advance in order to reduce the burden of evaluating a large number of tenders.²⁹³

5 2 4 Quotation Procedure

When this procedure is used, tender offers are solicited from no less than three potential tenderers in any manner the entity seeking to procure chooses, subject to the procedures being fair, equitable, transparent, competitive and cost-effective.²⁹⁴ Reasons for not obtaining at least three quotations should be recorded and approved by the relevant accounting authority. This procedure is used for contracts with a value above R10 000, up to R500 000. The quotations must be obtained from suppliers who are registered on a list of prospective suppliers or other possible suppliers. Suppliers who are not on the list are invited by means of an advertisement in a local newspaper or other means. They then apply for evaluation to be put on the list of prospective suppliers. The list is updated at least quarterly and suppliers should be listed per commodity. The invitation of suppliers should be done on a rotational basis in order to ensure that competition takes place.²⁹⁵

²⁹⁰ CIDB Best Practice Guideline A2 24.

²⁹¹ Trepte *Regulating Procurement* 274-275.

²⁹² 275.

²⁹³ 275.

²⁹⁴ CIDB Standard for Uniformity 7.

²⁹⁵ CIDB Best Practice Guideline A2 24.

5 2 5 Proposal procedure using the two-envelope system

In this procedure, tenderers submit technical and financial proposals in two separate envelopes. The technical proposal is opened and evaluated based on quality first, after which the financial proposal is considered only if the technical proposal was found to be acceptable.²⁹⁶ Tenders which do not achieve more than the minimum points for quality in technical proposals are returned unopened. Therefore, only those financial proposals which scored more than the minimum number of points for quality in the technical proposal are opened. This procedure is used for contracts with a value above R500 000.

This procedure is similar to the restricted tendering procedure where both technical and cost proposals are called for.²⁹⁷ Since contractors submit detailed proposals, the exact specifications normally provided by the procuring entity are in this case provided by the contractors. The proposals are evaluated and reduced to those contractors who are most likely to perform satisfactorily.²⁹⁸ This is done in order to lessen the burden on organs of state in evaluating a large number of tenders of which some may be unqualified to perform the contract.²⁹⁹ This type of procurement may also be employed where the time involved in evaluating a large number of tenders is disproportionate to the value of the goods or services being procured. There may furthermore be legislative, design, technological or safety reasons which justify the use of the restrictive tendering process.³⁰⁰ This procedure is said to be useful where changes need to be made to the contract after its award. If the chosen contractor is no longer able to deliver in terms of the changes, the organ of state may look to other contractors who qualify to perform the contract.³⁰¹ This procedure is also preferred in the procurement of consultancy services where the procuring entity is most concerned with the technical capability of the candidate.³⁰²

²⁹⁶ CIDB Standard for Uniformity 7.

²⁹⁷ Bolton *The Law of Government Procurement in South Africa* 135.

²⁹⁸ 135.

²⁹⁹ 135-136.

³⁰⁰ 136.

³⁰¹ 136.

³⁰² Trepte *Regulating Procurement* 295.

5 2 6 Proposal procedure using the two-stage system

In this procedure, non-financial proposals are called for. Tender offers are then invited from those tenderers who submit acceptable proposals based on procurement documents. Alternatively, a contract is negotiated with the tenderer scoring the highest number of evaluation points.³⁰³ This procedure is used for contracts with a value above R500 000. Two options for a method of implementation of this procedure exist.³⁰⁴

The first option is where tenderers submit technical proposals with price indications if required, on which a contract may be negotiated. The organ of state wanting to procure then evaluates each responsive proposal in terms of a method stated in the tender documents.³⁰⁵ A contract is then negotiated and awarded to the tenderer scoring the highest number of evaluation points.

The second option to this procedure is where tenderers submit technical proposals only. The organ of state invites all responsive proposals to submit tender offers after procurement documents have been issued. Tenders are evaluated in terms of the method stated in the tender documents after which the contract is awarded to the winning tenderer.

This procedure is generally employed in large and complex contracts where tenders which differ vastly on technical merit or where the procuring entity is unaware of its available options. It is useful where the organ of state is unable to set exact specifications and requires information from potential tenderers. After the technical proposals are evaluated, tenderers may revise their proposals once negotiations have been held. Tenderers who are unwilling to adjust their proposals may be rejected. Tenderers should furthermore be given sufficient time to prepare price proposals based on the amended technical proposals.³⁰⁶

³⁰³ CIDB Standard for Uniformity 7.

³⁰⁴ CIDB Standard for Uniformity 36.

³⁰⁵ Evaluation methods are discussed in more detail in chapter 5.

³⁰⁶ Trepte *Regulating Procurement* 295-296.

5 2 7 Shopping Procedure

When this procedure is used, written or verbal offers are solicited with respect to available goods obtained from three sources. The goods are purchased from the provider who offers the lowest price after it is confirmed in writing.³⁰⁷ This procedure is used for purchases up to the value of R10 000. The offers are obtained from providers found on a list of prospective suppliers.

This procedure is generally synonymous with the quotation procedure. At national and provincial government level, this procedure is permitted in terms of the National Treasury Practice Notes³⁰⁸ which state that verbal or written quotations may be obtained from at least three providers from a suppliers list where applicable. If the offers are obtained verbally, written confirmation from the selected suppliers should be received. Similar provisions are applicable at local government level,³⁰⁹ however, providers do not have to be listed on a suppliers list. Suppliers which are not listed must meet the listing criteria stated in the municipality's supply chain management policy.³¹⁰ In the interest of competition and transparency, it is required that the names of potential suppliers must be recorded and that written confirmation is obtained where quotations are acquired verbally.³¹¹

5 3 Competitive Negotiation Procedure

This procedure is used where it is not possible to provide detailed specifications for the work needed or where it is necessary to identify the characteristics of the supplies required. It is also used where there are a number of ways to satisfy procurement needs. For example, where the technical nature of the supplies or work requires the competitive negotiation procedure to be used or where the purpose of the contract is research-based.

³⁰⁷ CIDB Standard for Uniformity 7.

³⁰⁸ Practice Note SCM 8 of 2007/2008. Also see Bolton *The Law of Government Procurement in South Africa* 140.

³⁰⁹ Municipal Finance Management Act (MFMA) 56 of 2004 SCM Regulation 12(1)(b) provides for the use of written or verbal quotations for contracts with a value above R2000 up to R10 000. Also see Bolton *The Law of Government Procurement in South Africa* 149-150.

³¹⁰ MFMA SCM Regulation 16(a). Also see Bolton *The Law of Government Procurement in South Africa* 149-150.

³¹¹ MFMA SCM Regulation 16(d) and (e).

It may be used in the case of an experiment, study or development and where all the tenders received are non-responsive and to call for fresh tenders would result in the same outcome. It may further be used where extreme or emergency situations arise from human injury or death, human suffering or deprivation of human rights, serious damage to property or financial loss, livestock or animal injury, suffering or death, serious environmental damage or degradation or the interruption of essential services.³¹²

The competitive negotiation procedure reduces the number of tenderers competing for a contract by means of a series of negotiations until the remaining tenderers are invited to submit tender offers.³¹³ It is noted that this procedure should be used only where interactions with tenderers are essential to refine certain aspects of the contract or scope of work in order to achieve best value for money.³¹⁴

The procuring entity shall negotiate with prospective tenderers in at least one round of competitive negotiations based on the tenderers' rankings or the number of tender evaluation points until the remaining tenderers are invited to submit final tender offers.³¹⁵ Tenderers of all or no less than three responsive tenders which are also the highest ranked tenders shall be invited to enter competitive negotiations in each round of negotiations.³¹⁶ After each round, the organ of state shall invite tenderers to submit fresh tender offers based on the same evaluation criteria, with or without adjusted weight to the criteria. Once tenderers are invited to submit their final offers, evaluation is to take place in accordance with one of the four standard evaluation methods to be discussed in chapter five.

Tenderers shall further be informed that the competitive negotiation procedure is to be used and what the evaluation criteria will be. The criteria may not be varied after each round of negotiations. Before a round of negotiations is held, tenderers shall be informed in advance of the weight attached to each criterion.³¹⁷

³¹² CIDB Practice note 12 "The competitive negotiations procedure" February 2008 2-3.

³¹³ CIDB Practice note 12 2.

³¹⁴ CIDB Standard for Uniformity 11.

³¹⁵ CIDB Standard for Uniformity 11.

³¹⁶ CIDB Standard for Uniformity 35.

³¹⁷ CIDB Standard for Uniformity 11.

During the negotiations, the procuring organ of state is obliged to ensure the fair and equal treatment of all tenderers by not providing any information regarding requirements, criteria, guidelines, documents, clarification or other information relating to the negotiations which may give some tenderers an advantage over others.³¹⁸ The competitive negotiations procedure may take place in successive stages in order to reduce the number of tenderers to be negotiated with. The organ of state may not reveal to other participants the solutions proposed by tenderers or other confidential information communicated by a tenderer participating in the process without the tenderer's consent.

An organ of state may request for tender offers to be clarified, specified or fine-tuned provided that such clarification, specification or fine-tuning does not change the basic features of the tender process or tender information. It must not alter fundamental aspects of the tender offer, impose substantial new requirements which might negatively impact on competitiveness or affect the integrity of the tender process. Lastly, the organ of state shall close negotiations with tenderers when acceptable tenders have been identified, after which such tenderers should be notified and asked to submit final tender offers.³¹⁹

5 3 1 Restricted competitive negotiations

When restricted competitive negotiations are used, a call for expressions of interest is advertised. Tenderers, who have expressed an interest, satisfy objective criteria and are selected to submit tender offers are invited to do so. The procuring entity evaluates the offers and determines who may enter into competitive negotiations.³²⁰

This procedure resembles the two-stage tendering procedure, however, the difference lies in the possibility of additional explanations or information in the case of competitive negotiations. Trepte notes that even though minor mistakes may be corrected in the case of open tendering, more substantial mistakes which are essential to the acceptability of the

³¹⁸ CIDB Standard for Uniformity 11.

³¹⁹ CIDB Standard for Uniformity 11.

³²⁰ CIDB Standard for Uniformity 7.

tender can be resolved during discussions in the competitive negotiation procedure. An opportunity for revision of the tender may even be provided.³²¹

5 3 2 Open competitive negotiations

Tenderers submit tender offers in response to an advertisement. The procuring entity then evaluates the offers and determines who may enter into competitive negotiations.³²²

5 4 Procurement of professional services in the construction industry

Professional services are not defined in the CIDB Act or its Regulations. A profession, however, is considered to be “an occupation in which an individual uses an intellectual skill based on an established body of knowledge and practice to provide a specialised service in a defined area, exercising independent judgment in accordance with a code of ethics and in the public interest”.³²³

Professional service providers are procured by using the same procurement procedures used for construction works contracts, supply contracts and general service contracts. However, additional factors are considered when procuring professional services. The method or procedure to be used is determined by the scope of the assignment, the quality of the service, the complexity of the assignment and whether the assignment is of a routine nature or requires specialist knowledge.³²⁴ The procurement of professional services is currently under review (November 2012) by the CIDB, therefore the position as it stands and the proposed procurement of professional services will be discussed.

³²¹ Trepte *Regulating Procurement* 279. It is noted, however, that negotiation may not be used to achieve technical “levelling” which involves assisting a tenderer in adjusting its proposal to the level of another tenderer or to achieve “transfusion” which is the disclosure of technical information pertaining to one tender in order to enable improvement of another. Negotiation is further not to be used for the disclosure of tender prices so as to enable other tenderers to match or better the price given.

³²² CIDB Standard for Uniformity 7.

³²³ CIDB Practice Note 6 2.

³²⁴ CIDB Discussion Paper: The proposed CIDB system for the competitive selection of professional service providers July 2008 3
<http://www.cidb.org.za/Documents/PDM/reg_pro_sp/Competitive%20Selection%20of%20PSPs%20Comment%20and%20Response%20Detail.pdf> (accessed 20-02-2012).

5 4 1 Categorisation of projects

Professional service providers are hired to perform various projects and are procured based on the category of project they would fall under. Three types of projects are found in the construction industry. Firstly, routine projects are those of which the tasks are straightforward and require a basic level of professional and technical qualifications and experience. Secondly, specialist projects involve technically complex work which require considerable skill and expertise based on extensive experience. Lastly, complex projects are similar to specialist projects but are those of which the specifications are difficult to determine.³²⁵ It has been noted that price should play an important role in routine projects. However, in the case of specialist and complex projects, quality is more important and price therefore less significant.³²⁶

5 4 2 Procurement procedures

For the procurement of professional services, the procedures to procure construction works are used. According to the current system, procedures are chosen based on the nature of the project involved. In the suggested system, the procedures available are reduced to only the nominated, open and two-envelope procedures. The procurement of professional services will be primarily based on the quality of service and use will be made of a rotation system in order to promote competition.

5 4 2 1 Negotiation Procedure

CIDB prescripts indicate that this procedure should be used in the case of an emergency and where the service procured cannot be separated from another contract previously performed by a specific provider. It is to be used where there is only one provider able to perform the contract, where the work to be performed is identical to that in a previous contract and would not be in the interest of the public or the procuring entity to advertise a call for tenders. Lastly it should be used where the service required has a relatively low

³²⁵ CIDB Best Practice Guideline A7 "The procurement of professional services" December 2007 7.

³²⁶ CIDB Best Practice Guideline A7 9.

value.³²⁷ This specific procedure is used in the case of routine, specialist or complex projects.

5 4 2 2 Nominated Procedure

The nominated procedure should be used in the case of routine projects and where a large number of appointments will be made. Maintaining a list of qualified service providers would therefore be more cost-effective than advertising a call for tenders each time a professional service provider is needed. Where services are of a value below R200 000, a sole tenderer should be nominated. If the services required are above R200 000, a list of no less than five tenderers should be drawn up.³²⁸

5 4 2 3 Open Procedure

This procedure it is stated is suitable for most projects, however, it should be reconsidered where it would not be cost-effective and where only one provider is able to provide the service.³²⁹

5 4 2 4 Qualified Procedure

The CIDB notes that this procedure should be used where the contract involved requires skills that are not readily available, where exceptional management skills are needed, where the input of tenderers is required in order to determine specifications and price, where in the case of a large project it is necessary to divide the work amongst competitive tenderers, where the time and cost involved in evaluating an unlimited number of tenders would be disproportionate to the value of the service being procured and lastly where for practical reasons it is necessary to limit the number of tenders received. This procedure should be used in the case of specialist and complex projects.³³⁰

³²⁷ CIDB Best Practice Guideline A7 7.

³²⁸ CIDB Best Practice Guideline A7 8.

³²⁹ CIDB Best Practice Guideline A7 8.

³³⁰ CIDB Best Practice Guideline A7 8.

5 4 2 5 Quotation Procedure

The quotation procedure should be used in the case of contracts equal to and below R200 000 and is used for all types of projects.

5 4 2 6 Proposal procedure using the two-envelope system

As in the case of construction works, this procedure is used where tenderers determine the specifications of a contract. The quality of the work is considered more important than the price which is evaluated once the quality is deemed acceptable. This procedure is used in the case of specialist and complex projects only.³³¹

5 4 2 7 Proposal procedure using the two-stage system

This procedure is used where the organ of state is not aware of its options and therefore requires tenderers to determine the specifications of the contract. It is used in the case of complex projects only.³³²

5 4 3 Suggested procurement of professional service providers

In order for construction works contracts to be awarded to contractors, such contractors must be registered on the CIDB Register of Contractors in terms of chapter three of the CIDB Act. It is proposed that a Register of Professional Service Providers is created which will operate in the same way as the Register of Contractors.³³³ Qualification criteria for professional service providers are suggested in order to determine their capability to perform a contract. This will be discussed in chapter four which deals with the qualification

³³¹ CIDB Best Practice Guideline A7 8. The CIDB notes that the danger in using this procedure is that where no price indication is given by the organ of state, there is the possibility that a proposal which satisfies only the minimum requirements with an average price is unfairly compared with a high-scoring proposal with an unacceptably high price and is thus unresponsive. The CIDB therefore recommends that the project budget and approximate time limits are indicated to tenderers so that more comparable proposals are submitted.

³³² CIDB Best Practice Guideline A7 9.

³³³ CIDB Discussion Paper 6. The CIDB is empowered in terms of s 5(2)(g) of the CIDB Act to create and maintain a register of suppliers, manufacturers or service providers.

criteria which contractors must comply with when participating in public sector construction procurement.

In terms of construction procurement procedures, it is suggested that similar to construction works contracts, three categories of procedures are created for the procurement of professional services.³³⁴ In the first instance, nominated tenderers will compete on the basis of price and preference or quality, price and preference. Five providers which have been listed on an electronic database and have met the criteria advertised will be invited to tender based on their position on the database. The nominated procedure will thus be used provided that the value of the contract is less than R1.5 million. It is suggested that the two-envelope system may also be used in this case. This it is proposed be done in the case of simple or straight-forward services which involve a single discipline.³³⁵ Once tenderers are nominated, it must be confirmed that they are registered with the CIDB. After the contract has been awarded, the award must be registered on the CIDB website within 21 days of acceptance of the tender offer.³³⁶

In the second instance, pre-qualified tenderers compete on the basis of price and preference. In this case, tenderers may submit tender offers in terms of the normal open competitive selection procedure after they have been pre-qualified. In other words, contractors are pre-qualified before being placed on the database. Once they are on the list, they will be procured in terms of the open competitive selection procedure which allows an unlimited number of contractors on the list, to tender. In the case of complex projects or multidisciplinary appointments, either the open competitive selection procedure or the two-envelope procedure may be used.

In the third instance, pre-qualified tenderers compete on the basis of price, quality and preference. The competitive negotiation, qualified or two-envelope procedures may be used where specialist services which require considerable expertise and skills are procured or where the scope of work is not properly defined or where multidisciplinary appointments are made.

³³⁴ CIDB Discussion Paper 5 Table 4.

³³⁵ It is noted that organs of state will not be obliged to use the electronic rotating list of professional service providers, but are at the same time not allowed to create their own system parallel to that of the CIDB. See CIDB Discussion Paper 10 para 8.2.

³³⁶ CIDB Discussion Paper 11 Table 9.

5.5 Procurement relating to disposals in the construction industry

Unlike construction works contracts, no specific methods are allocated for the disposal of assets in the construction industry. It is, however, indicated in CIDB prescripts that disposals should be done in accordance with the PFMA. It is noted that assets may be disposed of by means of a transfer to another institution in terms of section 42 of the PFMA, transfer to another institution may also be done at market related value and assets may be transferred free of charge.³³⁷ When transferring assets free of charge, it must be borne in mind that assets may not be transferred to a sub-office or a school without the approval of the Head of Office of the sub-office or school. The selling of assets may also be done by way of competitive tendering.³³⁸

It is further noted that the chief financial officer must establish disposal committees when the need arises which shall consist of at least three officials, one of whom must be a supply chain management officer.³³⁹ The SCM unit of an organ of state must authorise the officials to dispose of assets using a procurement procedure provided for in the organ of state's SCM Policy after the feasibility of the transfer has been considered. If transferring an asset is not feasible, recycling or re-use of the asset must be considered as well as disposal by means of burning or demolition.³⁴⁰

The reasons for adopting a disposal method or procedure must be recorded and submitted to the chief financial officer for acceptance and auditing. All immovable assets to be sold or let shall be done at market related value.³⁴¹

Watermeyer notes that disposal contracts may be awarded by using only the negotiation, open and qualified procedures and public auction.³⁴² However, CIDB prescripts refer to disposal of assets by means of transfer, recycling or re-use only.

³³⁷ CIDB Best Practice Guideline A2 24.

³³⁸ CIDB Best Practice Guideline A2 58 para 4.1.5.

³³⁹ CIDB Best Practice Guideline A2 67 para E.1.

³⁴⁰ CIDB Best Practice Guideline A2 67-68 para E.2.

³⁴¹ CIDB Best Practice Guideline A2 68 para E.3 and E.5.

³⁴² Watermeyer (2004) *IMIESA* 16.

5 6 Framework Agreements

Framework agreements are those in terms of which a procuring entity obtains goods, services or construction works from contractors within a broad scope of work, as and when required by the procuring entity over a set term without necessarily committing to a definite quantum of work.³⁴³ The procuring entity normally concludes a contract with a number of contractors after the completion of a competitive selection procedure. Near the end of the completion of the contract, a call for tenders is advertised for the next term.

CIDB prescripts note that an essential element of a framework agreement is that the contract should be concluded with contractors who have the resources and capability to perform in terms of the contract. The remuneration of contractors must further be included in the agreement as well as the extent and location of the work. It is indicated that competition must take place where there is no justifiable reason for issuing a batch or task or package order to a specific contractor. All contractors must then be invited to submit quotations to execute the batch or task or package order.³⁴⁴ Contractors may proceed to execute a batch or task or package order only when given an official instruction to do so and cannot be expected to perform after the date of completion stated in the framework agreement. Any work which may be required by the procuring entity and which is outside the scope of work of the framework agreement must be procured in terms of a competitive procedure. Any work commenced with before the date and which may continue afterwards is permitted. It is noted that framework agreements are generally concluded for a period of three to five years.³⁴⁵

Where multiple framework agreements have been entered into and the agreements provide all details regarding the goods, services or construction works, the procuring entity may choose the contractor who in its opinion will perform the contract most satisfactorily to do so. Factors such as the geographic location of the contractor, prior work performed and the expertise of the contractor may be taken into account. The selection may also be made based on a rotation basis.³⁴⁶

³⁴³ CIDB Practice note 15 "Framework agreements" August 2008 2.

³⁴⁴ CIDB Practice note 15 2.

³⁴⁵ CIDB Practice note 15 3.

³⁴⁶ CIDB Practice note 15 4.

6 Constitutional compliance of construction procurement procedures

As noted, section 217(1) of the Constitution requires that when organs of state contract for goods or services, they should do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.³⁴⁷ When using the procedures referred to in this chapter, organs of state are engaging in procurement activities and are therefore obliged to conduct those procedures in accordance with section 217. In what follows, the constitutional compliance test will be done in terms of the categorisation of the procedures. Therefore, the compliance of the negotiation procedure will be discussed first, followed by the competitive selection procedure and lastly the competitive negotiation procedure.

6.1 Negotiation Procedure

As noted in chapter two,³⁴⁸ fairness in section 217 relates to the relationship between the procuring entity and the tenderers as well as the tenderers in relation to each other. It is required that tenderers have sufficient access to the procurement process, that the tendering opportunity should be publicly advertised and that sufficient participation is provided for. In the case of the negotiation procedure or single-source procurement, these requirements are not met as the organ of state approaches a single potential contractor. The tender is not advertised and no competition is present. It is therefore an inherently unfair procedure. However, section 217 refers to a *system* which must be complied with. Therefore, all five principles must be present in a specific procurement process. It has been noted that although all five principles must be present, they may not all be present at the same time and may not carry the same weight in a specific situation. The principles may also place restrictions on each other.³⁴⁹ There may be circumstances where the goods or services to be provided can be obtained from one supplier only in which case the use of the negotiation procedure would be justified. Advertising a call for tenders in such a

³⁴⁷ See chapter 2 para 6.

³⁴⁸ See para 6.1.

³⁴⁹ Bolton *The Law of Government Procurement in South Africa* 56 where it is noted that all the principles need not always be complied with at the same time but must be balanced to ensure overall compliance with section 217(1).

situation would not be cost-effective when the time and cost involved in a tender process is considered.³⁵⁰

When using the negotiation procedure, there is limited scope for equity to be fully complied with. Where one supplier is available or only one is for justifiable reasons approached, no pool of tenderers is available from which to compare and choose the highest scoring Broad-Based Black Economic Empowerment (B-BBEE) rating.³⁵¹ A transparent process is one which is “open” where all criteria or rules are publicly available in order to ensure accountability on the part of the organ of state. Since a single supplier is involved in the process, a public call for tenders is not advertised. The procedure is thus less open and competition is absent. It would appear that cost-effectiveness is the principle best complied with where single-source procurement is used. As noted, advertising a call for tenders where one supplier is available would not be cost-effective. Cost-effectiveness constitutes value for money which in turn involves knowledge of the goods or services, the experience and track record of the supplier, availability of the goods or services and the cost involved which may justify the use of the negotiation procedure where there is one supplier from whom the goods or services can be obtained.³⁵² The use of the negotiation procedure may further be justified in the case of urgency or an emergency.³⁵³

³⁵⁰ See *CEO, SA Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2011 3 All SA 233 (SCA) where an organ of state (the South African Social Security Agency or SASSA) entered into a contract without advertising a call for tenders. It was alleged by the unsuccessful party that a contract was entered into without following a process in accordance with s 217 of the Constitution or the Public Finance Management Act (PFMA) 1 of 1999 and its Regulations. See para 2. In the court a quo, the application to have the award set aside was granted. On appeal the court referred to PFMA Regulation 16A6.4 which provides for a deviation from a competitive tendering process where it would be impractical, provided that reasons are given for doing so and consent is obtained from the relevant accounting authority. The court held that in light of cost-effectiveness and the fact that no other entity was able to provide the same services, the departure from a competitive tendering process was justified. See paras 25-27. The court further held that the requirement of recording the reasons for a deviation in Regulation 16A6.4 was not mandatory or material or introduced in the public interest. Therefore, on considerations of public interest, pragmatism and practicality the appeal against setting the award of the contract aside was upheld. See paras 28-30 of the judgment.

³⁵¹ Tenderers' B-BBEE rating shortly refers to the score a tenderer is given based on its compliance with B-BBEE in its workplace. This will be discussed in more detail in chapter 6.

³⁵² See chapter 2 para 6 5.

³⁵³ Bolton *The Law of Government Procurement in South Africa* 168 para 4.3.4.2 where it is noted which circumstances may amount to emergencies in order to justify dispensing with tendering procedures. See also CIDB Best Practice Guideline A2 25.

6 2 Competitive Selection Procedure

All the procedures which are considered to be competitive selection procedures will be discussed as a whole under the headings found in section 217(1) of the Constitution. Therefore, the constitutional compliance of the competitive selection procedure will be analysed based on the extent to which it complies with fairness, equity, transparency, competition and cost-effectiveness.

6 2 1 Fairness

The competitive selection or tendering procedure is the one which gives best effect to section 217. All potential tenderers are given an equal opportunity to compete as the tendering opportunity is publicly advertised.³⁵⁴ Tenderers are treated fairly in that they are evaluated based on the published criteria which all are deemed to have met and provision is made for the return of tenders which do not comply with the criteria published in the call for tenders.³⁵⁵ The court held in *JFE Sapela Electronics v Chairperson: Standing Tender Committee*³⁵⁶ that to allow one tender to deviate from the tender specifications or criteria would be procedurally unfair as it affects the competitive position of tenderers.³⁵⁷

Clarification or site meetings are held where necessary,³⁵⁸ thereby promoting fairness in the treatment of tenderers in relation to each other.³⁵⁹ As is customary practice, a closing

³⁵⁴ Regulation 24 of the Construction Industry Development Regulations provides that when an organ of state publishes a call for expressions of interest or a call for tenders, the invitation should be placed on the CIDB website and that the solicitation must be in accordance with the PFMA Regulations, MFMA Regulations and the Standard for Uniformity. Regulation 16A6.3(c) of the PFMA Regulations provides that tenders must be advertised in at least the Government Tender Bulletin. MFMA SCM Regulation 18(a) provides that in the case of formal, written price quotations, invitations for these must be advertised on the relevant municipality's website and the official notice board of such municipality or municipal entity.

³⁵⁵ See CIDB Best Practice Guideline A1 "The procurement cycle" December 2007 7 Table 5 and 11.

³⁵⁶ 2004 3 All SA 175 (C) 728.

³⁵⁷ When a tenderer alleged to have been treated unfairly was disqualified due to unsigned tender documents, the court in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 17 held that our law permits condonation of non-compliance with peremptory requirements where it would be in the public interest and if the condonation was granted by the body for whose benefit the specific provision was enacted. The court held that in this case, condonation of the tenderer's failure to sign the documents would be in the public interest and would facilitate competition. The condonation would also have promoted fairness, competition and cost-effectiveness as found in s 217(1) of the Constitution.

³⁵⁸ CIDB Best Practice Guideline A1 12. The CIDB Standard for Uniformity 37 also provides for a clarification meeting where tenderers may familiarise themselves with aspects of the tender and the work to be

date and time is provided for the submission of tenders in order to avoid unfair advantage to a tenderer(s).³⁶⁰ In *Azola Recruitment Solutions v National Energy Regulator of South Africa*³⁶¹ a tender was submitted after the published submission time, was evaluated, found to be the most suitable tender and awarded to the tenderer. An unsuccessful tenderer challenged the award alleging that the contract was inconsistent with section 217(1). The court held that timeous submission of tenders was not only common practice and required in the interest of fairness and equity but is also in the public interest in that no tenderer should be given unfair advantage in allowing late submission.³⁶² It was argued in favour of the unsuccessful party that the provisions surrounding the submission of tenders were contractual provisions and should be upheld on that basis. The court held that even if the provisions in the tender documents constituted contractual terms, they would be subject to the principles of administrative justice and the public duty the organ of state had towards tenderers which included the duty to act lawfully, procedurally and fairly.³⁶³ The court held further that when an organ of state stipulates a date and time for the submission of tenders, it presents to the public that it will act in accordance with the published information.³⁶⁴ The court therefore found that the submission date and time was in accordance with the requirements of fairness and equity and that the organ of state was obliged to enforce the provisions. The decision in the court a quo to revoke the award was therefore not reviewable.³⁶⁵

Tenderers are usually not permitted to make any changes or alterations to their tenders in order to maintain a fair process. In keeping with this, alterations may not be made to tender documents except to comply with the instructions of the organ of state or to correct errors made by tenderers in which case all parties involved in the tender offer must initial such changes.³⁶⁶ Fairness is further promoted when tenders are opened in public or in the

performed and may pose questions. MFMA SCM Regulation 20(c) provides that local government procurement policies must provide for site meetings or briefing sessions if applicable.

³⁵⁹ See chapter 2 para 6 1 regarding substantive fairness which writers argue cannot be separated from procedural fairness in a public procurement context and involves assisting tenderers in having sufficient access to the tender process by arranging briefing sessions.

³⁶⁰ CIDB Best Practice Guideline A1 11 where provision is made for the return of tenders received after the submission date and time.

³⁶¹ (42023/09) [2010] ZAGPPHC 144 (8 October 2010).

³⁶² Para 14.

³⁶³ Para 16.

³⁶⁴ Para 19.

³⁶⁵ Para 22.

³⁶⁶ CIDB Standard for Uniformity 37.

presence of at least two officials.³⁶⁷ In using a procedure such as the qualified procedure where a limited number of tenderers are chosen to tender and others are excluded, other principles such as cost-effectiveness may restrict but justify the use of such a procedure. This is done in order to decrease the administrative burden of having to evaluate an unlimited number of tenders and attain best value for money by evaluating tenders with comparable or competitive prices. Fairness is further promoted when in procedures such as the nominated, quotation and proposal procedures a list of suppliers is made and potential contractors are chosen from the list on a rotational basis. Therefore, theoretically all tenderers have equal access to the procurement process.

In the case of framework agreements, fairness is promoted where performance is required from contractors based on the scope of work stated in the agreement. Any work outside the scope of work must be procured in terms of a competitive procedure in order to ensure that all potential tenderers are given a fair opportunity to conclude a framework agreement.

6 2 2 Equity

In order to comply with equity requirements, the criteria set for tenderers would have to provide for this. The CIDB is bound by the 2011 PPPFA Regulations,³⁶⁸ and must accordingly apply the point system in its procurement policies. CIDB statistics have shown that in January 2012, 80-90% of grades two, three and four public sector contract awards were made to black-owned contractors.³⁶⁹ From this it appears that preferential procurement policies are implemented in construction procurement procedures.³⁷⁰

³⁶⁷ CIDB Best Practice Guideline A1 12.

³⁶⁸ Regulation 2(1) provides that the Regulations are applicable to all public entities listed in Schedules 2, 3A, 3B, 3C, 3D and municipal entities.

³⁶⁹ CIDB "Quarterly Monitor: The economics of construction in South Africa" (2012) *CIDB* 38 < http://www.cidb.org.za/Documents/KC/cidb_Publications/Ind_Reps_Other/ind_reps_Quarterly_Monitor_January_2012.pdf> (accessed 02-02-2012). Further indications are that in public and private sector contract awards, 70% of the turnover of grade 2 to 4 contractor companies was generated by black-owned companies and 50% in grade 5 to 8. The grading designations of contractors will be discussed in chapter 4.

³⁷⁰ Case law has also shown that preferential procurement is in fact applied in the construction industry. See for example *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* (230/09) [2009] ZAECHC 7 (17 March 2009); *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 1 SA 327 (CC); *Simunye Developers CC v Lovedale Public FET College* (3059/2010) [2010] ZAECHC 121 (9 December 2010); *Scribante Construction (Pty) Ltd v Coega Development Corporation (Pty) Ltd* (2478/06) [2006] ZAECHC 117 (20 July 2006); *Ekageng Construction (Pty) Ltd Member of the Executive Council for Public Works and Roads Limpopo Province* (26791/05) [2005] ZAGPHC 309 (19 August 2005).

Exemption has, however, been granted to institutions listed in Schedules 2, 3B and 3D to the PFMA from some of the 2011 PPPFA Regulations until 7 December 2012.³⁷¹ The CIDB Act and its Regulations, as well as the Standard for Uniformity are still mandatory where construction procurement involving these entities is concerned. However, the Standard for Uniformity will be interpreted accordingly. The exempted institutions will therefore continue to implement their own preferential procurement policies until the date indicated. Preferential procurement in the construction industry will be examined more comprehensively in chapter six.

6 2 3 Transparency

In the interest of transparency, tender offers are opened in public or in the presence of no less than two officials.³⁷² Transparency involves *inter alia* sufficient access to all tender information³⁷³ and sufficient preparation time for tenderers. The CIDB Standard for Uniformity provides that tenders for engineering and construction works contracts shall be advertised on the CIDB website at least ten days before the submission date for tenders. PFMA SCM Regulation 16A6.3(c) provides that a call for tenders must be published at least 21 days prior to the submission date, except in the case of an emergency when a shorter period of time may be justified. MFMA SCM Regulation 22(1)(a) in turn provides

³⁷¹ These institutions have been exempted from Regulations 2(2), 3-8, 10, 11(1)-(9), 11(11)-(13) and 12-13. See Government Notice R1027 GG 34832 of 07-12-2011.

³⁷² CIDB Best Practice Guideline A1 12.

³⁷³ In the context of access to tender information, the court in *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 1 SA 438 (SCA) para 9 held that the principles in s 217 are present throughout the tender procedure. Therefore, access to the information had to be provided in order to enable the aggrieved tenderer to formulate grounds of appeal against the procuring body and in effect comply with s 217. When an organ of state refused to furnish an unsuccessful tenderer with information regarding the tender, the court in *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* 4 All SA 168 (NC) para 24 held that the organ of state's conduct "was subversive of the basic and fundamental principles of fairness, transparency and accountability which should underpin the actions of all organs of state". The court in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) established a tenderer's right of access to tender information based on s 33 of the Constitution which protects the right to just administrative action, including the right to procedural fairness. The tender was for the printing and publishing of a magazine and the court held that the applicant (also the unsuccessful tenderer), having printed and published the magazine for 16 years and wished to do so for another five years, had an obvious interest in the outcome of the tender process. The applicant's rights were thus affected in the refusal to provide information and therefore entitled to reasons for the tender award to the successful party. See paras 16.1-16.2. In *M & G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd* 2011 5 SA 163 (GSJ) the court granted access to tender information requested by the media. However, in *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 3 All SA 549 (SCA) an appeal against the decision of the court a quo to grant a review application was upheld despite an administrative error on the part of the procuring organ of state. Incorrect information was given to tenderers attending a compulsory site meeting prior to tendering which led to an unqualified tenderer winning the tender. The court held at para 21 that "[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction".

that a call for tenders must be publicly advertised in a local newspaper, the website of the municipality or municipal entity or any other appropriate means, no less than 30 days before the submission date in the case of contracts of a value more than R10 million or in the case of a long term contract. In any other situation, the advertisement must be published 14 days prior to the submission date. As in the case of provincial government, a shorter time period may be allowed when urgent or in the case of an emergency.³⁷⁴

CIDB prescripts ensure transparency in tender documents which provide for tenderers to submit sufficient information to enable the organ of state to make a well-informed decision. The criteria to be met by tenderers must be clear and unambiguous, all rights and liabilities of the parties must be clearly identified, the nature, quality and quantity of goods or services must be indicated and the terms and conditions of the contract to be concluded must be provided.³⁷⁵

Transparency requires that the information published in a call for tenders should be correctly applied. According to CIDB prescripts, tenders are evaluated in accordance with the evaluation method indicated for the particular procurement.³⁷⁶ In *Telkom SA Ltd v Merid Trading (Pty) Ltd*³⁷⁷ the applicant organ of state sought to have the court set aside its own decision to award a tender to the six respondents. It was submitted that the validity period for tenders stipulated in the tender documents was not adhered to and also not properly extended.³⁷⁸ The tender awarded to the respondents was set aside by the court on the basis that it did not comply with section 217 of the Constitution. The court held that after the validity period had expired, and no extension period was agreed upon, the organ of state was no longer free to negotiate with the tenderers. The process was therefore no longer transparent, equitable or competitive.³⁷⁹ The CIDB Standard for Uniformity provides that a tender must be considered valid at any time during the validity period stated in the

³⁷⁴ The court in *Menzies Aviation South Africa (Pty) Ltd v SAA (Pty) Ltd* (08/22988) [2009] ZAGPJHC 65 (4 December 2009) held that the nine days given as the time for tenderers to prepare and submit a tender was contrary to s 217. It further held at para 10 that SAA's refusal to provide further information as well as the request to extend the time period denied the applicant meaningful participation in the tender process.

³⁷⁵ CIDB Best Practice Guideline C1 "Preparing procurement documents" September 2005 1.

³⁷⁶ CIDB Best Practice Guideline A1 13 Table 6 para 4.4.

³⁷⁷ (27974/2010, 25945/2010) [2011] ZAGPPHC 1 (7 January 2011).

³⁷⁸ See 10 para 4.

³⁷⁹ See 18 para 14.

tender documents. An extension of the validity period may be granted if requested by the organ of state, with or without conditions attached to the extension.³⁸⁰

It would appear that transparency is further complied with in the CIDB prescripts which provide for internal controls throughout the procurement process.³⁸¹ In terms of the relationship between the CIDB and its procurement official, constant approval is required for every activity in the procurement process. The CIDB is required to respond to tenderer requests for any clarification of the specific tender, it is obliged to conduct site or clarification meetings when necessary and issue those who attend with the minutes of the meetings.³⁸²

With regard to the shopping procedure, however, transparency may not be entirely complied with. It is an informal procedure and does not require specific criteria or specifications to be published. However, because it is a procedure used to procure goods or services of a low value, no formal rules are necessary and a time-consuming tender process would therefore not be cost-effective.

In spite of the rules published by the CIDB to ensure transparency in construction procurement procedures, corruption is still prevalent in the industry. The CIDB has therefore introduced the international Construction Sector Transparency Initiative (COST) to the South African construction industry to enhance transparency and accountability in public sector construction contracts.³⁸³ The initiative includes procedures which improve the disclosure of information and provides for verification of information received from tenderers.³⁸⁴ The principles of the Initiative include social and economic objectives,

³⁸⁰ See 38 para F.2.16.1-2.

³⁸¹ CIDB Best Practice Guideline A1.

³⁸² CIDB Best Practice Guideline A1 7.

³⁸³ See CIDB Media statement "Establishment of a Working Committee to design a COST programme for the South African Construction Industry" 23 May 2011 <http://www.cidb.org.za/Documents/Corp/News/corp_news_MediaStatement_CoST_23May2011.pdf> (accessed 20-02-2012). The Initiative currently operates in seven countries and is funded by the Department for International Development (DFID) and the World Bank.

³⁸⁴ The Initiative has three key stages in which it is implemented. Firstly, information regarding a construction contract is disclosed to the public by the procuring entity. The information includes *inter alia* the project purpose, location, the beneficiaries, general specifications, contract price and any significant changes that may have been made to the contract or contract price with reasons for the change. Secondly, an Assurance Team is appointed to assess the reliability of the information disclosed and thirdly public reporting takes place where the findings of the team are published. See <www.constructiontransparency.org/HowtoJoin/> (accessed 20-02-2012). These stages were also implemented in the South African pilot project. See

accountability of the government, investor confidence and value for money.³⁸⁵ The objectives of the Initiative are therefore aligned with those of public sector procurement in South Africa.³⁸⁶

6 2 4 Competition

The competitive selection procedures provide for a range of options available to the CIDB to ensure that sufficient competition takes place. Procedures such as the nominated, qualified, proposal and shopping procedures do, however, decrease competition in that only a limited number of tenderers may participate. As noted, some principles may restrict or limit others and may justify the use of procedures which limit competition in the interest of cost-effectiveness. Provision is made in the CIDB prescripts for an estimation of the financial value of the proposed procurement and a corresponding procurement procedure to be employed in order to ensure cost-effectiveness.³⁸⁷ Competition is further promoted where contractors for purposes of framework agreements are selected on a competitive basis. Where use is made of a rotation system, each tenderer should be given an opportunity to perform in terms of the contract.

6 2 5 Cost-effectiveness

Cost-effectiveness is intertwined with competition and requires that the best procurement procedure be used in order to attain value for money. Provision is made in the construction industry for procedures to be employed in the case of low value contracts or where the time and cost involved in a call for tenders would not be cost-effective.³⁸⁸ At the same time, provision is also made for procedures where quality is an important factor,³⁸⁹ where

<http://www.cidb.org.za/Documents/KC/cidb_Publications/Presentations/19May2011_CoSTSummit_ResultsPilotProject_GeorgeOfori.pdf> (accessed 20-02-2012).

³⁸⁵ See <www.constructiontransparency.org/AboutCoST/Principles/> (accessed 20-02-2012).

³⁸⁶ For a detailed discussion on corruption in public procurement see S Williams & G Quinot "Public Procurement and Corruption: The South African response" (2007) 124(2) *SALJ* 339-363; "To debar or not to debar: when to endorse a contractor on the register for tender defaulters" (2008) 125(2) *SALJ* 248-258.

³⁸⁷ CIDB Best Practice Guideline A1 4.

³⁸⁸ See for example the shopping or qualified procedures where a more informal procedure is followed but is still competitive. CIDB Standard for Uniformity 7. See also CIDB Best Practice Guideline A2 9 where a table is provided, indicating the standard procedures used for specific types of contracts. In the case of a low value supply contract for readily available supplies, for example, the shopping procedure is to be used.

³⁸⁹ For example the proposal procedures involving two stages in the procurement process.

information is required from potential tenderers to enable the organ of state to make a good decision and where the organ of state is already aware of competent tenderers.³⁹⁰

As noted, cost-effectiveness involves two factors namely, the capability of tenderers to perform the contract, and the submission of tax clearance certificates by tenderers.³⁹¹ The court in *Mpumalanga Steam and Boiler Works CC v Minister of Public Works*³⁹² set a tender aside which was awarded to a tenderer who knowingly submitted an invalid tax clearance certificate. The court referred to the duty on organs of state to act when suspecting that a tenderer may have committed fraud and held that the fact that the procurement committee omitted to act in this regard was contrary to a constitutional order which demands transparency, accountability and effective service delivery.³⁹³ In evaluating quality which is linked to cost-effectiveness, a procuring body in the construction industry may consider a tenderer's qualifications and demonstrated experience which relates to a tenderer's capability to perform in terms of the contract.³⁹⁴ A further factor to be considered is that the tenderer is not insolvent, in receivership, bankrupt or is being wound up or has its financial affairs administered by a court or judicial officer or has suspended its business activities.³⁹⁵

6.3 Competitive Negotiation Procedure

As discussed previously,³⁹⁶ the competitive negotiation procedure is a tendering procedure which allows for competition by making use of tendering and at the same time makes provision for negotiation with tenderers in order to ensure value for money. The procedure is used only where interaction with the tenderers is necessary to refine aspects of the

³⁹⁰ See the qualified and nominated procedures.

³⁹¹ See chapter 2 para 6.5. Regulation 14 of the 2011 PPPFA Regulations provides that "[n]o tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order". The 2001 Regulations, however, expressly provided for a tax clearance certificate to be submitted by a tenderer indicating that its tax matters are in order, for a contract to be awarded to it. See Regulation 16 of the 2001 Regulations.

³⁹² (2010) 2010 (1) SA 128 (30 September 2010) para 31.

³⁹³ Paras 32-33. See also *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 1 SA 327 (CC) where the Constitutional Court held that an organ of state has a duty to act against tenderers who have obtained preference fraudulently.

³⁹⁴ CIDB Standard for Uniformity 12 para 4.3.3 (i).

³⁹⁵ CIDB Standard for Uniformity 44 para F.3.13 (d).

³⁹⁶ See para 5.3 of this chapter.

contract to be performed.³⁹⁷ The point of departure in both competitive negotiation procedures would be to inform tenderers that the procedure is to be used. This is provided for in CIDB prescripts.³⁹⁸ Negotiation is generally not permitted in public procurement processes as it has the potential to be unfair, unequal and may not be transparent. Therefore, it is important that tenderers be informed of the possibility or likelihood of negotiations in the tender process. It was noted in *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals*³⁹⁹ that post-tender negotiations are acceptable in a tender process. The court held that there was no evidence which showed that any tenderer had been treated favourably and thus had an unfair advantage over others, or that any tenderer had information it was not entitled to have. It was found that the organ of state had been open about the fact that negotiations would be held throughout the tender process.⁴⁰⁰ The court further held that the purpose of section 217 of the Constitution was, subject to the application of affirmative action, to ensure that the government attains best value for money.

CIDB prescripts provide that tenderers should be informed of all evaluation criteria as well as the weight attached to each criterion. It is indicated that the criteria shall not be varied with each round of negotiations and that should the weighting of the criteria change, all tenderers should be informed.⁴⁰¹ This ensures fair treatment of tenderers in relation to each other in that no tenderer is evaluated in terms of different criteria. Fairness is further promoted by the obligation placed on the organ of state not to reveal any requirements, criteria, guidelines, documents, clarification or other information relating to the negotiations which may give a tenderer an unfair advantage.⁴⁰² Any confidential information provided by a tenderer may also not be disclosed without the consent of the tenderer.⁴⁰³ As in the case of the usual tender procedure without negotiation, provision is made for the return of tenders which are received late or after the submission date and time, or are submitted in

³⁹⁷ CIDB Standard for Uniformity 11.

³⁹⁸ CIDB Standard for Uniformity 11 para 4.2.2.3.

³⁹⁹ (11445/2010) [2011] ZAKZDHC 22 (30 March 2011) para 104.

⁴⁰⁰ The court reiterated in para 109 that because the tenderer was aware at the time of submitting its tender that negotiations would be held, the process did not depart from one which is required to be fair, equitable, transparent, competitive and cost-effective as envisaged in s 217(1) of the Constitution.

⁴⁰¹ CIDB Standard for Uniformity 11 para 4.2.2.3.

⁴⁰² This provision may possibly be challenged based on a tenderer's right of access to information in public procurement processes that has been confirmed and upheld by our courts.

⁴⁰³ CIDB Standard for Uniformity 11 paras 4.2.2.2 (a) and (c). See *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) where information required by a tenderer was considered to be confidential. The court allowed access to the information and ordered that only the legal representatives of the party requesting the information would have access to it. The representatives were barred from disclosing any confidential information except when consulting with counsel or an independent expert. See para 29.

a different manner to that indicated in the tender documents or those which have been withdrawn correctly.⁴⁰⁴ This ensures that all tenderers are treated fairly in relation to each other. As is the general practice, tenderers are not permitted to alter or amend any part of their tenders in order for the process to remain fair.⁴⁰⁵ However, in the construction industry, the procuring organ of state may request that a tender be “clarified, specified and fine-tuned” provided that no changes are made to the basic features of the tender process or any material changes are made to the tender offer, or that new criteria are introduced which would affect competition in the process.⁴⁰⁶

The fact that all evaluation criteria and weightings attached to the criteria must be advertised and that tenderers must be made aware of the fact that competitive negotiations will be used in the tender process ensures that the process is transparent. This is further complied with when tender offers are opened immediately after the closing time for submissions and is done in the presence of tenderers’ agents.⁴⁰⁷ The names of those who tendered are announced and recorded and are made available to interested parties who request the information.⁴⁰⁸ The organ of state is required to negotiate with qualified and responsive tenderers only and is expected to apply the evaluation criteria advertised in the tender documents which further promotes transparency.⁴⁰⁹

As in the case of competitive selection, the competitive negotiation procedure allows for competition to take place when a call for expressions of interest is advertised in the case of restricted competitive negotiations or a call for tenders in the case of open competitive negotiations. The difference between the two procedures is that competition is somewhat limited when restricted competitive negotiations are held. Either all responsive tenders or no less than three tenderers which achieved the highest points in the pre-qualification

⁴⁰⁴ Tenders which are not submitted in the form indicated in the tender documents may be considered as non-responsive. See CIDB Practice note 12 4. A tender offer may be withdrawn only with written notice to the organ of state’s agent before the closing time for tenders. See CIDB Standard for Uniformity 38 para F.2.16.3.

⁴⁰⁵ See chapter 2 para 6 1.

⁴⁰⁶ CIDB Standard for Uniformity 11 para 4.2.2.2 (d).

⁴⁰⁷ CIDB Practice note 12 4.

⁴⁰⁸ CIDB Practice note 12 4.

⁴⁰⁹ CIDB Standard for Uniformity 10-11 para 4.2.2.2. It is stated in the CIDB Standard for Uniformity 41 para F.3.8.2 that a responsive tender is one which complies with all the terms, conditions and specifications found in the tender documents without material deviation or qualification. A material deviation or qualification is in turn considered to be one which would detrimentally affect the scope, quality or performance of the works, services or supplies to be provided. It is also considered to be one which would significantly change the risks and responsibilities of both the organ of state and the tenderer or one which might affect the competitive position of other tenderers.

stage engage in competitive negotiations. This is the case after each round of negotiations.⁴¹⁰

It would appear that the competitive negotiation procedure is used mainly in the interest of cost-effectiveness. It is noted that the procedure is to be used only when it is necessary for the organ of state to interact with tenderers to refine aspects of the contract to be performed.⁴¹¹ Pre-qualification is normally done when the quality of the product or service to be provided is of great importance in order to ensure value for money. The CIDB Standard for Uniformity indicates that where exceptional quality is required, the qualified procedure must be used.⁴¹² Where negotiation or refining of the contract is required, it would be appropriate for the restricted competitive negotiation procedure to be employed which would serve both purposes well. It is further indicated that quality in a tender shall form an integral part of the tender offer and shall enable the most economically advantageous offer possible.⁴¹³ Therefore, the competitive negotiation procedure ensures cost-effectiveness in the procurement process.

6 4 Procurement of professional services

6 4 1 Fairness

As in the case of competitive selection of construction works contracts, tenders will be publicly advertised by using the i-Tender service on the CIDB website in all three categories of procurement procedures for professional service providers.⁴¹⁴ Tenderers will be required to apply for admission to the Register of Professional Service Providers and new entries will be placed in the sequence in which applications are received.⁴¹⁵ Only

⁴¹⁰ CIDB Standard for Uniformity 35 para F.1.6.2.2.

⁴¹¹ CIDB Standard for Uniformity 11.

⁴¹² See 11 para 4.3.1 (c).

⁴¹³ CIDB Standard for Uniformity 12 para 4.3.2 (c).

⁴¹⁴ The i-Tender service is an electronic database on the CIDB website (www.cidb.org.za) where a register of contractors and register of projects as required by the CIDB Act are kept. Contractor information such as grading designations and contract awards can be found on the database. Tenders are advertised on the database and tenderers are able to track their contractor applications in order to establish whether they have been admitted to the Register of Contractors. Once they have been placed on the register, they and the public have access to tenderer track records. Organs of state may also register on i-Tender to have access to contractor information and advertise tender opportunities and awards.

⁴¹⁵ CIDB Discussion Paper 12 para 8.5.

those tenderers who meet the minimum pre-qualification criteria will be evaluated which will ensure that tenderers are treated fairly in relation to one another. Furthermore, organs of state must evaluate tenders which do not exceed the maximum value for the contract advertised unless the exceeded amount is considered reasonable. Therefore, only comparable offers will be accepted and tenderers will thus be treated fairly.⁴¹⁶ The procuring entity must confirm that the tenderers are in fact registered with the CIDB which will ensure that only capable tenderers are allowed to submit offers and will therefore promote fairness in the process. When a tenderer's information changes, such as grading designations are increased or the tenderer's B-BBEE rating is increased, the tenderer will be required to apply for an amendment of its particulars to be made on the register and to provide the necessary proof or documentation. An amendment may be permitted after the CIDB has received and confirmed the correctness of the documents.⁴¹⁷

It would appear that much emphasis is placed on the capability of professional service providers in order to ensure that the contract is performed properly. Continuous confirmation of tenderers' particulars will promote fair treatment of tenderers in relation to each other and fairness between the organ of state and tenderers. However, the process may result in unfair treatment when in the nominated procedure tenderers will automatically be placed in the five highest ranking tenderers and may not be able to tender at that specific time. Tenderers, who are not able to compete for the contract, will be placed at the bottom of the list without having had the opportunity to partake. It is indicated that those who decline a contract, those who were unsuccessful and those who win tenders will be moved to the bottom of the list.⁴¹⁸ Tenderers who are moved to the bottom of the list due to an inability to tender may, however, be justified in terms of cost-effectiveness. In order to avoid unfair treatment, the procuring entity may have to determine when a tenderer is not able to tender and when it simply chooses not to which may become a time consuming task which would unnecessarily lengthen the procurement process.

⁴¹⁶ CIDB Discussion Paper 11-12 Table 9.

⁴¹⁷ CIDB Discussion Paper 11-12 Table 9.

⁴¹⁸ CIDB Discussion Paper 12 para 8.4 (d). This concern was raised in a meeting held by the CIDB in order to consult with members of the construction industry on the proposed system for professional service providers. See "CIDB response on industry consultation regarding competitive selection of professional service providers" September 2008.

6 4 2 Equity

Professional service providers will be required to compete on the basis of preference in all three suggested categories for the procurement of professional services. Tenderers would therefore be obliged to have a B-BBEE component in their tenders and would thus ensure compliance with equity. In order to maintain a fair and equitable procurement process, as noted, upon a change in a tenderers B-BBEE rating, the CIDB must confirm the correctness of the documentation provided in support of the amendment. Such a provision would also prevent fronting in construction procurement procedures.⁴¹⁹

6 4 3 Transparency

Transparency in the proposed procurement of professional services appears to be complied with since tender opportunities will be publicly advertised and organs of state will be required to inform tenderers on the electronic list of the tender requirements.⁴²⁰ The obligations placed on organs of state will be available to the public and will thus contribute to a transparent system. Transparency will further be promoted when contract awards are placed on i-Tender within 21 days after the acceptance of the offer.

6 4 4 Competition

Where in the first instance tenderers will be nominated to compete, five tenderers must be invited to submit tender offers which will ensure a measure of competition. Where the open competitive procedure will be used, an unlimited number of tenderers will be permitted to submit tender offers which will provide for maximum competition. The rotation list provided

⁴¹⁹ Fronting has been described as “the practice of black people being signed up as fictitious shareholders in essentially ‘white’ companies”. It is also referred to as “tokenism”. See Bolton *The Law of Government Procurement in South Africa* 293-294, 293 footnote 225. An unsuccessful tenderer in *Viking Pony Africa Pumps v Hydro-Tech Systems* (175/09) [2010] ZASCA 23 (25 March 2010) alleged that the winning tenderer had won the tender based on fraudulent preference claims. The court found that fronting had indeed taken place and the appeal against the court a quo’s decision was denied.

⁴²⁰ CIDB Discussion Paper 11-12 Table 9.

for will ensure that a larger number of tenderers are given the opportunity to tender since those already given the opportunity are placed at the bottom of the list.⁴²¹

6 4 5 Cost-effectiveness

In the proposed system for professional service providers, it would appear that cost-effectiveness is a major concern for organs of state. All tenderers will be pre-qualified in terms of the new system which normally relates to the quality component in the tender and in turn impacts on cost-effectiveness. Factors such as the qualifications, competence and experience of tenderers will be considered in order to attain value for money. As noted, the geographical location of tenderers as a requirement will be a further indication of an attempt at achieving value for money in the procurement process. Cost-effectiveness will further be ensured in all three categories where it is indicated that the procuring entity must confirm that a tenderer is registered with the CIDB and that the tenderer has the necessary capability to perform the work.⁴²² Cost-effectiveness may, however, be compromised where tenderers are graded according to all fees and expenses a professional service provider is considered capable of performing.⁴²³ After a tenderer may have been elected to tender and the scope of work is clearly defined after the initial qualification, it may be that the work required to be performed amounts to a contract value greater than the tenderer is able to perform. The work might therefore be performed by a tenderer not capable of doing so. Alternatively, a new rotation or fresh call for tenders must be re-advertised and value for money will not have been attained.

7 Conclusion

The CIDB has been created by the CIDB Act for the regulation of public sector construction procurement. The CIDB is empowered, alongside the general public sector

⁴²¹ Concerns have, however, been raised regarding the proposed national rotation system. It has been noted that the rotation system should be decentralised to a provincial or local level for a more effective system. See "CIDB response on industry consultation" September 2008. It is required that in order for a contractor to be awarded a contract, the contractor's geographical location will be considered in light of cost-effectiveness. A decentralised list may therefore assist in applying the qualification requirement of a contractor's geographical location.

⁴²² CIDB Discussion Paper 11-12 Table 9 para 1.3; 2A.6 and 2A.7; 2B.5 and 2A.7; 2C.4 and 2C.5; 3.3 and 3.4.

⁴²³ CIDB Discussion Paper 10 Table 8.

procurement legislation, to create rules for construction procurement in order to provide for the specific needs of the industry. All parties involved in public sector construction procurement must comply with the Act, its Regulations and the rules published by the CIDB.

Currently in South Africa, construction contracts are regarded as services and therefore do not form a separate category in public procurement. Section 1(j) of the CIDB Act defines construction works as a combination of goods and services. In the construction industry, provision is made for construction works, supplies and services contracts. The Regulations to the Act, however, make reference to construction works only. These are placed into six categories and supplies and services appear to be excluded.⁴²⁴ Section 18(1) of the CIDB Act provides that “[a] contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the Board and holds a valid registration certificate issued by the Board”. Regulation 4(2) provides that “[a] contractor who undertakes a construction works contract substantially consisting of the provision of labour is exempt from registration in terms of these Regulations”.⁴²⁵ Regulation 4(3) in turn provides for exemption from registration in the case of supply contracts. Therefore, supply contracts and both general and professional services contracts are not addressed in the Regulations. The CIDB Act thus provides for a wider definition of construction works than that in the Regulations.

The procurement procedures employed in the construction industry are much the same as those used for general public procurement purposes. They have, however, been adjusted in accordance with the demands of the industry. This is evident in procedures such as the competitive negotiation procedure which is generally regarded as an informal procurement method. It appears to be a more formal procedure in the construction industry and may include pre-qualification. It has been modified to provide for competition and negotiation for refinement of contract provisions which may be necessary in a complex project and industry where the quality of the product procured is of great importance in order to ensure value for money. All the procedures as described in the CIDB prescripts, including

⁴²⁴ See Schedule 3 to the Regulations where the six categories of construction works are found.

⁴²⁵ The CIDB Standard for Uniformity defines a services contract as the provision of labour or work. See CIDB Standard for Uniformity 5 para 3.12.

disposals and framework agreements, appear to comply with section 217(1) in that they are fair, equitable, transparent, competitive and cost-effective. Where procedures lack in one of these principles, they are restricted or justified by another in order to ensure overall compliance.

The changes suggested for the procurement of professional service providers will promote competition and equity should the Register for Professional Services Providers be used. With regard to fairness and transparency, further details regarding the rotation list and procurement procedures should, however, be provided and the Regulations to the Act should be amended accordingly. Use of the register will also promote cost-effectiveness in the pre-qualification of tenderers and confirmation of registration and accurate tender information by the CIDB. However, the suggested grading of tenderers may lead to unqualified service providers performing a contract and consequently risk not attaining value for money.

CHAPTER FOUR

QUALIFICATION OF CONTRACTORS IN THE CONSTRUCTION INDUSTRY

1 Introduction

The aim of this chapter is to establish whether the qualification criteria which construction contractors are obligated to meet, comply with section 217 of the Constitution which requires the criteria to be fair, equitable, transparent, competitive and cost-effective.

The qualification of contractors in the South African construction industry is regulated by means of a Register of Contractors and a Register of Projects which are established by the Construction Industry Development Board (CIDB) Act.⁴²⁶ The Regulations to the Act⁴²⁷ indicate the specific criteria contractors must meet in order to be placed on the Register of Contractors so that they are able to tender for construction works contracts.

In this chapter, the criteria for placement on the Registers will be described. Contractors are registered in categories or grading designations relating to their specific field of work and capabilities. The criteria for these grading designations will thus be looked at next. Thereafter, the rules regulating the invitation for tenders or expressions of interest will be described as found in the Regulations to the Act and the constitutional compliance of all qualification criteria for contractors will be analysed.

As noted in chapter three, the Construction Industry Development Board (CIDB) is currently in the process of creating a Register of Professional Service Providers to regulate the procurement of professional services in the construction industry. The suggested qualification criteria for this Register will be looked at as well as its constitutional compliance which will be based on the limited available information.

⁴²⁶ 38 of 2000.

⁴²⁷ Government Notice (GN) R8986 in Government Gazette (GG) 31603 of 14-11-2008.

2 Qualification of contractors in public sector procurement

When contractors wish to conclude contracts for the provision of goods or services, the procuring entity often requires compliance with certain criteria. These criteria are the minimum requirements for participation in the procurement process and serve as an indication to the procuring entity of the capability of a contractor to perform the contract in question.⁴²⁸ The criteria are normally advertised in a call for tenders or expressions of interest. It entails the financial and technical requirements needed in order to ensure that the winning contractor will be able to perform in terms of the contract.⁴²⁹ It may also entail “secondary” or “horizontal” criteria which are criteria not directly aimed at determining whether a contractor is able to perform a contract. It may relate to a contractor’s criminal record for example or compliance with other laws.⁴³⁰ Trepte notes that the general suitability of a contractor is looked at and refers to the general standing of the potential tenderer. The purpose is to ensure that the tenderer is of good professional standing, responsible and trustworthy.⁴³¹

A distinction has been made between pre-qualification, qualification and shortlisting. It has been noted that the pre-qualification of a contractor takes place in the case of open procedures where the procuring entity decides which tenderers will be invited to submit a tender offer.⁴³² In the case of restricted procedures, qualification is done prior to

⁴²⁸ S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 585. P Trepte *Regulating Procurement: Understanding the ends and means of public procurement regulation* (2004) 194 notes that qualification criteria “is, at the end of the day, a purely practical and factual mechanism whereby the procurement agent can satisfy himself that the contractor can satisfactorily complete the construction works to the specified requirements, within the budget and on time”.

⁴²⁹ Arrowsmith et al *Regulating Procurement* 585. The specific criteria which contractors are expected to comply with will depend on the procurement in question. See Arrowsmith et al *Regulating Public Procurement* 587. Factors usually considered when financial and technical criteria are set, are the financial position of contractors and their cash flow capability which is determined by the submission of audited financial statements, tax returns and an indication of access to liquid and unencumbered assets. See Arrowsmith et al *Regulating Public Procurement* 589.

⁴³⁰ For example compliance with affirmative action laws or the integrity and business practices of contractors. See Arrowsmith et al *Regulating Public Procurement* 585, 624.

⁴³¹ Trepte *Regulating Procurement* 195.

⁴³² It has been noted by Arrowsmith et al *Regulating Public Procurement* 610-611 that the benefits of pre-qualification according to the World Bank include affording contractors the choice not to tender, thereby avoiding expenses, when they are not qualified to do so or the opportunity to form joint ventures in order to increase their chances of winning a tender. Another benefit is that those contractors who do meet the qualification criteria, tender with the assurance that they are competing against equally qualified tenderers. Procuring entities can assess the interest shown by potential tenderers and amend the contract requirements accordingly. It is noted that pre-qualification is to be used to determine which contractors are qualified and not to reduce the number of tenderers. See Arrowsmith et al *Regulating Public Procurement* 608.

contractors being invited to submit tender offers and at which stage a shortlist of those to be invited is made.⁴³³

The pre-qualification of tender offers, it is said, must be distinguished from the evaluation of tenders. Pre-qualification merely determines the capability of tenderers to complete a contract as opposed to evaluation which involves determining the lowest price or best offer received.⁴³⁴ Pre-qualification therefore relates to the tenderers and evaluation to the tenders.

3 Qualification of construction works contractors in the South African construction industry

Qualification of contractors in the construction industry is regulated by means of registers. A national Register of Contractors is established in terms of section 16(1) of the CIDB Act and indicates which contractors are qualified to tender for a construction works contract.⁴³⁵ Contractors are placed on the Register in terms of a grading designation which is determined by their financial and works capability. A contractor's status as a potentially emerging enterprise,⁴³⁶ its recognition status in terms of a best practice recognition scheme and its Broad-Based Black Economic Empowerment (B-BBEE) recognition level are also considered when determining which grading a contractor should have.⁴³⁷ Contractors are registered in one of nine grading designations with grade one being the grade with the lowest value of contracts for which contractors may tender and grade nine with an unlimited value, the highest. A contractor may be registered to perform more than one class of construction works but may hold one grading designation in relation to a

⁴³³ 596.

⁴³⁴ 598, 608.

⁴³⁵ It has been noted that although not defined in the Act or its Regulations, contracts for the procurement of fences will fall under construction works. See CIDB Practice note 20 "Applying the Register of Contractors to fencing" July 2010 2.

⁴³⁶ An emerging enterprise is defined in s 1 of the CIDB Act as "an enterprise which is owned, managed and controlled by previously disadvantaged persons and which is overcoming business impediments arising from the legacy of apartheid".

⁴³⁷ Regulation 6(1)(a)-(d) of the Construction Industry Development Regulations. S 21 of the CIDB Act states that the CIDB must establish a best practice contractor recognition scheme which (a) enables organs of state to manage risk on complex contracting strategies and (b) promotes contractor development in relation to best practice standards and guidelines developed by the CIDB. This scheme will be further explained in para 5 2 of this chapter under the equity principle.

specific class.⁴³⁸ It should be noted that certain contractors are exempt from registration on the Register of Contractors. Regulation 4(1) exempts contractors who are registered as home builders in terms of the Housing Consumer Protection Measures Act⁴³⁹ from registration with the CIDB for the purpose of construction works relating to the provision of a home. Regulation 4(2) and (3) further exempt contractors who perform construction contracts which substantially consist of the provision of labour, in other words services and construction contracts which substantially consist of the provision of supplies.

A Register of Projects is established in terms of section 22(1) of the CIDB Act for the recording of projects in which construction works contractors are involved. Failure to register a project must be reported to the Auditor-General in terms of Regulation 21(4).

It should be noted that the Regulations to the CIDB Act are being amended.⁴⁴⁰ Therefore, the Regulations as they stand currently (November 2012) will be explained and analysed.

3 1 Qualification criteria for placement on the Register of Contractors

Different requirements or criteria have been set for the various grading designations. These will be discussed according to the two groups found in the Construction Industry Development Regulations.

3 1 1 Grading designations two to nine

A contractor, who wishes to be registered as a grade two to nine contractor, must apply to the CIDB for the registration.⁴⁴¹ Application must be made for registration in at least one grading designation.⁴⁴² As noted, a contractor may be registered for more than one class of construction works, but may hold one grading designation for a specific class of works. An application for registration must be accompanied by the required fees as indicated in

⁴³⁸ Regulation 7(3). See Schedule 3 to the Regulations for the classes of construction works.

⁴³⁹ 95 of 1998.

⁴⁴⁰ See GN 794 in GG 35727 of 05-10-2012.

⁴⁴¹ Regulation 7(1).

⁴⁴² Regulation 7(2).

Schedule 2 to the Regulations and the complete financial statements of the contractor for the two years preceding the application.⁴⁴³ Where the financial statements are not audited, supporting evidence relating to the contractor's turnover as set out by the South African Revenue Services (SARS) and proof of payment of value added tax must be provided if requested by the CIDB.⁴⁴⁴ An original tax clearance certificate issued by SARS must be provided as well as certified copies of the identity documents of the principal(s) of the contractor.⁴⁴⁵ Proof of any financial sponsorship must be provided, qualified persons employed by the contractor must be registered and if the contractor is registered with an emerging contractor development scheme, proof of such registration must be furnished.⁴⁴⁶ Documentary proof of contracts completed must be submitted to the CIDB as well as any other information required by the Board.⁴⁴⁷

It is indicated that if the information required is submitted by use of the internet, supporting documents must be submitted by mail or by hand for the application to be considered complete.⁴⁴⁸ The CIDB may obtain a contractor's tax clearance certificate if authorised to do so and may take reasonable steps to verify the information provided by a contractor.⁴⁴⁹ If a contractor does not provide further information within 60 days as requested by the CIDB, the application for registration may be cancelled.⁴⁵⁰ The information on the Register of Contractors on the CIDB website serves as a contractor's registration certificate.⁴⁵¹

In terms of Regulation 10(1), the CIDB must appoint an assessor or an independent person with the relevant expertise to evaluate applications for registration. The assessor is obligated in terms of Regulation 10(2) to decide on the specific category of registration for a contractor and may register a contractor in a lower grading than that applied for. The contractor must be notified within 21 days and may request reasons for registration in a lower grading.⁴⁵²

⁴⁴³ Regulation 7(4)(a) and (b).

⁴⁴⁴ Regulation 7(4)(c).

⁴⁴⁵ Regulations 7(4)(e) and (f).

⁴⁴⁶ Regulation 7(4)(g)-7(4)(k). This scheme will be discussed in more detail in chapter 6.

⁴⁴⁷ Regulations 7(4)(l) and (m).

⁴⁴⁸ Regulation 7(5).

⁴⁴⁹ Regulations 7(6) and (7).

⁴⁵⁰ Regulation 7(8). It is further indicated in Regulation 7(9) that if the information provided is not in English, the application must be accompanied by an English translation.

⁴⁵¹ Regulation 7(11).

⁴⁵² Regulation 10(4) and (5).

3 1 2 Grading designation one

As in the case of grading designations two to nine, a contractor who wishes to be registered as a grade one contractor must apply to the CIDB for the registration.⁴⁵³ An application for registration as a grade one contractor must be accompanied by certified copies of the identity documents of the contractor's principal(s), the registration number and certificate in the case of a close corporation, an original tax clearance certificate issued by SARS, proof of registration with the relevant professional bodies for example the Electrical Contracting Board of South Africa and any other information required by the CIDB.⁴⁵⁴ Applications made via the internet, must be submitted by mail or by hand and the CIDB must take reasonable steps to verify the information received.⁴⁵⁵ If a contractor does not respond to a request for further information within 90 days, the application for registration may be cancelled.⁴⁵⁶ All non-English applications must be accompanied by an English translation.⁴⁵⁷

A person, who is appointed as an administrator in terms of the CIDB Act, must enter the particulars of a contractor on the registration system. In the absence of an application form, a form of declaration with all the necessary information may be signed by the contractor and retained by the administrator who must register a contractor upon receipt of an administration fee.⁴⁵⁸ Contractor information as found on the Register serves as the registration certificate.⁴⁵⁹

⁴⁵³ Regulation 7A(1).

⁴⁵⁴ Regulation 7A(2)(a)-(e).

⁴⁵⁵ Regulation 7A(3) and (4).

⁴⁵⁶ Regulation 7A(5).

⁴⁵⁷ Regulation 7A(6).

⁴⁵⁸ Regulations 7A(8)-(10).

⁴⁵⁹ Regulation 7A(11).

3 2 Qualification for grading designations

Regulation 11(1) provides that a grading designation is determined by a contractor's financial and works capability. Different criteria are used for grades five to nine and grading designations two to four. It would appear that no specific qualification criteria is applicable to grade one contractors who may conclude contracts with a value below or equal to R200 000.⁴⁶⁰

3 2 1 Grading designations two to four

3 2 1 1 Financial capability

A contractor, who is registered in grading designations two to four, must have financial capability determined by the contractor's best annual turnover for the two years immediately preceding the application for registration which must be equal to or exceed the minimum amount indicated in Regulation 12(1).⁴⁶¹ The contractor is required to have completed at least one construction works contract during the five years immediately preceding the application which exceeds a value indicated in Regulation 12(1).⁴⁶² The contractor must further have available capital equal to or exceeding the minimum amounts indicated in Regulation 12(1).⁴⁶³

⁴⁶⁰ See Regulation 17, Table 8.

⁴⁶¹ Regulation 11(2A)(a). Regulation 12 provides a table (Table 1) which indicates the amounts contractors in the various grading designations must comply with.

⁴⁶² Regulation 11(2A)(b).

⁴⁶³ Regulation 11(2A)(c). Regulation 11(3) provides that for purposes of all grades (two to nine) the available capital is calculated by adding any financial sponsorship to the total amount comprising of the net asset value of a contractor indicated in the contractor's financial statements and the financial sponsorship (a) where the sponsor is a registered contractor or owns 50% or more of the applicant contractor and may constitute up to 100% of the total amount of required available capital and (b) where the sponsor is not a registered contractor and owns 25% or more of the applicant contractor, the financial sponsorship may not exceed 75% of the total amount of the required available capital. It is further provided that where the sponsor is not a registered contractor and owns less than 25% of the applicant contractor, the financial sponsorship may not exceed 50% of the total amount of the required available capital.

3 2 1 2 Works capability

The works capability of a contractor in grade two to four is determined by the number of qualified persons as indicated in Regulation 12(4).⁴⁶⁴ The contractor is further required to fulfil the requirements in Regulations 12(5) or (8) which provide for registration with the relevant professional bodies.⁴⁶⁵ Lastly, the contractor must have completed at least one construction works contract in the five years immediately preceding the application in the category for which the contractor wishes to register which is of a value exceeding the minimum amount stated in Regulation 12(7).⁴⁶⁶

3 2 2 Grading designations five to nine

3 2 2 1 Financial capability

In order to determine the financial capability of a contractor in grade five to nine, it must be established whether the contractor has available capital equal to or exceeding an amount indicated in Regulation 12(1).⁴⁶⁷

3 2 2 2 Works capability

A contractor is required to employ the minimum number of qualified persons as indicated in Regulation 12(4) in the specific class of construction works for which it wants to register.⁴⁶⁸ As in the case of grading designations two to four, the contractor applying to be registered as a grade five to nine contractor must be registered with the relevant professional body as provided for in Regulations 12(5) or (8).⁴⁶⁹

⁴⁶⁴ Regulation 11(5)(a)(i). See Table 4A of Regulation 12(4) which provides for the minimum number of qualified persons but gives no indication of a minimum number of qualified persons for grades two to four.

⁴⁶⁵ Regulation 11(5)(a)(ii).

⁴⁶⁶ Regulation 11(5)(a)(iii).

⁴⁶⁷ Regulation 11(2B).

⁴⁶⁸ Regulation 11(5)(b)(i). See Table 4B of Regulation 12(4).

⁴⁶⁹ Regulation 11(5)(b)(ii).

3 2 3 Grading designation for joint ventures⁴⁷⁰

Regulation 25(6) provides that the grading designation of a joint venture is determined based on the number of partners registered in a specific grade. In other words, a joint venture will be a grade three contractor if three of its partners are registered in grading designation two. Similarly, a joint venture will be a grade four contractor if three of its partners are registered in grading designation three.⁴⁷¹ Its grading can also be determined in terms of Regulation 11 and will be based on the sum of the annual turnovers of all its members, the sum of the available capital of all the members and the total number of full-time qualified persons in the specific class of construction works advertised.⁴⁷²

3 3 Qualification criteria for the Register of Projects

As noted, the Register of Projects is established in terms of section 22(1) of the CIDB Act. Section 22(3) provides that all construction contracts above a prescribed tender value must be recorded in the Register.⁴⁷³ Regulations 18(1A)(a) and (b) in turn provide that public sector contracts with a value exceeding R200 000 or private sector contracts and those public entities listed in Schedule 2 to the PFMA with a value exceeding R10 million must be recorded in the Register of Projects. The procuring entity must, within 21 days of acceptance of a tender offer, apply for the registration of a construction works project.⁴⁷⁴ After 30 days of receipt of the application, the project must be registered by the CIDB.⁴⁷⁵

⁴⁷⁰ Regulation 1 defines a joint venture as “a grouping of two or more contractors who jointly and severally undertake to perform a construction works contract”. Joint ventures are often also referred to as consortiums. See further *Slipknot Investments 777 (Pty) Ltd v Eastern Cape Liquor Board* (EL 861/2011, ECD 1294/2011) [2011] ZAECELLC 17 (8 December 2011) where the court noted at para 19.6 the importance of disclosing a joint venture relationship in the tendering process and the particular entitlement each partner will have which results from the award of a tender.

⁴⁷¹ See Regulation 25(6) Table 9 for the requirements for all grading designations.

⁴⁷² Regulation 25(6)(a)-(c).

⁴⁷³ Exemption from registration is given for certain construction works. These are for construction works projects undertaken in a mining area as defined in the Petroleum and Mineral Resources Development Act 28 of 2002, maintenance of plant infrastructure and the installation, repair or alteration of mechanical materials handling systems and lifting machinery. See Regulation 19(b)-(d).

⁴⁷⁴ Regulation 18(1A)(1).

⁴⁷⁵ Regulation 18(1A)(2).

Where a representative acts on behalf of a procuring entity, such person must be authorised to have access to the Register of Contractors and Register of Projects.⁴⁷⁶ A report regarding construction works contracts must be submitted to the CIDB. This report must include detail regarding any arbitration or litigation relating to a contract and the capability of a contractor who was awarded a contract in a higher grading designation than the contractor was registered in.⁴⁷⁷

3 4 Qualification criteria for the invitation of construction works contracts

The qualification criteria relating to the invitation of construction works contracts are applicable to organs of state who advertise contracts with a value equal to or exceeding R30 000.⁴⁷⁸ Regulation 25(1) provides that subject to subregulation (1A), a call for tenders or expressions of interest must stipulate that only those contractors who are registered in the category of registration for which a contract is advertised or higher, may tender. However, a contractor who is not registered in the required category but who is capable of being registered before tenders are evaluated, may submit a tender offer. In the case of an expression of interest, the contractor concerned must be capable of being registered within 21 days of the closing date for submission.⁴⁷⁹

Regulation 25(2) provides that despite subregulation (1A) a procuring organ of state may under extreme conditions state in its call for tenders or expressions of interest that only contractors who are registered at the time of the advertisement will be evaluated. Extreme conditions are considered to be when human injury or death, human suffering or deprivation of human rights, serious damage to property or financial loss, injury, suffering or death of livestock or other animals, serious environmental damage or degradation and the interruption of essential services is present or imminent.⁴⁸⁰ A single class of construction works which best describes the work to be performed must be advertised. However, if more than one class adequately describes the work, no more than two classes

⁴⁷⁶ Regulation 20(1). The CIDB must be notified if a representative no longer acts as such for a procuring entity. See Regulation 20(2). The entity is further required to ensure that its representative acts in accordance with the conditions of use of the registers. Regulation 20(3).

⁴⁷⁷ Regulation 21(1)-(3).

⁴⁷⁸ Regulation 23.

⁴⁷⁹ Regulation 25(1A).

⁴⁸⁰ Regulation 25(2)(a)-(f).

may be stated in the tender call.⁴⁸¹ In terms of Regulation 25(3)(b), a contractor's recognition status in terms of a best practice contractor recognition scheme must also be considered to determine its grading designation. In the case of a joint venture, Regulation 25(5) provides that it may submit a tender offer or expression of interest if every member is registered and the leading partner is registered in the specific grading designation for which the contract is advertised.

Of note is that in terms of Regulation 25(7), an organ of state must determine after the receipt of tender offers, the final lowest category of registration required for the contract concerned. An organ of state may further evaluate a tender offer from a tenderer which is registered but tendered outside of its grading designation. This is, however, conditional upon the requirements that the margin by which the value of the contract advertised and that for which the contractor may tender, is reasonable. The award of a contract to such tenderer must furthermore not pose any undue risk to the procuring organ of state. Lastly, the decision to award a contract to a tenderer in terms of this Regulation must be reported.⁴⁸² An organ of state may furthermore evaluate the tender offer of a contractor who is a potentially emerging enterprise for a contract with a tender value one grade higher than the grading designation for which the contractor is registered. This may take place provided that the contractor has the potential to develop and qualify to be registered in the higher grade and that the contractor has the necessary financial, management and other support to enable it to perform the contract properly.⁴⁸³ Lastly, an organ of state must be satisfied prior to awarding a contract that the suggested winning tenderer is registered in terms of the Regulations, is not prohibited by legislation from participating in the procurement process and has the necessary resources to perform the contract. The tenderer's capacity to perform the contract must furthermore not be unduly compromised by the award of the contract.⁴⁸⁴

⁴⁸¹ Regulation 25(3)(a)(i).

⁴⁸² Regulation 25(7A)(a)-(d). Regulation 21 refers to a report which must be submitted by a procuring organ of state to the CIDB regarding the particulars of a construction works contract. The report must be submitted within one month from issuing a practical completion certificate, or renewal of the contract, or cancellation or termination of the contract or within one month of settling all amounts owing to the contractor. It is indicated in Regulation 25(10) that a tender which does not satisfy an organ of state in terms of Regulation 25(7) must be rejected.

⁴⁸³ Regulation 25(8)(a)-(b).

⁴⁸⁴ Regulation 25(9)(a)-(c).

4 Suggested qualification criteria for the procurement of professional services

As noted in chapter three,⁴⁸⁵ qualification criteria for professional service providers have been suggested by the CIDB for registration on the proposed Register for Professional Service Providers. It has been noted that unlike the criteria for construction works contractors, working capital will not be a qualification criterion for professional service providers since they do not have the same resources.⁴⁸⁶ They may, however, form joint ventures or sub-contract⁴⁸⁷ with consultants or employ staff on a contractual basis. Therefore, no minimum number of staff members will be required.⁴⁸⁸

The suggested system for the procurement of professional service providers is premised on a number of factors. These are that the services to be procured should be those which relate to construction works which are most commonly found and only providers who are primary service providers, as opposed to sub-contractors, will be able to apply for registration. Furthermore, at least 50% of a professional service provider's principals must be registered with their respective professional bodies. For example, registration in terms of the Engineering Profession Act. It is further stated that professional service providers should be registered in terms of their annual turnover, the service areas or professional services they offer,⁴⁸⁹ their geographical location, their status in terms of a best practice recognition scheme and their B-BBEE status level.⁴⁹⁰

It is further suggested that a professional service provider will be able to be registered in a specific professional service area if it has in its employ at least one full time appropriately

⁴⁸⁵ Para 5 4 3.

⁴⁸⁶ CIDB Discussion Paper: The proposed CIDB system for the competitive selection of professional service providers July 2008.

⁴⁸⁷ CIDB Practice note 7 "Subcontracting arrangements" May 2007 2 which provides for subcontracting in construction works contracts and notes subcontracting as an effective means of involving Small, Medium and Micro Enterprises (SMMEs) in the construction industry.

⁴⁸⁸ CIDB Discussion Paper 7.

⁴⁸⁹ A table is provided in the discussion paper which indicates the suggested areas of specialisation for which professional services will be required. These include architectural services, construction services, engineering services which will include civil, electrical, geotechnical, structural and mechanical engineering. Further services are those which relate to environmental impact studies, landscape architectural services, management services, quantity surveying services, surveying, transportation planning and town planning services. See CIDB Discussion Paper 8-9.

⁴⁹⁰ CIDB Discussion Paper 7-8. Preference in construction contracts, including B-BBEE status will be discussed more comprehensively in chapter 6.

qualified person.⁴⁹¹ Professional service providers will be required to be in good financial standing and will have to provide financial statements. They will further be required to have a minimum level of uninterrupted professional indemnity cover. It is indicated that only those professional service providers who will be registered for a specific professional service area will be able to submit tender offers. The same will apply to joint ventures that collectively satisfy the criteria.⁴⁹²

According to the Discussion Paper, the Register of Professional Service Providers will categorise providers based on their professional service area and enterprise size. Similar to construction works contractors, they will be placed in class designations according to their annual turnover.⁴⁹³ There will be four class designations of which one will be for those enterprises that have an annual turnover of less than R3 million. These contractors will be able to tender for contracts up to R1.5 million. Class two enterprises must have an annual turnover of equal to or higher than R3 million but less than R13 million. These contractors will be able to tender for contracts up to R6.5 million. Enterprises in class designation three, will be required to have an annual turnover of equal to or more than R13 million but less than R26 million and will be able to perform contracts of up to R13 million. Lastly, class four enterprises will be required to have an annual turnover of equal to or more than R26 million and will be able to tender for contracts of an unlimited amount.⁴⁹⁴

Professional service providers will be required to apply for registration and must submit supporting documents. Changes to the particulars of providers may be amended. However, these must be confirmed by the CIDB after the submission of supporting documents.⁴⁹⁵

⁴⁹¹ It will be required that the qualified person be registered with its relevant professional body and has had at least ten years' experience in his/her profession. See CIDB Discussion Paper 10.

⁴⁹² CIDB Discussion Paper 10.

⁴⁹³ CIDB Discussion Paper 10 para 8.3.

⁴⁹⁴ See Table 8 of the CIDB Discussion Paper 10.

⁴⁹⁵ See CIDB Discussion Paper 12 para 8.5.

5 Constitutional compliance of the qualification criteria for construction works contracts

Section 217(1) of the Constitution requires that organs of state when contracting for goods or services should do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. These principles function as a system and should be regarded as a whole. They will, however, at times place restrictions on each other. All the principles therefore need not always be complied with at the same time but should be balanced to ensure overall compliance with section 217.⁴⁹⁶

5.1 Fairness

As noted in chapter two,⁴⁹⁷ fairness in the public procurement context refers shortly to procedural fairness in the relationship between an organ of state and tenderers and the relationship between tenderers in relation to each other. In order for the process to be fair, it is required that the tender information or qualification criteria for purposes of this chapter, are publicly available. It is further required that tenderers should be familiar with all the applicable criteria and that the process should provide for sufficient participation.

The qualification criteria which construction works contractors are required to meet, are found in the Construction Industry Development Regulations, CIDB prescripts⁴⁹⁸ and the CIDB website.⁴⁹⁹ Tendering opportunity is afforded to contractors who are capable of performing contracts of all values and classes of construction works, thus providing for a system of grading designations which facilitates competition. Furthermore, Regulation 24 provides that invitations for tenders or expressions of interest should be advertised on the CIDB website and in accordance with the Public Finance Management Act (PFMA)⁵⁰⁰ and

⁴⁹⁶ Bolton *The Law of Government Procurement in South Africa* 56.

⁴⁹⁷ See chapter 2 para 6.1.

⁴⁹⁸ CIDB Best Practice Guideline A6 "Applying the Registers to Construction Procurement" December 2008 and CIDB Practice note 3 "Applying the register of contractors in construction works contracts" August 2006.

⁴⁹⁹ See <www.cidb.org.za> (accessed 19-03-2012).

⁵⁰⁰ 1 of 1999.

the Local Government: Municipal Finance Management Act (MFMA).⁵⁰¹ Qualification criteria are therefore widely published for sufficient participation.

The requirement that a contractor's works and financial capability must be evaluated promotes fair treatment of tenderers in relation to each other. The tenders received are competitive and therefore evaluated fairly as opposed to tender offers which differ vastly with regard to works and financial capability. It ensures that only those tenderers who are capable of performing, compete in the process.

Neither the Regulations, nor the CIDB prescripts provide for qualification criteria applicable to contractors registered in grading designation one.⁵⁰² Consequently, no standard exists in terms of which the capability of a grade one contractor to perform a contract can be tested or established.⁵⁰³ It has been recorded in CIDB statistics that one of the reasons for poor quality in construction work in South Africa is procurement related, specifically the lack of pre-qualification of tenderers.⁵⁰⁴ It would appear that the qualification of grade one contracts for the purpose of registration and evaluation is, in the absence of qualification criteria, done at the discretion of the procuring entity.

As noted, in order for fairness to be complied with, tenderers should be treated fairly in relation to one another. It has been noted that grade two to nine contractors are required to comply with a registration system from which grade one contractors are exempt. On the face of it, it may appear as though these contractors have been given an unfair advantage

⁵⁰¹ 56 of 2004. See MFMA Supply Chain Management (SCM) Regulation 18(a) and PFMA Regulation 16A6.3(c) and para 6 2 1 of chapter 3.

⁵⁰² This includes financial and works capability criteria, minimum annual turnover, available capital and a minimum number of qualified persons employed by a grade one contractor. However, Part IV, which refers to the qualification criteria for the invitation of construction works contracts is applicable to contracts of a value exceeding R30 000, thereby including grade one contractors who may tender for a contract up to R200 000. See Regulation 17, Table 8.

⁵⁰³ The electronic national Register of Contractors indicated that on 19-03-2012, 100 100 grade one contractors were registered with the CIDB in all classes of construction works. See <<https://registers.cidb.org.za/Reports/public/default.aspx>> (accessed 19-03-2012).

⁵⁰⁴ See CIDB Discussion Document "Construction quality in South Africa; A client perspective" <http://www.cidb.org.za/Documents/KC/cidb_Publications/Ind_Reps_Other/Construction_Quality_in_SA_Client_Perspective_2010_06_29_final.pdf> (accessed 19-03-2012). At the same time, it is acknowledged that a factor which ensures good quality in construction works is a contractor's capability to perform a contract which is in turn ensured by the use of a procurement system which provides for the recognition of a contractor's capabilities, therefore the qualification criteria for contractors.

above others.⁵⁰⁵ However, this may have been done in the interest of cost-effectiveness. As required by National Treasury Practice Notes,⁵⁰⁶ all procurement transactions below R500 000 must be procured by way of written quotations. Grade one contracts would be awarded by means of quotations⁵⁰⁷ which is a less formal method of procurement.⁵⁰⁸ In addition to a less formal procurement method, the administrative process in procuring goods or services from grade one contractors would also be shorter.

CIDB prescripts have indicated that grade one contractors, which constitute the micro enterprise sector has been over stimulated in the building and civil engineering classes of construction works to the extent that these enterprises are no longer sustainable.⁵⁰⁹ Challenges facing this sector have been recorded as low annual average turnovers due to contractor dependence on cession agreements or donation of construction materials and sporadic track records due to fluctuating job opportunities. Initiatives have been suggested for the development of these contractors⁵¹⁰ and once they have been sufficiently developed to be competitive contractors, qualification criteria for these contractors should be set. It has been noted that fairness and equity are interrelated principles and that procedural fairness cannot be completely separated from substantive fairness.⁵¹¹ Therefore, although the needs of a grade one contractor cannot be compared to that of a grade nine contractor, in the light of fair and equal treatment as well as a cost-effective procurement system in ensuring that all contractors are capable of performing, section 217(1) would be better complied with if contractors in all grading designations are required to comply with prescribed criteria. The Regulations make provision for distinct requirements for two groups of grading designations, thereby acknowledging that different requirements are needed for the two groups. Therefore, specific criteria should be set for grade one contractors as well. Such criteria would furthermore provide an opportunity for

⁵⁰⁵ See *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* 2009 JDR 0299 (EL) where the court held at para 16 that the lack of specifications provided in the invitation to tender did not amount to a meaningful evaluation of tenders. The agreement concluded was found to have been beyond the scope of the tender advertised, therefore fairness was not complied with since the tender awarded was for items not indicated in the invitation to tender. See paras 19 and 26. The court further held at para 17 that the applicant tender which was the winning tender was evaluated on criteria of which other tenderers were not aware. It therefore had an unfair advantage over other tenderers.

⁵⁰⁶ See SCM Practice Note 8 of 2007/2008.

⁵⁰⁷ See Regulation 17, Table 8 which indicates R200 000 as the maximum amount for which grade one contractors may contract.

⁵⁰⁸ See chapter 3 for formal and informal procurement procedures.

⁵⁰⁹ CIDB Best Practice Guideline A8 "Procurement Measures to Develop Registered Contractors" December 2008 3 para 4.

⁵¹⁰ See CIDB Best Practice Guideline A8.

⁵¹¹ Bolton *The Law of Government Procurement in South Africa* 45, 47 and 48 for an explanation on the link between fairness and equity in a public procurement context.

grade one contractors to develop their capability to perform construction works contracts and in turn ensure fair treatment of all tenderers in the construction procurement process.

In terms of Regulation 25(7), on receipt of tender offers, the procuring entity must determine the final lowest category of registration required for the tender advertised. However, a departure from the category indicated in the tender advertisement must be reasonable. Regulation 25(10) in turn provides that a tender offer which does not satisfy the requirements envisaged in Regulation 25(7) must be rejected. It has been noted that tenderers have a right to expect and require an organ of state to apply the criteria advertised in a tender call.⁵¹² The principles of fairness and transparency would be compromised if this was not adhered to. Therefore, it would seem unfair to adjust tender requirements after tender offers have been received. The different classes of construction works each provide for a different field of expertise and the grading designations provide for contract values which differ vastly. Tenderers who would have prepared responsive tenders may be unfairly excluded if the criteria, although required to be reasonable, is changed. Where organs of state or procuring entities are uncertain of the exact specifications of a project, a call for expressions of interest in terms of procurement procedures such as the qualified, two-envelope and two-stage procedures may be used in order to determine what options are available to them. Once expressions of interest have been received, an organ of state should be able to set the qualification criteria for the particular tender. Furthermore, the provision made in Regulation 25(3)(a)(i) further assists in allowing an alternative class of construction works to be advertised in a call for tenders. In order to ensure that fairness is complied with, the criteria advertised in the call for tenders should be the criteria applied when tenders are evaluated.⁵¹³

⁵¹² Bolton *The Law of Government Procurement in South Africa* 182, 199. It is further noted at 185 that in the case of construction contracts, pre-disclosure of tender evaluation and adjudication criteria is particularly important due to the technical nature of the work to be carried out.

⁵¹³ The award of a tender was contested in *VDZ Construction (Pty) Ltd v Makana Municipality* (1834/2011) [2011] ZAECHC 64 (3 November 2011) when the unsuccessful party (the applicant) alleged that its tender was incorrectly found to be non-responsive. It was argued that the conditions of tender or qualification criteria required the tenderers to submit an original valid Municipal Billing Clearance Certificate and that the applicant did not adhere to this requirement in that it submitted a certificate which was only partially original. The court held at para 15 that from the evidence presented there was no suggestion that fraud or malpractice had been committed. It was found at para 16 that the certificate which was submitted in only partially its original form was a *bona fide* error in form rather than substance and could be corrected. The court further held that condoning the tenderer's mistake would be in the public interest and would promote the values of fairness, competition and cost-effectiveness. See para 17. In *IMVUSA Trading 134CC v Dr Ruth Mompoti District Municipality* (2628/08) [2008] ZANWHC 46 (20 November 2008) the court condoned the correction of a mistake which was alleged to have been contrary to the qualification criteria and therefore resulted in the submission of a fatally defective tender. The court allowed a tenderer to submit a tax

The court in *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd*⁵¹⁴ set a tender award aside which was found to have exceeded the scope of a tender call. The municipality which awarded the tender to Afrisec accepted that it advertised a call for tenders for the procurement of security-related work and that it awarded the contract to the deserving tenderer, Afrisec. However, the municipality alleged that the work which was performed in execution of the tender was beyond the scope of the tender call.⁵¹⁵ The municipality concluded a main agreement with Afrisec (scope of work or SOW 1) based on the tender advertised and various subsequent agreements (SOW 3-28) which were not concluded in terms of a separate tender process.⁵¹⁶ During the execution of the work it became apparent that the amount paid for work already done far exceeded the amount which Afrisec tendered.⁵¹⁷ Afrisec then initiated litigation when the municipality advertised a call for tenders which involved the implementation of work which Afrisec assumed it was contracted to perform.⁵¹⁸

The court held that a tender process should have been conducted for SOW 3-28 to have been concluded⁵¹⁹ and that the vast difference between the price tendered and the price paid indicated that the work performed exceeded the tender call.⁵²⁰ The court further held that the argument that the work in terms of SOW 3-28 was negotiated based on SOW 1 could not stand since no tender process existed where the offer made by Afrisec could be matched by other tenderers. The original call for tenders which resulted in SOW 1 did not

clearance certificate after the submission for tenders and held at para 16 that the tenderer's tax matters were at all material times in order. The correction of the mistake was thus found at para 17 to have complied with s 217 in that it was fair, transparent and competitive. However, in *Sanyathi Civil Engineering Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality* 2012 1 BCLR 45 (KZP) the court held that the organ of state did not evaluate tenders based on the criteria advertised and that this could not be condoned. The organ of state advertised that price would weigh 70 points but at evaluation actually weighed 90 points. The winning tenderer was therefore given an unfair advantage above other tenderers. Such a deviation from the conditions of tender was considered a material deviation and violated the principles of fairness, transparency and competition. See paras 73-74. Unfair treatment was further found in the advertisement which indicated a different pricing method from that used in the evaluation of tenders. The court at para 86 found this to be another material deviation from the conditions of tender. The court held that advertising a tender involving less managers than the actual tender was anti-competitive and not cost-effective. Not consulting with tenderers to inform them of the change in specifications violated the obligation to ensure that tender procedures are transparent and competitive. See para 90.

⁵¹⁴ 2008 JDR 1014 (SE).

⁵¹⁵ Para 2.

⁵¹⁶ Para 5.

⁵¹⁷ Para 9.

⁵¹⁸ Para 10.

⁵¹⁹ Para 17.

⁵²⁰ Para 20.

refer to the work performed in terms of SOW 3-28.⁵²¹ Therefore, the tender was found to be beyond the scope of the tender call and set aside.⁵²²

5.2 Equity

As noted in chapter two,⁵²³ equity in the public procurement context refers to substantive equality. This means that the socio-economic circumstances of construction contractors should be taken into account when contracts are awarded. This is referred to as preferential or targeted procurement. Regulation 5 of the Construction Industry Development Regulations provides that in terms of a targeted development programme, potentially emerging contractors in particular grading designations allocated specifically for the purpose of development programmes on the Register of Contractors, may be identified. When contractors apply to be placed on the Register of Contractors, their status as potentially emerging enterprises⁵²⁴ and their status in terms of a best practice recognition scheme is considered.⁵²⁵ Provision is therefore made for equity to be

⁵²¹ Paras 20-22.

⁵²² See P Bolton "The status of contracts exceeding a municipal tender call" (2009) 2 *TSAR* 382 where this case is discussed. See also *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) where a tender was found to have exceeded the tender call. The court held at 429 para 30 that all tenderers should tender for the same product or service and the fact that a "secret agreement" had been concluded was subversive of a credible tender procedure.

⁵²³ See para 6.2.

⁵²⁴ Regulation 13(a)-(c) indicates that the CIDB must identify, in determining whether a contractor is a potentially emerging enterprise, the principals of the contractor who are previously disadvantaged persons. The CIDB must further establish whether the principals identified own at least 50% of the contractor and whether the principals have the authority to manage the assets and daily operations of the contractor and has the appropriate managerial and financial authority.

⁵²⁵ Regulation 6(1)(b) and (c). A best practice contractor recognition scheme is defined in s 1(c) of the CIDB Act as the best practice recognition scheme referred to in s 21 of the Act which in turn refers to a scheme established by the CIDB which "promotes contractor development in relation to best practice standards and guidelines developed by the Board in terms of section 5(2)". Section 5(2) provides that the guidelines published by the CIDB must be aligned with the procurement policy of the government. See s 5(3)(c). Part of the government's procurement policy is preferential procurement implemented by means of the PPPFA. The CIDB, as an entity bound by s 217 of the Constitution, is therefore obliged to implement preferential procurement policies in the construction industry and this is done by means of its best practice guidelines for preferential procurement. The best practice contractor recognition scheme is therefore a scheme aimed at achieving equity in construction procurement. More specifically, it aims to ensure that the abilities of contractors match the requirements of a particular contract. This will be achieved through the requirement that contractors should be formally certified by the CIDB or certification authorities recognised by the CIDB and that they comply with certain requirements or are involved in particular projects such as the Best Practice Project Assessment Scheme discussed in chapter 6. Compliance with this scheme will be considered as part of the functionality component of a tender offer or as a pre-qualification criterion. See <http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/BestPracContrRecogScheme_Framework_for_Construction_Management_Systems_2012_04_26.pdf> (accessed 31-10-2012).

implemented in construction procurement qualification criteria.⁵²⁶ Regulation 6(d) further provides for a contractor's B-BBEE status to be considered when applying to be placed on the Register of Contractors.

In terms of Regulation 25(8), a procuring entity may accept the tender offers or expressions of interest of a contractor who is registered as a potentially emerging enterprise in terms of a targeted development programme and is registered in a grading designation one level lower than that advertised. This is, however, conditional upon the entity being satisfied that the contractor has the potential to develop and qualify to be registered in the higher grade and that the contractor has the necessary financial, management or other support in order to carry out the contract. The equity principle is therefore complied with.

The court found in *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape*⁵²⁷ that the qualification criteria relating to preference as advertised in the call for tenders was incorrectly applied. The applicant tenderer applied for the tender awarded to the third respondent to be set aside and awarded to it. The reasons for the tender having been awarded to the respondent were that the applicant had been given substantial work already and was still in the process of performing those contracts and that more benefit would be gained from awarding the tender to the respondent. The question before the court was whether these two factors fell under those contemplated in section 2(1)(f) of the PPPFA.⁵²⁸ The court held that the argument that a larger benefit could be gained from the respondent tender could not stand. This amounted to evaluating the same criterion twice since the price of the tender was evaluated already.⁵²⁹ The court noted that not all additional objective criteria could be specified in a tender call but that this did not mean that those factors considered in terms of the preference point system could be evaluated again as objective criteria.⁵³⁰ Therefore, having considered gaining a larger benefit from the respondent tenderer as additional objective criteria was incorrect and did not justify

⁵²⁶ See further CIDB Best Practice Guideline A8 where initiatives are given for the development of registered contractors.

⁵²⁷ (769/02) [2003] ZAECHC 23 (18 March 2003).

⁵²⁸ S 2(1)(f) provides that a contract must be awarded to the contractor who scores the highest points unless objective criteria additional to those in s (2)(1)(d) and (e) justify the award to another tenderer.

⁵²⁹ Para 28.

⁵³⁰ Para 31.

awarding the tender to the respondent.⁵³¹ The court further held that tenderers had a right to know that preference was going to be given to those tenderers who had not previously been awarded tenders. This would have enabled them to determine whether tendering for the contract would be cost-effective. This was supported by section 217 of the Constitution and the failure to put this requirement in the tender call offended against the principles in section 217(1).⁵³² Therefore, considering the fact that substantial work had already been awarded to the applicant tender did not constitute an additional objective criterion. The court found that if such a policy existed within the procuring entity, it would have fallen within the boundaries of a preferential procurement policy and could therefore not be additional objective criteria.⁵³³ The tender was thus set aside and awarded to the applicant tenderer.

Similarly, in *Grinaker LTA Ltd v Tender Board (Mpumalanga)*⁵³⁴ the court held that the preference point system as required by the PPPFA and its draft Regulations at the time was not applied. The draft Regulations were also the conditions of tender and therefore the qualification criteria which tenderers were required to have met. The court held that the procuring entity did not apply its mind to the PPPFA in that section 2(1)(f) of the Act was applied incorrectly.⁵³⁵ The court held that the first respondent who awarded the tender was under the mistaken impression that it could apply the preference point system on a basis other than that indicated in the draft Regulations.⁵³⁶ The court further held that the tender should have been awarded to the tenderer who scored the highest points unless objective criteria justified otherwise as stated in section 2(1)(f) of the PPPFA.⁵³⁷ It was not stated what objective criteria justified the tender not to be awarded to the applicant⁵³⁸ and that the approach used by the tender board was contrary to the PPPFA and the conditions of tender.⁵³⁹ The court found that awarding a tender to a tenderer who did not have the lowest price was contrary to section 217 of the Constitution and amounted to contracting

⁵³¹ Para 33.

⁵³² Para 37.

⁵³³ Paras 39-40.

⁵³⁴ 2002 3 All SA 336 (T).

⁵³⁵ Para 43.

⁵³⁶ Para 51.

⁵³⁷ Para 54.

⁵³⁸ Para 55.

⁵³⁹ Para 61.

for goods or services which were not competitive or cost-effective.⁵⁴⁰ The tender award was accordingly set aside.

5.3 Transparency

A Code of Conduct has been published in terms of section 5(4)(a) of the CIDB Act and binds all participants in construction procurement processes.⁵⁴¹ The preamble to the Code of Conduct makes reference to good corporate governance which is of great importance for all parties in the construction industry to comply with and requires *inter alia* transparent conduct. It is further stated that the development of the construction industry will be promoted by transparent performance and is further emphasised in the principles governing the conduct of parties in construction procurement.⁵⁴² Participants must furthermore ensure that transparency is maintained in the tendering process. Section 29 of the CIDB Act provides for the enforcement of the Code of Conduct by way of an inquiry into a possible breach. All parties are therefore bound by the Code which will ensure that transparency is complied with.

The CIDB Standard for Uniformity further provides that procuring entities and tenderers behave honestly and transparently.⁵⁴³ In promoting transparent practices, parties to a particular procurement are required to disclose any conflict of interest and shall not participate in any of the procurement decisions or recuse themselves from the process.⁵⁴⁴ Transparency is further promoted in the obligation on the procuring organ of state to accept only tenders which comply with the published criteria. Tenderers must further inform organs of state of any material change relating to the qualification criteria of a tender.⁵⁴⁵

⁵⁴⁰ Para 70.

⁵⁴¹ See Code of Conduct for all parties engaged in construction procurement GG 25656 of 31-10-2003.

⁵⁴² See part 2.1 of the Code of Conduct where it is indicated that parties are expected to behave equitably, honestly and transparently.

⁵⁴³ See Annexure F Standard Conditions of Tender to the Standard for Uniformity 34 which relate to the qualification criteria for contractors.

⁵⁴⁴ A conflict of interest is defined as a situation in which i) someone in a position of trust has competing professional or personal interests which make it difficult to fulfil his or her duties impartially or ii) an individual or organisation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit or iii) incompatibility or contradictory interests exist between an employee and the organisation which employs that employee. See CIDB Standard for Uniformity 34 para F.1.3.3 a).

⁵⁴⁵ CIDB Standard for Uniformity 36 para F.2.1.1-F.2.1.2.

As noted in chapter two, a transparent system is one which is open and requires that all tender information be made publicly available.⁵⁴⁶ Qualification criteria for contractors in the construction industry are published in the Construction Industry Development Regulations, CIDB prescripts⁵⁴⁷ and the CIDB website.⁵⁴⁸ The criteria contractors must meet are therefore widely available which makes for a transparent system.⁵⁴⁹

Procurement documents in the construction industry include those used to prequalify tenderers in order to solicit tender offers. These documents require tenderers to submit sufficient information to enable organs of state to evaluate tender submissions and make a well-informed decision.⁵⁵⁰ It is required that qualification criteria should be set in clear and unambiguous terms and that all rights and obligations must be defined.⁵⁵¹ The rules for preparing construction procurement documents therefore promote transparency.

The requirements for the Register of Projects further promote transparency in that all information relating to a particular award is made publicly available. This is strengthened by the sanction imposed in Regulation 21(4) which is a report to the Auditor-General by the CIDB of the failure to register a project.

Transparency is, however, compromised by the absence of works and financial capability criteria for grade one contractors. Therefore, the rules which determine the capability of these contractors to perform contracts are not publicly available. However, as noted,⁵⁵² this may possibly be justified by the cost-effectiveness principle.

⁵⁴⁶ See para 6 3.

⁵⁴⁷ CIDB Best Practice Guideline A6 "Applying the Registers to Construction Procurement" December 2008.

⁵⁴⁸ See <www.cidb.org.za> (accessed 27-03-2012).

⁵⁴⁹ CIDB Best Practice Guideline A2 "Applying the procurement prescripts of the CIDB in the Public Sector" December 2007 29 indicates that transparency in the construction industry is present when the terms on which the process will be conducted and the criteria for tenders are documented and made widely available. The award of a tender and the reasons for the award must be made publicly available. It must further be possible to verify that the published criteria were the criteria applied in evaluating and awarding the tender. The prescript indicates that transparency in construction procurement is maintained through published detailed rules relating to the procurement process, publicly announcing procurement requirements, clearly indicating how tender submissions will be evaluated, in other words stating the evaluation criteria, notifying unsuccessful tenderers and the public of the outcome, details regarding procedures for challenging the tender award and putting in place checks and balances for the oversight of all procurement actions.

⁵⁵⁰ CIDB Best Practice Guideline C1 "Preparing procurement documents" September 2005 1 paras 1.1 a)-1.2

j).
⁵⁵¹ Best Practice Guideline C1 1 para 1.2 ii)-iii).

⁵⁵² See para 5 1 of this chapter.

5.4 Competition

The principle of competition is intertwined with that of cost-effectiveness. The aim of competition in a procurement process is to have a choice between different options in order to choose the most viable deal.⁵⁵³ Competition with regard to the qualification of contractors is given effect to by means of the registration system. The designation of different grades determined by financial and works capability provides for competition amongst contractors. The higher the grading designation, the bigger the tender value for which contractors may compete. This therefore serves as an incentive for contractors to develop their financial and works capability in order to ultimately be registered in the highest grading designation.⁵⁵⁴ Regulation 25(8) further provides for contractors who are registered as potentially emerging enterprises to tender for contracts in one grading designation higher than they are registered for. Such a provision promotes competition and contractor development in that more contractors tender for a contract than would be the case in the absence of Regulation 25(8). Competition is further complied with in the qualification of contractors based on their works and financial capability which ensures that competitive tenders are submitted.

Competition is promoted in Regulation 25(5) which provides for joint ventures to submit tender offers or expressions of interest. The formation of joint ventures allows contractors to pool their resources, both their financial and works capabilities, in order to win a tender which is normally of a value much higher than they would be able to tender for individually. More contractors are therefore involved which provides for more competition in the tender process.⁵⁵⁵

⁵⁵³ See chapter 2 para 6.4.

⁵⁵⁴ S 17(2) of the CIDB Act allows a contractor to amend its category status, meaning its grading designation and class of construction works. Regulation 8 in turn requires that the necessary change in contractor information be submitted with evidence in support of an amendment. The CIDB has published an industry report for contractors on becoming a grade nine contractor in which it is indicated what the characteristics of a large contractor are and what factors smaller contractors should look at in order to develop their potential to become large contractors. See http://www.cidb.org.za/Documents/KC/cidb_Publications/Ind_Reps_Other/ind_reps_Research_Report_Mapping_Path_to_Grade_9.pdf (accessed 29-03-2012).

⁵⁵⁵ See CIDB Best Practice Guideline D2 "Joint venture arrangements" March 2004 where it is noted that joint ventures may be formed for various reasons. For example, where the contract being tendered for is too large or complex to be performed by one contractor or where the work to be performed requires specialist skill and expertise or for the purpose of developing emerging enterprises in developing countries such as South Africa.

5.5 Cost-effectiveness

Cost-effectiveness involves attaining value for money by taking into account various factors such as price, whole-life cost, the nature and quality of the goods or service to be provided, knowledge, capacity and the track record of tenderers.⁵⁵⁶ Since public sector procurement and thus construction procurement involves the expenditure of government funds, measures must be put in place to ensure that value for money is attained.

When construction contractors are placed on the Register of Contractors, their financial and works capabilities are looked at not only to determine their respective grading designations but also to determine whether they are capable of performing the work to ensure a cost-effective procurement.⁵⁵⁷ Cost-effectiveness is further established by evaluating quality in tender submissions.⁵⁵⁸ Contractors are often required to submit expressions of interest before submitting tender offers to enable an organ of state to determine what its options for procurement are and to choose the most viable deal. It

⁵⁵⁶ See chapter 2 para 6.5. The issue of a tenderer's bad track record was raised in *Renaissance Security and Cleaning Services CC v Rustenburg Local Municipality, Municipal Manager: Rustenburg Local Municipality and White Leopard Security Services CC* (1811/2007) [2008] ZANWHC 29 (19 August 2008). The applicant, who was also the highest scoring tenderer, brought an application for review of a tender awarded to the second highest scoring tenderer. The reason provided for the rejection of the applicant's tender was its bad track record. Regulation 38(1)(d)(ii) of the MFMA SCM Regulations requires written notification to be given to a tenderer for the rejection of its tender based on its bad track record. The applicant alleged not having received such notification. The court held at para 10 that Regulation 38(1)(d)(ii) was set in peremptory terms and that the onus rested on the respondent municipality who awarded the tender to prove that written notification had been given. The court found at para 17 that the municipality failed to discharge the onus and the decision to award the tender to the winning tenderer. See para 24 of the judgment. See further P Bolton "From the courts: When can bidders with bad track records be rejected?" (2009) 11(1) *LGB* 22-24. The court in *The New Reclamation Group (Pty) Ltd v Eskom Holdings Ltd* (07/27391) [2008] ZAGPHC 138 (14 May 2008) set aside a tender awarded to a tenderer who had no record of past experience or financial standing. All information submitted by the tenderer was information pertaining to its shareholder and subsidiary companies which the court held were separate from the tenderer. See paras 21-29. The fact that the organ of state evaluated the tender as one of a joint venture was irrational and that the conditions of tender which required a tenderer to have the necessary skill, expertise and financial capability were not complied with. Paras 44-46.

⁵⁵⁷ Trepte *Regulation procurement* 197 notes that a contractor's financial capability indicates the ability of the contractor to carry out the contract from a financial perspective. A contractor's technical (or work) capability indicates the contractor's technical ability to carry out the contract. An organ of state thus looks at technical qualifications, the number of staff the contractor has in its employ and its equipment facilities.

⁵⁵⁸ Quality is used as a synonym for functionality in the construction industry and is defined as "the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs". See CIDB Standard for Uniformity 5 para 3.11. In evaluating quality, the whole-life cost of the product or service is taken into account when price is evaluated. It must relate to the goods, services or construction works to be procured and must be the most economically advantageous offer possible. Running costs are considered, as well as after-sales service. See CIDB Standard for Uniformity 11-12 paras 4.3.1-4.3.3. See further CIDB Best Practice Guideline A4 "Evaluating quality in tender submission" December 2007 5 where it is noted that quality may be a criterion incorporated into general qualification criteria. See also CIDB Practice note 9 "Evaluation of quality in tender submissions" November 2007 4.

would appear, therefore, that the purpose behind the qualification of contractors is to achieve value for money for a cost-effective procurement system.

In the South African context, cost-effectiveness entails the capability of potential tenderers to perform a contract and the submission of tax clearance certificates by tenderers.⁵⁵⁹ It has been noted that the verification of tax clearances certificates enhances the attainment of value of money and that it can be assumed that a contractor who is unable to pay its taxes will be unable to perform a contract properly.⁵⁶⁰ Provision is made for determining the capability of construction works tenderers⁵⁶¹ and tax clearance certificates issued by SARS must be submitted in order for contractors to be registered.⁵⁶² The court in *Mpumalanga Steam and Boiler Works CC v Minister of Public Works*⁵⁶³ set aside the award of a tender to a tenderer who submitted an invalid tax clearance certificate based on Regulation 16 of the 2001 PPPFA Regulations.⁵⁶⁴ The court held that in light of Regulation 15 of the 2001 PPPFA Regulations,⁵⁶⁵ the organ of state had a duty to investigate an allegation of a possible fraudulent tax clearance certificate and that its failure to do so has no place in a constitutional order that values transparency, accountability and effective service delivery.⁵⁶⁶ The court found that on the evidence presented, it could not establish that the tax clearance certificate was indeed obtained fraudulently, however, due to its invalidity at the time of tender submissions the award had to be set aside.⁵⁶⁷

In *IMVUSA Trading 134CC v Dr Ruth Mompoti District Municipality*,⁵⁶⁸ the court condoned the fact that the municipality allowed the winning tenderer to submit a fresh tax clearance certificate which was found to be invalid at the time of submission of tenders. The unsuccessful party argued that the winning tenderer submitted a fatally defective tender

⁵⁵⁹ Bolton *The Law of Government Procurement in South Africa* 103. Also see chapter 2 para 6 5.

⁵⁶⁰ Bolton *The Law of Government Procurement in South Africa* 105.

⁵⁶¹ Regulation 11(1)(a) and (b).

⁵⁶² Regulation 7(4)(e) for contractors in grade two to nine and Regulation 7A(2)(c) for grade one contractors. Therefore, despite the absence of works and financial capability criteria for grade one contractors, the submission of a tax clearance certificate is required and is thus some indication of their financial standing.

⁵⁶³ (22023/08) [2010] ZAGPPHC 128 (30 September 2010).

⁵⁶⁴ This Regulation provides that no contract may be awarded to a person who has failed to submit an original tax clearance certificate issued by SARS to certify that the taxes of that person are in order.

⁵⁶⁵ This Regulation places a duty on organs of state to act against any person who obtains a preference in a fraudulent manner.

⁵⁶⁶ Para 33.

⁵⁶⁷ Para 34. See also P Bolton "The exclusion of contractors from government contract awards" (2006) 10(1) *Law, Democracy and Development* 25-48 regarding the exclusion of contractors from government contract awards due to non-payment of taxes.

⁵⁶⁸ (2628/08) [2008] ZANWHC 46 (20 November 2008).

which rendered its acceptance invalid. The court held that the tender process was subject to section 217 of the Constitution but that the tender board was permitted to condone some defects. A distinction had to be drawn between a material factor and the evidence needed to prove that factor and that all the facts of the case had to be considered as well as public interest. The court held further that those who fraudulently contribute to the country's economy are not permitted to benefit from public tenders. This meant that a tenderer's tax matters had to be in order for a contract to be awarded to it.⁵⁶⁹ It was found that the winning tenderer's tax matters had at all times been in order and that only the proof of this was omitted. Therefore, the organ of state having allowed the tenderer to submit a fresh certificate constituted correcting a *bona fide* mistake which it was entitled to do.⁵⁷⁰ Section 217 was thus complied with in that the process was fair, transparent and competitive.⁵⁷¹

It would appear that the qualification of construction works contractors is done at various stages. They are qualified based on their works and financial capability, in order to be placed in a grading designation and in terms of an invitation for tenders or expressions of interest. This ensures that contractors are able to perform in terms of their contracts. Furthermore, the overall detailed qualification criteria for construction works contractors ensure that only capable contractors are awarded contracts and that cost-effectiveness is complied with.

In terms of Regulation 25(1), a call for tenders or expressions of interest must indicate that those contractors who are registered in the grading designation indicated in the advertisement or higher, may tender. Subregulation (1A), however, provides that notwithstanding Regulation 25(1), a contractor who is not registered in the grading designation advertised may submit a tender or expression of interest if such contractor is capable of being registered in the required grading. This must be done before tenders are evaluated in the case of a call for tenders and within 21 days after the submission date in the case of expressions of interest. It is further indicated in Regulation 25(2), that despite Regulation 25(1A), a procuring entity may indicate in extreme conditions only that contractors who are already registered may submit a tender offer or expression of interest.

⁵⁶⁹ Para 6.

⁵⁷⁰ Para 16.

⁵⁷¹ Para 17.

Cost-effectiveness may be compromised where contractors are not registered within the time frame given. In other words, where they are not registered within 21 days or before evaluation. The process may be less cost-effective and more time-consuming when unqualified contractors are allowed to participate in the procurement process. A measure of flexibility should be provided for in exceptional circumstances where tenderers are not capable of being registered at the time it is required or may still be in the process of doing so when they tender for a contract. However, Regulation 25(2) appears to contravene the requirement in section 18(1) of the CIDB Act that contractors must be registered to undertake construction works contracts and contradicts the idea of maintaining a Register of Contractors which promotes a cost-effective system.

6 Constitutional compliance of the suggested qualification criteria for professional service providers

At present (November 2012) limited information is provided regarding the procurement of professional services. The test against section 217 of the Constitution is therefore based on the current available information.

6.1 Fairness

In order for the qualification criteria to be fair, the Construction Industry Development Regulations will have to be amended so that the criteria are published for tenderers to be aware of the requirements. The idea of a Register for Professional Service Providers will promote access to the procurement process in that tendering opportunities will be publicly available, the criteria for placement on the Register will be available and access to tender information will be possible if the Register is managed in the same way as the Register of Contractors. As in the case of construction works contracts, more detail relating to the submission of tenders such as the date of submission, when tenders will be opened and provision for the correction of tender information should be published. Fair treatment in the procurement process refers to the equal treatment of tenderers and is interpreted as a substantive concept.⁵⁷² Therefore, in taking into account the socio-economic

⁵⁷² See chapter 2 para 6.2.

circumstances of potential service providers and in light of a new system, briefing sessions should be held to ensure that all tenderers are aware of the rules pertaining to the process. This will ensure that tenderers are treated fairly in relation to each other.

6 2 Equity

In qualifying professional service providers, their status in terms of a best practice recognition scheme and B-BBEE status level is considered. Preference is also taken into account in the procurement procedures discussed in chapter three.⁵⁷³

6 3 Transparency

In order for the procurement process to be transparent, professional service providers must have confidence in the process. Therefore, all information must be widely available at all times. To give effect to this, as noted, the qualification criteria relating to placement on the Register and class designations should be published. The Regulations to the CIDB Act should be amended and best practice guidelines specifically for the procurement of professional services should be published. The information provided at present, although not yet complete, does not appear to comply with the principle of transparency.

6 4 Competition

The Register of Professional Service Providers will make tenderer information available so that organs of state are aware of which service providers are registered and able to perform a contract. The suggested rotating list will provide for sufficient participation in the procurement process. All providers on the Register will be given the opportunity to participate in the process as they are placed on the Register in the order in which they are received.⁵⁷⁴ Those who will have had the opportunity to tender will be placed at the bottom of the list in order to give all contractors on the Register an opportunity to tender. The formation of joint ventures will further promote competition in allowing several service

⁵⁷³ See paras 5 4 3 and 6 4 2 of chapter 3.

⁵⁷⁴ See CIDB Discussion Paper 12.

providers to pool their resources in order to win a tender. Competition may, however, be limited due to the fact that only those construction works services most commonly found and therefore not all services in the construction industry will be subject to the Register.

6.5 Cost-effectiveness

It would appear that much emphasis is placed on a service provider's registration with its specific professional body and its annual turnover.⁵⁷⁵ The provider's experience and financial standing are further factors which are considered.⁵⁷⁶ These are taken into account when an organ of state wants to determine whether a tenderer is capable of performing the work. All service providers will be pre-qualified which further indicates an attempt at attaining value for money. Tender information made available on the Register will contribute to a cost-effective procurement system where the information has already been verified. Organs of state will therefore be assured of correct information being provided regarding the capability of service providers.

7 Conclusion

The qualification criteria for construction works contractors are regulated by means of the Register of Contractors and Register of Projects. Section 18(1) of the CIDB Act provides that contractors who are not registered, may not perform construction works contracts or any part thereof. Contractors may be removed from the Register of Contractors when it is established that its registration was obtained in breach of the requirements for registration.⁵⁷⁷

Construction works contractors are required to submit various documents in order to be placed on the Register of Contractors. They must comply with prescribed criteria to determine their works and financial capability in order to be placed in a grading designation. Contractors must further comply with the rules which regulate the tender

⁵⁷⁵ CIDB Discussion Paper 7-8 paras 8.2 3), 4 a), 5), 6), 7), 8 a), 9) and 11). Also see Table 8 on Discussion Paper 10.

⁵⁷⁶ CIDB Discussion Paper 12 paras 8.2 8.b) and 10).

⁵⁷⁷ S 19(1) of the CIDB Act.

invitations of construction works contracts. It appears therefore that organs of state can at various stages determine the capability of contractors to perform construction works contracts. The qualification criteria are widely available which ensures a fair and transparent system in that all tenderers are aware of the terms on which they will be evaluated. However, fairness and transparency may be compromised where organs of state are permitted to determine final lowest grading designations after the submission of tenders. The system of grading designations provides for a competitive procurement system where contractors are motivated to develop their capabilities to be registered in higher grades in order to tender for higher value contracts. It would appear, however, that grade one contractors are at a disadvantage due to the challenges they face. These contractors should therefore be developed in order to become competitive tenderers which will promote a fair and equitable process.

The attainment of value for money or cost-effectiveness appears to be the overarching purpose in the qualification of contractors. They are required to comply with a system of rules which ensures that contractors are capable of performing the work. Cost-effectiveness will be further promoted in the proposed Register for Professional Service Providers. However, when the rules regulating the procurement of professional service providers have been completed, the Regulations to the CIDB Act should be amended accordingly in order to ensure transparency.

CHAPTER FIVE

EVALUATION AND AWARD OF CONSTRUCTION CONTRACTS

1 Introduction

The aim of this chapter is to establish whether the evaluation and award of construction contracts comply with a system which is fair, equitable, transparent, competitive and cost-effective as required by section 217(1) of the Constitution.

Once tenders have been submitted, the procuring entity determines whether the tenders received are responsive or acceptable.⁵⁷⁸ Those found to have complied with all the qualification criteria and are responsive, are then evaluated for the purposes of awarding the contract to the tenderer with the best offer. As noted in chapter four, a distinction is made between the qualification of tenderers and evaluation of tenders. The evaluation of tenders which will be discussed in this chapter, involves determining the best offer received⁵⁷⁹ and has been defined as “the event in a procurement process during which the procuring entity determines the actual cost and the relative merits of offers, to determine which offer is to be accepted for contract award”.⁵⁸⁰

The evaluation of tenders in the construction industry will be described in terms of the process indicated in the Construction Industry Development Board (CIDB) prescripts. Firstly, the opening of tender offers will be looked at. Next, the completion and responsiveness test of tenders will be described. Thirdly, the evaluation of tenders will be explained and the performing of a risk analysis and preparation of an evaluation report will be described. Thereafter, the tender committees formed in the construction procurement process will be looked at and the cancellation of tenders will be discussed. Lastly, a compliance test against section 217(1) of the Constitution will be given.

⁵⁷⁸ See s 1 of the Preferential Procurement Policy Framework Act (PPPFA) 5 of 2000 which defines an acceptable tender as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”.

⁵⁷⁹ See chapter 4 para 2.

⁵⁸⁰ S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 673.

2 Evaluation of tender offers

As a general rule, contractors are required to meet all qualification criteria stated in the tender documents in order to tender for a contract. In the case of construction contracts, the conditions of tender indicate the specifications of the tender and the evaluation criteria.⁵⁸¹ After tenders have been evaluated and a winning tenderer has been allocated, the conditions of contract which “describe the risks, liabilities and obligations of the contracting parties and the procedures for the administration of the contract” become applicable.⁵⁸² The evaluation process used in the industry is applicable to the competitive selection and competitive negotiation procedures and not the negotiation procedure or single-source procurement.⁵⁸³

2.1 Opening and recording of tender offers⁵⁸⁴

When tender offers are opened, it is done in public or in the presence of two officials and tender information is recorded.⁵⁸⁵ Where competitive selection procedures other than the two-envelope procedure are used, tender offers must be opened in the presence of the tenderers’ agents. The information made available includes the names of the tenderers, the total price of a tender, whether any preferences have been claimed and the time of completion of the contract.⁵⁸⁶ In the case of the two-envelope procedure, only technical

⁵⁸¹ CIDB Practice note 5 “Evaluating tender offers” May 2007 2 refer to the conditions of tender as those which regulate the award process and “establish the tenderer’s obligations in submitting a tender and the employer’s undertakings in administering the tender process and evaluating tender offers”. The employer in this case is the procuring entity.

⁵⁸² CIDB Practice note 5 2.

⁵⁸³ 1.

⁵⁸⁴ CIDB Best Practice Guideline A1 “The procurement cycle” December 2007 12.

⁵⁸⁵ 12. It is noted that where tenders are not opened in public, provision should be made in the tender documents for the information to be published and made available to all tenderers. See CIDB Practice note 5 9.

⁵⁸⁶ CIDB Best Practice Guideline A3 “Evaluating tender offers” February 2008 2 para 2. The information is recorded if the tender offers were submitted in sealed envelopes, were submitted with the required particulars and were placed in the designated tender box or delivered at the specified place. See CIDB Practice note 5 3 para 3.1. Where it is not possible to open tender offers immediately after the closing time for submission, such tenders should be opened not more than one week after the initial closing time for submission of offers in the presence of at least two persons and a third who is independent from the procuring entity and was identified in the tender documents. See CIDB Best Practice Guideline A3 3 para 2. Where contracts are awarded to more than one tenderer, the recording of the total of all tender prices is not required. However, where the portions of the contract to be awarded to various tenderers are easily definable, the total price should be recorded. This applies to contracts awarded in terms of the competitive selection procedure. See CIDB Practice note 5 9. Where the competitive negotiation procedure is used, only the names of tenderers who submitted tender offers shall be announced. See CIDB Standard for Uniformity

proposals are opened. The quality component of the proposals is evaluated and the financial proposals of those tenders which score above the minimum number of points for quality are opened next.⁵⁸⁷ The information to be announced includes the score obtained for the technical proposals, the total tender price and the preferences claimed. It is further indicated that tenders which are received late or are submitted by a method other than that indicated in the tender documents or tenders which have been withdrawn correctly, must be returned.⁵⁸⁸

2.2 Determining whether tender offers are complete⁵⁸⁹

When determining whether tender offers are complete, a list of returnable documents is used. This document contains a list of all the supporting documents a procuring entity requests from a tenderer.⁵⁹⁰ Tender offers are compared to the list and an opportunity is given to tenderers to complete any incomplete documents which are required for the purpose of evaluating tenders.⁵⁹¹ Tenderers are permitted to provide completed documents if the information to be provided does not change or affect their competitive positions and must be done within a reasonable time.⁵⁹² CIDB prescripts note that tenderers are not permitted to provide additional information which fundamentally affects their offers. In other words, when providing outstanding information, tenderers may not furnish further information regarding their tender prices, preferences or quality of the works tendered.⁵⁹³ In the competitive negotiation procedure, however, the procuring entity may request that tenders be “clarified, specified and fine-tuned” in order to improve a tenderer’s

in Construction Procurement Government Gazette (GG) 33239 of 28-05-2010 35 para F.1.6.2.1. See also *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals* (11445/2010) [2011] ZAKZDHC 22 (30 March 2011) where the court held that it is possible for various contracts to be concluded from a single tender invitation.

⁵⁸⁷ The financial proposals of the tenders which score below the minimum number of points are returned unopened. See CIDB Best Practice Guideline A3 2 para 2.

⁵⁸⁸ See CIDB Standard for Uniformity 38 para F.2.16.3 which provides that written notice of withdrawal or substitution of a tender must be given to the agent of the procuring entity for a tender to be considered as correctly withdrawn.

⁵⁸⁹ CIDB Best Practice Guideline A1 12.

⁵⁹⁰ CIDB Standard for Uniformity 5 para 3.8.

⁵⁹¹ CIDB Best Practice Guideline A3 4 para 3.

⁵⁹² See CIDB Practice note 5 4. Provision is made in the CIDB Standard for Uniformity 39 para F.2.17 for the clarification of tender offers after submission. This may involve the clarification, upon request by the procuring entity, of rates or prices. It is noted that this provision does not preclude negotiation of the final contract terms with the winning tenderer after a tendering process.

⁵⁹³ CIDB Practice note 5 4 para 3.2. Where the competitive negotiation procedure is applicable, this rule does not apply. It is merely required that as in the case of a competitive selection procedure, outstanding information must be provided within a reasonable time. See CIDB Practice note 12 “The competitive negotiations procedure” February 2008 4 para 3.2.

competitive position provided that fundamental aspects of the tenders are not affected and that no new requirements are introduced in the process.⁵⁹⁴ Tenders which do not contain all the necessary documents as they are requested may be found to be non-responsive.⁵⁹⁵

2.3 Determining whether tender offers are responsive⁵⁹⁶

After tenders have been opened and before detailed evaluation, the procuring entity must determine whether the tenders comply with the conditions of tender, whether all tenders have been fully and properly completed and signed and whether any other requirements stated in the tender documents have been complied with.⁵⁹⁷ According to CIDB prescripts, a responsive tender is “one that conforms to all the terms, conditions and specifications in the tender documents without material deviation or qualification”.⁵⁹⁸ Reasons must be provided when tenders are declared non-responsive.⁵⁹⁹ Further factors considered in determining whether tenders are responsive are compliance with conditions indicated where alternative tender offers have been submitted.⁶⁰⁰ Each tenderer is permitted to submit one tender only and must provide access to their premises for inspection, tests or analysis if so required in the tender documents.⁶⁰¹ As part of the responsiveness test, tenderers must provide the necessary securities, bonds, guarantees, policies and certificates stated in the tender documents.⁶⁰² A tenderer is further required to have signed a form of offer and acceptance.⁶⁰³ However, the form of offer and acceptance is one which

⁵⁹⁴ CIDB Standard for Uniformity 35 para F.1.6.2.2.

⁵⁹⁵ CIDB Standard for Uniformity 38 para F.2.14 and F.2.18; CIDB Practice note 5 4; CIDB Practice note 12 5 para 3.3.

⁵⁹⁶ CIDB Best Practice Guideline A1 13.

⁵⁹⁷ CIDB Standard for Uniformity 41 para F.3.8.1.

⁵⁹⁸ CIDB Standard for Uniformity 41 para F.3.8.2. A material deviation is one which would a) detrimentally affect the scope, quality or performance of the works, services or supplies identified in the Scope of Work, b) significantly change the risks and responsibilities of both procuring entity and tenderer or c) affect the competitive position of other tenderers who have submitted responsive tenders if they were to be corrected. Where the competitive negotiation procedure is used, exemption from compliance with conditions relating to material deviations is granted. See CIDB Practice note 12 5 para 3.3.

⁵⁹⁹ CIDB Best Practice Guideline A3 5.

⁶⁰⁰ See P Bolton *The Law of Government Procurement in South Africa* (2007) 214 where it is noted that alternative tenders should not be substantially different from the initial tender specifications. In other words, an alternative tender “should not detrimentally affect the scope, quality or performance of the contract to be awarded; it should not change the contract’s risks and responsibilities under the contract; and, most importantly, it should not affect the competitive position of other tenderers tendering for the same contract”. CIDB Standard for Uniformity 37 para F.2.12 provides that in the case of the submission of alternative tenders, a schedule indicating a comparison between the alternative tender and the tender specifications must be included.

⁶⁰¹ CIDB Practice note 5 5 para 3.3. See also CIDB Standard for Uniformity 39 para F.2.19.

⁶⁰² CIDB Practice note 5 5 para 3.3. See also CIDB Standard for Uniformity 39 para F.2.20 and F.2.23.

⁶⁰³ CIDB Practice note 5 5 para 3.3.

is signed by the winning tenderer after it has been informed that its tender was the best offer received in order to conclude a contract. Therefore, a signed form of offer and acceptance cannot be a requirement at the evaluation stage of the procurement process when a procuring entity determines whether the tenders received are responsive.

2.4 Evaluating tender offers⁶⁰⁴

When tender offers are evaluated, they are compared in terms of their price. The reasonableness of tender prices is judged and tenders found to have unrealistic prices must be rejected.⁶⁰⁵ The quality component of tenders must be evaluated and scored as well as the preferences claimed.⁶⁰⁶ Tenders are evaluated in terms of the standard methods indicated in the tender documents and CIDB prescripts.⁶⁰⁷ Tender offers are then ranked from the highest to the lowest ranking tenders.⁶⁰⁸ Where the competitive negotiation procedure is applicable, the preferred tenderers for purposes of negotiation are identified. These should include all tenderers who submitted responsive tenders or a minimum of three.⁶⁰⁹ Separate negotiations must be held with each tenderer. After each round of negotiations, tenderers may be requested to submit fresh tender offers based on the evaluation criteria stated in the tender call. However, the various components which are evaluated may differ in weight.⁶¹⁰ Lastly, the procuring entity must determine whether the preferred tenderer has engaged in any corrupt or fraudulent activities and if so, must be disqualified from the procurement process.⁶¹¹

⁶⁰⁴ CIDB Best Practice Guideline A1 13.

⁶⁰⁵ CIDB Practice note 5 6 para 3.4. Unrealistic offers are those “where it is not economically possible to execute the contract at that price”. In the case of such an offer, the procuring entity may communicate with the tenderer to ascertain the reason for the offer. Where no reasonable justification can be provided, the tender offer must be considered to be non-responsive. See CIDB Best Practice Guideline A3 6 para 5.2. It should be noted that evaluation of the reasonableness of tender prices is not applicable where competitive negotiation is used as a procurement method.

⁶⁰⁶ See CIDB Best Practice Guideline A4 “Evaluating quality in tender submissions” December 2007 and CIDB Practice note 9 “Evaluation of quality in tender submissions” November 2007 for the manner in which quality is evaluated in construction tenders. It is noted in CIDB Best Practice Guideline A2 “Applying the procurement prescripts of the CIDB in the Public Sector” December 2007 15 para 15 that the evaluation criteria for quality or functionality which are used interchangeably in the construction industry may include the tenderer’s relevant experience, the quality of the methodology proposed in the tender and the qualifications of the staff involved in the project. It is further noted that more weight should be given to functionality in tenders for complex projects. See CIDB Best Practice Guideline A2 15 para 16.

⁶⁰⁷ See CIDB Standard for Uniformity 8 Table 2.

⁶⁰⁸ CIDB Practice note 5 6 para 3.4.

⁶⁰⁹ CIDB Practice note 12 6 para 3.4.

⁶¹⁰ CIDB Standard for Uniformity 35 para F.1.6.2.3.

⁶¹¹ CIDB Standard for Uniformity 41 para F.3.7; CIDB Practice note 5 7 para 3.5; CIDB Practice note 12 6 para 3.5. Corrupt practice is defined as “the offering, giving, receiving or soliciting of anything of value to

Four standard methods of evaluation are used for construction tenders.⁶¹² Method one is used where only the price of the tender is considered. In other words, the tenderer which offers the best price will be the winning tenderer.⁶¹³ Method two is used where tender price and preference are evaluated. Tenders are given a score out of a possible 100 points of which 80 or 90 are awarded for price depending on the value of the contract and the remaining 10 or 20 points for the preference claimed by a tenderer.⁶¹⁴ Where method three is used, points are awarded for price and quality. The ratio of scores would be used as stated in the tender documents.⁶¹⁵ Method four involves the evaluation of price, quality and preference.⁶¹⁶ Where this evaluation method is used, price and quality are given a combined score out of 80 or 90 points as allowed by the 2001 PPPFA Regulations.⁶¹⁷

In a High Court judgment, the court in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality*⁶¹⁸ held that the Regulations to the PPPFA which allowed for quality and price to constitute 80 or 90 points, thereby causing the price component to weigh less than 80 or 90 points were *ultra vires* since the Act provided for 80 or 90 points to be awarded for price only. The court found that quality or functionality as used in the construction industry could not be read into the word “price” and that the two are distinct

influence the action of the employer of his staff or agents in the tender process”. Fraudulent practice, on the other hand, is defined as “the misrepresentation of the facts in order to influence the tender process or the award of a contract arising from a tender offer to the detriment of the employer, including collusive practices intended to establish prices at artificial levels”. See CIDB Practice note 5 7.

⁶¹² These are found in the CIDB Standard for Uniformity 8 Table 2.

⁶¹³ See CIDB Standard for Uniformity 42 para F.3.11.2 where it is stated that the tender should be awarded to the highest ranking tenderer unless compelling and justifiable reasons exist for not doing so. See also s 2(1)(f) of the PPPFA which provides for a tender award to a non-highest scoring tenderer where objective criteria other than those in s 2(1)(d) and (e) are present. The court in *Grinaker LTA Ltd v Tender Board (Mpumalanga)* 2002 3 All SA 336 (T) para 56 held that “other objective criteria” in s 2(1)(f) of the PPPFA referred to those preferences “over and above” or “besides; as well as” those contemplated in s 2(1)(d) and (e). In *Simunye Developers CC v Lovedale Public FET College* (3059/2010) ZAECGHC 121 (9 December 2010) the court permitted the award of a tender to the second-highest scoring tenderer and held at para 35 that the highest-scoring tenderer’s lack of good workmanship and its bad quality of work previously performed constituted “other objective criteria” which justified the award to the second-highest scoring tenderer.

⁶¹⁴ The use of a point system is imposed by the PPPFA which places an obligation on the CIDB to do so as an entity bound by the Act. See Regulation 2 of the 2011 PPPFA Regulations. Preference and the manner in which it is implemented in the construction industry will be discussed in chapter 6.

⁶¹⁵ See CIDB Best Practice Guideline A3 8 where it is noted that tender offers must be evaluated in terms of the evaluation criteria stated in the tender documents. See also CIDB Standard for Uniformity 42 para F.3.11.4. CIDB Best Practice Guideline A2 16 para 21 further indicates that no additional criteria may be added to those stated in the tender documents and no criteria may be amended or omitted.

⁶¹⁶ CIDB Standard for Uniformity 43 para F.3.11.5.

⁶¹⁷ See Regulations 8(2) and (3). It is also indicated that quality may be evaluated as a specific goal for preference as provided for in s 2(1)(d) of the PPPFA, or as objective criteria in s 2(1)(f) of the PPPFA, or as part of the qualification criteria in the tender documents or as part of the price component. See CIDB Best Practice Guideline A4 3 para 3.

⁶¹⁸ 2011 4 SA 406 (KZP) para 11.

words.⁶¹⁹ The result of this judgment was that quality or functionality could no longer be evaluated with price to form a single score out of 80 or 90. Therefore, the CIDB published a discussion paper, in which it noted an alternative method of evaluating quality in the construction industry, which was as a preference which can be classified as “other objective criteria” provided for in section 2(1)(f) of the PPPFA.⁶²⁰

Subsequently, the National Treasury issued an instruction note on guidelines for the evaluation of functionality in tenders at national and provincial government level.⁶²¹ The Instruction Note indicated that functionality⁶²² had to be evaluated by firstly stating in tender documents that functionality would be evaluated and secondly that it would be evaluated as part of the qualification criteria. Therefore, a tenderer would be given a score for functionality at the stage when the procuring entity determines whether contractors qualify to tender. Thereafter, tenders would be evaluated based on price and preference which together would weigh 100 points. Notwithstanding these provisions, the Instruction Note exempted the CIDB from complying with it and was permitted to continue evaluating quality in terms of its prescripts.

Following the Instruction Note, the 2011 PPPFA Regulations were promulgated which provided for the evaluation of functionality in the same manner. Functionality is defined in Regulation 1(k) as “the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer”. Regulation 2(1) binds the CIDB as a Schedule 3 entity to the PFMA to comply with the 2011 PPPFA Regulations. Therefore all construction contracts concluded in terms of CIDB

⁶¹⁹ Para 10.

⁶²⁰ CIDB “Position paper on the evaluation of best value for money in construction industry related tenders” (2010) 1
 4<http://www.cidb.org.za/Documents/Corp/News/corp_news_cidbPositionPaper_EvalBestValueMoneyTenders_4Aug2010.pdf> (accessed 27-05-2012).

⁶²¹ National Treasury Instruction Note on the amended guidelines in respect of bids that include functionality as a criterion for evaluation (2012) <<http://www.treasury.gov.za/divisions/sf/sc/PracticeNotes/Instuction%20Note%2015%20Sep%202010.pdf>> (accessed 07-05-2012).

⁶²² This was defined in the Instruction Note as “the measurement according to predetermined norms of a service or commodity designed to be practical and useful, working or operating, taking into account quality, reliability, viability and durability of a service or commodity”.

prescripts must be evaluated for functionality as a qualification criterion as required by Regulation 4.

2.5 Performing a risk analysis⁶²³

When performing a risk analysis on the possible winning tenderer, the procuring entity must determine whether any grounds exist for disqualifying the highest scoring tenderer from the process.⁶²⁴ The acceptability of the preferred tenderer is then determined by confirming that the tenderer or its principles are not restricted in any way from participating in the public procurement process, that the tenderer has demonstrated that it possesses the necessary technical and professional qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and the personnel to perform the contract, that no conflicts of interest exist and also that it has the legal capacity to enter into a contract.⁶²⁵

Before awarding the contract to the preferred tenderer, the procuring entity must review all bills of quantities⁶²⁶ or pricing schedules included in the tender to establish any errors, omissions or discrepancies.⁶²⁷ The tenderer is given an opportunity to correct any part of its tender which may pose a commercial risk to the entity.⁶²⁸ Once this process has been completed, the tenderer may be recommended as the winning tenderer.⁶²⁹

⁶²³ See also CIDB Best Practice Guideline A5 “Managing construction procurement risks” March 2004 and CIDB Practice note 24 “Managing construction procurement processes” September 2010 for more detailed information regarding the risk analysis in the construction procurement process. See further CIDB Practice note 17 “Securing supplies of critical plant and materials” November 2008 for the risk assessment involved in the procurement of limited resources which may form part of a contract.

⁶²⁴ CIDB Practice note 5.7 para 3.5. See also CIDB Standard for Uniformity 14 para F.3.7.

⁶²⁵ CIDB Best Practice Guideline A3.15; CIDB Practice note 5.7 para 3.6.

⁶²⁶ See CIDB Practice note 21 “Bills of quantities” August 2010 for the use of bills of quantities in construction works contracts and where a bill of quantities is defined as “a list of items giving the measured or estimated quantities and a brief description of the work to be performed under the contract”.

⁶²⁷ See CIDB Practice note 2 “Correcting arithmetical errors in tenders” August 2006 on how price changes may be made.

⁶²⁸ A commercial risk may be present where the preferred tender contains unduly high or low prices. See CIDB Practice note 5.8. A tendered price may be considered unreasonably low where it would compromise the ability of the contractor to complete the contract. Market-related prices or a professional opinion may be used as a benchmark but each case should be decided on its merits. The procuring entity may also request the tenderer to provide detailed information regarding the cost involved in the process. See CIDB Practice note 5.10 endnote 9. In the competitive negotiation procedure, tenderers are not given an opportunity to correct any possible commercial risk, neither is provision made for the clarification of ambiguities in the tender.

⁶²⁹ CIDB Best Practice Guideline A3.16; CIDB Practice note 5.8.

2.6 Preparing an evaluation report

The procuring entity awarding a construction contract must prepare an evaluation report of the tender process.⁶³⁰ In this report, the procurement procedures followed must be stated, including the evaluation criteria which were applied. The specific evaluation method must be indicated as well as the quality criteria used and how it was evaluated.⁶³¹ Reasons for the rejection of any tender offers must be noted as well as the reasons for the preferred tender being recommended for the contract. Lastly, the recommendation of the preferred tenderer must be confirmed.⁶³² Once the tender offer has been accepted, the contract is drafted.⁶³³ The contract must be formally accepted and unsuccessful tenderers must be notified.⁶³⁴ Upon request, reasons for any action taken in terms of the procurement process must be provided.⁶³⁵

2.7 Tender committees⁶³⁶

Where construction tenders are involved, tender committees are formed and perform different functions at the various stages of the construction procurement process. It is noted that the bid specification committee (BSC) and the bid evaluation committee (BEC) are formed on an *ad hoc* basis. The bid adjudication committee (BAC), however, is a permanent committee.⁶³⁷ It is required that suitably qualified professionals form part of the committees due to the technical nature of construction contracts in order for this component to be fairly assessed.⁶³⁸

⁶³⁰ CIDB Practice note 5.8 para 3.7; CIDB Practice note 12.8 para 3.9.

⁶³¹ CIDB Best Practice Guideline A3.16 para 7; CIDB Practice note 5.8 para 3.7.

⁶³² CIDB Best Practice Guideline A3.18 para 8; CIDB Practice note 5.8 para 3.8.

⁶³³ See CIDB Best Practice Guideline C1 "Preparing procurement documents" September 2005 and Best Practice Guideline C2 "Choosing an appropriate form of contract for engineering and construction works" September 2005 which relate to the drafting of the procurement documents and the subsequent contract. See also CIDB Practice note 23 "Construction procurement strategy" September 2010 where guidance is given on a procurement and contracting strategy.

⁶³⁴ CIDB Best Practice Guideline A3.45 para F.3.16. See further P Bolton "Notifying the correct bidder of its success" 2009 11 (5) *LGB* 25 where the importance of notifying the correct winning tenderer is noted.

⁶³⁵ CIDB Best Practice Guideline A3.45 para F.3.18.

⁶³⁶ See P Bolton "The committee system for competitive bids in local government" 2009 12(2) *PER* 57-96 and "The roles and functions of bid committees" 2009 11(4) *LGB* 19-20 on the bid committee system in general public sector procurement.

⁶³⁷ CIDB Practice note 24.4-5 para 4.

⁶³⁸ See *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* (1357/2007) [2008] ZANHC 73 (12 December 2008) paras 48-58 where the court held that it was imperative for the committees to be correctly constituted. It was required that technical experts form part of the relevant committees which they did not in

Firstly, the BSC is involved in the drafting of tender specifications and must ensure that these are compiled in accordance with all the relevant legislation and CIDB prescripts.⁶³⁹ The committee is required to select the correct form of contract for a specific procurement, ensure that the templates in the Standard for Uniformity have been used correctly, that the scope of work in the specifications adequately describe the work to be performed and that risk allocations to the various parties involved are appropriate.⁶⁴⁰ The committee is further required to ensure that legal approval has been obtained for any additional conditions of contract not provided for in the industry templates.

Secondly, the BEC is responsible for the evaluation of construction tenders. It is required to ensure that tenderers have complied with the specifications in the tender documents, they are expected to qualify tenderers and determine whether the tenders received are responsive. Members of the BEC must declare any conflicts of interest and must evaluate tenders strictly in accordance with the requirements of the CIDB Standard for Uniformity. They are further required to prepare a tender evaluation report and provide reasons for their evaluation.⁶⁴¹ The BEC must forecast a final amount for the procurement, taking into account any possible price changes, currency fluctuations and any risks or contingencies. This amount is the maximum amount which may be spent on the contract and approval must be obtained for incurring any additional expenses in relation to the contract.⁶⁴²

In the third instance, the BAC reviews procurement decisions including the need for disposals and appoints a committee for the implementation of disposals. The adjudication committee further approves or refers back the recommendations of the bid evaluation committee regarding the award of a tender, it regulates framework agreements and reviews the reasons provided for the use of the negotiation procedure. The membership of

this case. The court held that no reason existed as to why this could not be done and therefore, the committees were not properly constituted. The tender was accordingly set aside.

⁶³⁹ This includes the Local Government: Municipal Finance Management Act (MFMA) 56 of 2004 and the Local Government: Municipal Systems Act (MSA) 32 of 2000 in the case of local government contracts and the Public Finance Management Act (PFMA) 1 of 1999 in the case of provincial or national government contracts. See specifically s 21(a)(iii) of the MFMA which provides that a supply chain management policy must take into account the requirements of the CIDB in the case of a tender relating to construction, upgrading or refurbishment of buildings or infrastructure. Similarly at national and provincial government level, the PFMA Supply Chain Management Treasury Regulation 16A6.3(a)(ii) Government Notice (GN) R225 in Government Gazette (GG) 27388 of 15-03-2005 provides that tender documents must be drawn up in accordance with the prescripts of the CIDB.

⁶⁴⁰ CIDB Practice note 24 5-6 para 4.2.

⁶⁴¹ CIDB Practice note 24 6 para 4.3.

⁶⁴² CIDB Practice note 24 6-7 para 4.3.

this committee is determined by the accounting officer or authority of the procuring entity.⁶⁴³ Lastly, a disposal committee is formed for the purpose of administering disposals.⁶⁴⁴

The accounting authority who awards the contract must review any motivation for an increase in the amount to be paid for the procurement where the budgeted amount is exceeded by more than 10%.⁶⁴⁵

2.8 Cancellation of tenders

The CIDB Standard for Uniformity provides that a procuring entity “may accept or reject any variation, deviation, tender offer or alternative tender offer, and may cancel the tender process and reject all tender offers at any time before the formation of a contract. The employer shall not accept or incur any liability to a tenderer for such cancellation and rejection, but will give written reasons for such action upon written request to do so”.⁶⁴⁶ A procuring entity is further not permitted to re-advertise a tender call which substantially covers the scope of work of the initial tender advertisement within six months after it has cancelled or abandoned a tender process or has rejected all responsive tenders. However, this would be possible if only one tender was received and was returned unopened.⁶⁴⁷ A possible reason for the cancellation of construction tenders has been that the work involved must be refined in order to finalise the scope of work. In such circumstances, the cause of the cancellation is normally that it was the intention of the procuring entity to test market prices in order to create suitable design and cost models.⁶⁴⁸ Furthermore, funding may not be available in order to proceed with procurement and may have been caused by insufficient planning. The goods, services or works to be procured may no longer be needed or the tender prices may exceed that which the procuring entity budgeted for. A further reason may be that the preferred tenderer did not submit a responsive tender, or

⁶⁴³ CIDB Practice note 24 7-8 para 4.4.

⁶⁴⁴ CIDB Practice note 24 8 para 4.5. It is noted that disposals should be undertaken after a feasibility and desirability test has been done. It may be undertaken in terms of a transfer to another organ of state or business at market related value or may be donated. The products involved may further be recycled or re-used or disposed of at a dumpsite or may be burnt or demolished. See also chapter 3 para 5.5 regarding disposals in the construction procurement process.

⁶⁴⁵ CIDB Practice note 24 8 para 4.6.

⁶⁴⁶ CIDB Standard for Uniformity 35 para F.1.5.1.

⁶⁴⁷ CIDB Standard for Uniformity 35 para F.1.5.2.

⁶⁴⁸ CIDB Practice note 18 “Cancellation of tenders” June 2009 2 para 1.

did not tender at all or that there was insufficient competition or the belief that the tender would be re-advertised or set at a lower price due to poor advertising. A tender may also be cancelled where no responsive tenders were received.⁶⁴⁹

3 Constitutional compliance of the evaluation and award process for the procurement of construction contracts

3 1 Fairness

A fair procurement system is promoted in the opening of all tenders in public immediately after the submission date. This ensures that no tenderer is given extra time to submit a tender. Procedural fairness is further promoted where tenderers are permitted to submit outstanding information after the submission date. Although this may on the face of it appear to be an unfair practice, it is noted that the information provided should not change or affect the competitive position of tenderers and must be done within a reasonable time, thereby ensuring that it remains fair. The courts have furthermore held that it is in fact possible to allow tenderers to correct obvious mistakes, or explain an ambiguity or even ask for clarification for the purpose of a fair evaluation.⁶⁵⁰

As noted in chapter two,⁶⁵¹ substantive fairness cannot be entirely removed from procedural fairness and is found in the clarification meetings held after the submission of tenders. However, provision should be made for clarification only and not the amendment of tender details in order to ensure that the process remains fair. When tenders are evaluated, the procuring entity may communicate with a particular tenderer to determine the reason for a possible unrealistic offer. This further illustrates substantive fairness in the procurement process. It may, however, be less time-consuming if this were to be done at the stage when tenders are tested for responsiveness and not at the evaluation stage.

When the preferred tenderer is allowed to amend any part of its tender which may pose a commercial risk to the procuring entity, it should be borne in mind that the amendment

⁶⁴⁹ CIDB Practice note 18 2 para 1.

⁶⁵⁰ See *Metro Projects CC v Klerksdorp Municipality* 2004 1 SA 16 (SCA) para 13.

⁶⁵¹ See para 6 1.

should remain fair towards other tenderers.⁶⁵² In other words, the preferred tender after its amendments should still comply with the tender specifications.

In preparing an evaluation report, fairness is ensured where the reasons for the rejection of tenders and the acceptance of the winning tenderer are made available. This is further promoted in the provision that unsuccessful tenderers should be notified of the outcome of the process.⁶⁵³ Procedural fairness is complied with in the provision of reasons for all actions taken throughout the procurement process in the evaluation report. It is settled law that public procurement constitutes administrative action⁶⁵⁴ which in turn involves the right to procedural fairness including the right to written reasons.⁶⁵⁵ It has been noted that the right to reasons is characteristic of a transparent procurement system.⁶⁵⁶

Tenderers which participate in the competitive selection procedure are given more opportunity to correct mistakes or offer explanations for ambiguities in their tenders than those in the competitive negotiation procedures. The fact that only the names of the tenderers in the competitive negotiation procedures are announced at the opening of the tenders is appropriate since information such as price and functionality are negotiated after the opening of tenders. These tenderers are also permitted to “clarify, specify and fine-tune” their offers which may be done to improve their competitive positions. Such provisions are justified by virtue of the competitive nature of the procedure. The purpose of having negotiations with at least three tenderers is to enable them to improve their offers after each round of negotiations. This in turn enables the procuring entity to accept the best possible offer. The opportunity given to tenderers in the competitive selection procedure to correct errors which may pose a commercial risk or the opportunity to clarify ambiguities is justified on the same principle in that tenderers in the competitive

⁶⁵² See the *Metro Projects* case para 13 where the court held that “whatever is done, may not cause the process to lose the attribute of fairness”.

⁶⁵³ See chapter 2 para 6 3 where Allen’s view is noted that informing tenderers of the reasons for decisions results in them being more likely to believe that the process was fair.

⁶⁵⁴ See *Umfolozzi Transport (Edms) Bpk v Minister van Vervoer* 1995 2 All SA 548 (A) 552-553; *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) 117 para 16.1; *Transnet Ltd v Goodman Bros(Pty) Ltd* 2001 2 BCLR 176 (SCA) paras 27-39; *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) para 12; *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* 2004 3 All SA 715 (C) 720.

⁶⁵⁵ See s 33(1) of the Constitution which provides for the right to just administrative action which is lawful, reasonable and procedurally fair. See also s 5 of the Promotion of Administrative Justice Act 3 of 2000 which provides specifically for the right to reasons for administrative action. See further chapter 9 of Bolton *The Law of Government Procurement in South Africa* regarding the right to reasons and access to information in the public procurement context.

⁶⁵⁶ Bolton *The Law of Government Procurement in South Africa* 229.

negotiation procedures have sufficient opportunity during negotiations to clarify or explain any ambiguities or risks.

3.2 Equity

The CIDB is an entity bound by the PPPFA and is therefore obligated to apply a preference system in its construction procurement processes. In the evaluation methods used in the industry, only two of the methods provide for the evaluation of preference. As noted, the CIDB published a paper in which it indicated its intention to evaluate quality as a preference. However, quality is a component all tenderers would be required to meet and attain a score for and can therefore not be a mechanism for awarding preference. The evaluation of quality, or functionality which includes quality and are therefore two distinct terms, are specifically provided for in the qualification stage of the tender process.⁶⁵⁷ If functionality were to be evaluated as a preference, it would be scored twice which is not permitted by the point system.

Regulation 8 of the PPPFA Regulations provides that the 80/20 points system should be applied to contracts valued between R30 000 and R1 000 000. Therefore, where method one is used which indicates that a contract is awarded based solely on price, preference should be provided for as well. It is indicated in CIDB prescripts⁶⁵⁸ that method one may be used in all types of contracts. It may be applied in the case of construction works contracts which require exceptional functionality, simple works of a value below R500 000, low value contracts as well as contracts for construction works previously performed or which cannot be separated from a previous contract. It may similarly be used for supply contracts of a low value, in the case of a sole provider or where the goods are readily available. The same applies to service contracts.⁶⁵⁹ The use of method one may be justified in the case of low value contracts where it may not be cost-effective to implement a preferential policy.⁶⁶⁰ These would be contracts, as indicated by the PPPFA Regulations, below R30

⁶⁵⁷ See Regulation 4 of the 2011 PPPFA Regulations which provides that tenders must be declared non-responsive if such tenders do not meet the minimum requirements for functionality. Tenders which have achieved the minimum score for functionality must be evaluated further in terms of preference and price.

⁶⁵⁸ CIDB Standard for Uniformity 9.

⁶⁵⁹ These are services other than professional services.

⁶⁶⁰ See Bolton *The Law of Government Procurement in South Africa* 257 for the link between equity and cost-effectiveness.

000.⁶⁶¹ It may also be justified where the work is a continuation of a previous contract.⁶⁶² However, since price is no longer the only criterion on which contract awards are based⁶⁶³ and due to the obligation placed on organs of state by Regulation 5 of the PPPFA Regulations which provides for the procurement of construction works, supplies or services of a value equal to or above R30 000, preference must be evaluated when these contracts are awarded. The same principle would apply where evaluation method three is used which involves the evaluation of price and quality.⁶⁶⁴

3.3 Transparency

The evaluation process is made available in several CIDB prescripts which promotes a transparent procurement system.⁶⁶⁵ The procurement documents used in the process are required to contain clear and unambiguous criteria and language and must define the rights, obligations and liabilities of the parties to the contract.⁶⁶⁶

As noted in chapter two,⁶⁶⁷ a transparent system is one in which all information regarding the procurement process is publicly available so that tenderers are aware of the criteria to be applied. Transparency is ensured where it is noted that tender offers must be evaluated in accordance with the criteria advertised. This is further promoted by the fact that no additional criteria may be added and that no criteria may be amended or omitted which ensures that tenderers are evaluated based on the criteria advertised. Transparency is

⁶⁶¹ Regulation 5(1)(b) does, however, indicate that the 80/20 points system may be applied to contracts awarded by means of price quotations of a value below R30 000.

⁶⁶² See Bolton *The Law of Government Procurement in South Africa* 172 where it is noted that a tendering process may be dispensed with in the case of necessary additional and unforeseen work or where the work cannot be separated from a previous contract.

⁶⁶³ G Penfold & P Reyburn "Public Procurement" in S Woolman, T Roux, J Klaaren, D Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed. (OS: 12-03 2011) 25-1. Furthermore, s 217(1) of the Constitution requires that goods and services must be procured in accordance with a system which is *inter alia* "cost-effective" which refers to the attainment of value for money and in turn involves a number of factors to be taken into account. See chapter 2 para 6.5.

⁶⁶⁴ It should be noted that according to the CIDB Standard for Uniformity 9, method three is used for the procurement of engineering and construction works contracts only, where the design-build or management contractor types of procurement are used as well as construction works which require exceptional functionality or where it is desirable to invite a limited number of tenderers of similar capability and size and for contracts below a threshold not indicated.

⁶⁶⁵ See CIDB Standard for Uniformity 9, 34-45; CIDB Best Practice Guideline A1 2, 12-15; CIDB Best Practice Guideline A2 11; CIDB Best Practice Guideline A3; CIDB Practice note 5; CIDB Practice note 9; CIDB Practice note 18.

⁶⁶⁶ CIDB Best Practice Guideline C1 1 para 1.2.

⁶⁶⁷ See para 6.3.

ensured when tender information is recorded and made publicly available when tenders are opened. It is complied with when tender offers are opened in public or in the presence of two officials. It is further promoted in the provision of information to be published when tenders are not opened in public.

The fact that an evaluation report containing all the information pertaining to the tender process must be prepared and made available promotes a transparent system. Tenderers will be able to determine whether the process was conducted in accordance with the tender invitation and will be informed of the reasons as to why their tenders were rejected as well as the reasons for the winning tender having been successful and therefore be able to improve on their offers in future. The reasons made available also ensure that a tenderer's right to just administrative action which includes the right to written reasons is complied with.

3 4 Competition

The rules regulating evaluation of construction tenders are applicable to the competitive selection and competitive negotiation procedures only. Therefore, the process is inherently competitive. Competition is promoted in the provision of at least three tenderers who have submitted responsive tenders to negotiate with the procuring entity. This is further promoted in allowing these tenderers to improve their offers after each round of negotiations. The fact that the weight of criteria is changed each time indicates a desire for competition to enable tenderers to submit their best offers.

However, a provision which breeds anti-competitive procurement practices is that which allows for the cancellation of a tender call when the tenderer preferred by the procuring entity either did not submit a tender offer or did not present the best offer. This amounts to custom-made contracts which undermine the fairness of the process and inhibits competition.⁶⁶⁸

⁶⁶⁸ See Bolton *The Law of Government Procurement in South Africa* 137.

3.5 Cost-effectiveness

When tender offers are tested for responsiveness, cost-effectiveness is ensured in determining whether a tender contains all the necessary securities, bonds and guarantees. This serves as an indication that from a financial perspective a tenderer is capable of performing the contract. Cost-effectiveness is further promoted in the evaluation of tenders for unrealistic price offers. Such a provision assists in ensuring that the procuring entity does not award a tender to a contractor who is unable to complete the contract due to a lack of funds and will further prevent the conclusion of a contract with an unduly high price which could amount to a wasteful expenditure.⁶⁶⁹

The evaluation of functionality in construction contracts is a further measure which ensures that value for money is attained. Functionality in a tender enables the procuring entity to determine whether the goods or services sought to be procured are of an acceptable standard or quality so that the best possible deal can be made. A cost-effective system is further promoted when a risk analysis is performed on the preferred tenderer which includes confirmation of all costs involved.

The reasons provided for the cancellation of a call for tenders may, however, compromise a cost-effective system. Where a tender invitation is cancelled because more work must be done in order to refine of the scope of work, it may amount to a wasteful exercise and impact on the fairness of the process since those who tender have an expectation that firstly the process will be conducted and secondly that it will be done according to the tender specifications.⁶⁷⁰ Instead of a provision which allows for the cancellation of tenders where the preferred entity did not tender or did not tender the best offer, the use of single-source procurement may be justified provided that the tenderer is the only tenderer from

⁶⁶⁹ S 1 of the PFMA and s 1 of the MFMA define fruitless and wasteful expenditure as “expenditure which was made in vain and would have been avoided had reasonable care been exercised”.

⁶⁷⁰ At provincial and national government level s 51(1)(b)(ii) of the PFMA provides that the accounting authority must “prevent irregular expenditure, fruitless and wasteful expenditure”. Similarly, s 78(1)(c) of the MFMA provides that senior managers and other officials of municipalities must take reasonable steps to ensure “that any unauthorised, irregular or fruitless and wasteful expenditure and any losses are prevented”. Allowing the cancellation of a tender call due to the need for further refining of the scope of work is furthermore contrary to the prescripts of the CIDB. See CIDB Best Practice Guideline A1 4 para 1.2 where it is noted that feasibility studies should be undertaken in order to determine the financial viability of the procurement. It is further indicated that proper planning should be done based on a broad scope of work but which would attain value for money and avoid cancellation of a tender call.

which the goods or services may be obtained or where it can be proven that there are no other suitable tenderers. The cancellation of a tender due to insufficient competition may be the result of poor advertising and may result in a system which is not cost-effective. Therefore, as previously noted, clear tender specifications should be set in order for tenderers to be well-informed and tender their best offers so that value for money is attained.

In *CAE Construction CC v Petroleum Oil & Gas Corporation of SA (Pty) Ltd*⁶⁷¹ an aggrieved tenderer challenged the decision of an organ of state to cancel a tender. The tenderer held that because the organ of state stated in its tender call that the provisions of the PPPFA would apply, it was bound by the reasons for cancellation of a tender in Regulation 10 of the 2001 PPPFA Regulations.⁶⁷² The court held that because the tender invitation specifically stated that the PPPFA and its point system would apply to the evaluation of tenders, the Regulations regarding the cancellation of tenders were not applicable. The tenderer therefore incorrectly interpreted the tender call.⁶⁷³ Consequently, the organ of state was not bound by Regulation 10. The court further held that the organ of state was under no obligation to have afforded the tenderer an opportunity to make representations before cancelling the tender since no responsive tenders were received.⁶⁷⁴ It was held that through the submission of an offer, the tenderer was afforded an opportunity to make its case to be awarded the tender.⁶⁷⁵ The court held that due to the technical nature of the contract in question, it was unable to substitute the decision of the organ of state.⁶⁷⁶

⁶⁷¹ (3667/06) [2006] ZAWCHC 57 (8 December 2006).

⁶⁷² Para 7. The tenderer relied on Regulation 10(4) specifically which provides that an organ of state may cancel a tender if a) due to changed circumstances, there is no longer a need for the goods or services, b) funds are no longer available for the procurement or c) no responsive tenders are received.

⁶⁷³ Paras 34-35.

⁶⁷⁴ Para 46.

⁶⁷⁵ See *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 25 where the court held that procedural fairness entails affording a tenderer the opportunity to make representations at least in writing before the non-award of a tender. See also Bolton *The Law of Government Procurement in South Africa* 210-211 where it is noted that the courts have held that tenderers, who are applicants in the public procurement process, are entitled to make representations thereby making the right applicable to those rights which have not yet been defined.

⁶⁷⁶ Para 47.

4 Conclusion

The detailed evaluation process of construction tenders as set out in the CIDB prescripts is evidence of a transparent system. Although many activities are repeated in the various stages of the process, it goes a long way in ensuring that a cost-effective contract is concluded. Due to recent legislative amendments,⁶⁷⁷ however, the CIDB prescripts should be amended to be brought in line with legislative requirements. As seen in chapter four, functionality plays an important role in construction contracts in general and is provided for in the 2011 PPPFA Regulations. The CIDB, as an entity bound by the PPPFA, must adhere to the provisions and also be seen to adhere to them in order to maintain transparency and for tenderers in the industry to have confidence in the process.

It would appear that although the qualification criteria as indicated in the Construction Industry Development Regulations and discussed in chapter four is applicable to only construction works contracts in particular, the evaluation process applies to construction works, supplies and service contracts. The process as published in the prescripts generally provides for a fair, transparent, competitive and cost-effective procurement system. However, equity does not appear to be entirely complied with in all contracts. Therefore, the CIDB prescripts and thus the evaluation methods should be amended to be brought in line with legislative requirements and to ensure overall compliance with section 217(1) of the Constitution.

⁶⁷⁷ The promulgation of the 2011 PPPFA Regulations.

CHAPTER SIX

PREFERENTIAL PROCUREMENT IN THE CONSTRUCTION INDUSTRY

1 Introduction

The aim of this chapter is to establish whether preferential procurement is applied in construction contracts and whether the manner in which it is implemented complies with section 217 of the Constitution.

It should be noted that preferential procurement is also referred to as targeted procurement, using procurement as a policy tool and horizontal procurement. The term “targeted procurement” is used in the construction industry.⁶⁷⁸ However, these terms will be used interchangeably in this chapter. Preference in the construction industry is implemented in terms of the schemes used in general public procurement such as set-asides, qualification criteria, offering back, providing for preference at the short listing stage, product or service specification and award criteria. However, it appears that preference is primarily implemented by means of contract participation goals⁶⁷⁹ which can be provided for directly or indirectly. In terms of a direct contract participation goal, a tenderer is awarded a contract based on its status as a preferred or targeted tenderer. Where indirect contract participation goals are used, a percentage of the value of the contract must be sub-contracted to a targeted contractor.⁶⁸⁰

⁶⁷⁸ Targeted procurement is defined as “a system of procurement which provides employment and business opportunities for marginalized individuals and communities, enables procurement to be used as an instrument of social policy in a fair, equitable, competitive, transparent and cost-effective manner and permits social objectives to be quantified, measured, verified and audited. It is an international version of the Affirmative Procurement Policy”. The Affirmative Procurement Policy in turn, is defined as “a procurement policy which uses procurement as an instrument of social policy in South Africa to affirm the changed environment, government’s socio-economic objectives and the principles of the Reconstruction and Development Programme. See S Gounden *The Impact of the Affirmative Procurement Policy on Affirmable Business Enterprises in the South African Construction Industry* PhD thesis University of Natal (2000) 1.6 para 1.4 footnote 1 and 1.7 para 1.6 footnote 2.

⁶⁷⁹ S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement* note that 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”.

⁶⁸⁰ A contractor is defined as “a person or organization that contracts to provide the goods, services or engineering and construction works covered by the contract”. See CIDB “Draft for Public Comment: Standard for Indirect Targeting for Enterprises Development through Construction Works Contracts” (2012) *CIDB 2* <http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/Framework_for_Indirect_Targeting_2012_02_22/pdf> (accessed 01-08-2012). A targeted enterprise (or contractor) is in turn defined as

In this chapter, the use of public procurement as a policy tool in general public sector contracts will be discussed. Following this, preference as prescribed by the 2001 and 2011 Preferential Procurement Policy Framework Act (PPPFA) Regulations⁶⁸¹ will be explained. Thereafter, preferential procurement as it is implemented in the construction industry will be set out. This will include the current methods of implementation as well as recent and future developments. Next, the implications of the 2011 Regulations on the construction industry will be discussed. Finally, the extent to which the use of procurement as a policy tool in the construction industry complies with the Constitution will be analysed.

2 Public procurement as a policy tool in general public sector contracts

Section 217(2) of the Constitution provides that organs of state in section 217(1) are not prevented from implementing a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. In terms of section 217(3), this procurement policy must be implemented in accordance with the framework provided for in national legislation. As noted,⁶⁸² the PPPFA⁶⁸³ is the legislation which has been enacted for this purpose. The Act operates with its Regulations and binds the CIDB as a Schedule 3 entity to the Public Finance Management Act (PFMA).⁶⁸⁴

As noted in chapter two,⁶⁸⁵ the purpose of public procurement is in the main to contract for the provision of goods and services on the best possible terms. Public procurement may, however, be used for wider objectives. For example, to further local industry, the

“an enterprise which: a) is a contractor registered with the Construction Industry Development Board acting in the capacity of a sub-contractor or JV partner; and b) the contractor does not have an equity holding exceeding 20% in the enterprise, either directly or through a flow through calculation in accordance with the Construction Sector Code of Good Practice published in General Notice 862 of 2009 in Government Gazette No of 2009 in terms of the Board-Based Black Economic Empowerment Act of 2003 (Act 53 of 2003); and c) employs at least three permanent employees other than the owner; and d) be registered in terms of the Company’s Act of 2008 (Act No. 71 of 2008) or Close Corporation Act of 1984 (Act No. 69 of 1984); and e) is 50% or more black owned or 30% or more black women owned; f) has entered into a written relationship agreement of co-operation and assistance with the developed enterprise for the duration of the contract”. CIDB Standard for Indirect Targeting 2.

⁶⁸¹ Preferential Procurement Regulations Government Notice (GN) R725 in Government Gazette (GG) 22549 of 10-08-2001 and GN R502 in GG 34350 of 08-06-2011.

⁶⁸² See chapter 2 para 7.

⁶⁸³ 5 of 2000.

⁶⁸⁴ 1 of 1999. See Regulation 2(1).

⁶⁸⁵ See para 7.

promotion of environmental concerns⁶⁸⁶ and for the promotion of socio-economic objectives by providing for preference in the award of public sector contracts to historically disadvantaged persons.⁶⁸⁷

The use of procurement as a policy tool was introduced in South Africa for the development of small, medium and micro enterprises (SMMEs) and the implementation of 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”.⁶⁸⁸ It was further intended to promote the objectives of the Reconstruction and Development Programme (RDP). These objectives were incorporated into the 2001 PPPFA Regulations in terms of which preference was awarded to tenderers for being a historically disadvantaged individual (HDI), sub-contracting with an HDI or achieving any of the specified goals of the RDP.⁶⁸⁹ As discussed below, preference is now tied to the B-BBEE status level of a contractor.

3 Preferential procurement in terms of the PPPFA Regulations

Section 2(1) of the PPPFA states that an organ of state *must* determine and implement its preferential procurement policy in accordance with the framework provided for in the Act. All entities bound in Regulation 2(1) of the 2011 Regulations are thus obligated to use the preference system in the PPPFA. The Act provides for a 80/20 or 90/10 point system in terms of which tenders must be evaluated and awarded points for preference. The Regulations to the Act have recently been promulgated, bringing about a number of

⁶⁸⁶ See P Bolton “Incorporating environmental considerations in government procurement in South Africa” (2008) 1 *TSAR* 31 for the inclusion of environmental concerns as preference in public contracts; S De la Harpe “Green Public Procurement – An Option for South Africa?” (2008) 2 *Speculum Juris* 53 for a discussion on environmentally friendly procurement practices in South Africa.

⁶⁸⁷ Arrowsmith et al *Regulating Public Procurement: National and International Perspectives* (2000) 63.

⁶⁸⁸ Green Paper on Public Sector Procurement Reform para 3.1.5.

⁶⁸⁹ See Regulations 3(2) and 4(2) of the 2001 Preferential Procurement Regulations. See also Regulation 17 which describes the specific goals which may be attained. See CIDB Best Practice Guideline B1 “Formulating and Implementing preferential procurement policies” March 2004 1 where it is noted that procurement as a policy tool has been used for the stimulation of economic activity, the protection of national industry, the improvement of competition in certain industrial sectors, remedying regional disparities and for the achievement of certain more directly social policy functions such as the creation of jobs, the promotion of fair labour conditions, the use of local labour, the prohibition of discrimination against minority groups, the promotion of environmental considerations, the fostering of equal opportunity for men and women and the promotion of employment of disabled people.

changes in the way in which organs of state apply preferential policies. Although the use of a point system has been retained in the 2011 Regulations, the specific criteria for which preference may be awarded has changed. The 2001 and 2011 Regulations will be examined insofar as they are relevant to preferential procurement in the construction industry.⁶⁹⁰

3 1 Organs of state bound by the 2001 and 2011 Regulations

Regulation 2(1) of the 2001 Regulations provides that entities bound by the Regulations are those organs of state indicated in section 1(iii) of the PPPFA. The definition of an organ of state in section 239 of the Constitution is broader than that in section 1(iii) of the PPPFA since major public entities and municipal entities are excluded from the Act. Regulation 2(1) of the 2011 Regulations, however, provides that those organs of state contemplated in section 1(iii) of the Act and all public entities listed in Schedules 2A, 3A, 3B, 3C and 3D to the PFMA as well as municipal entities are bound by the Regulations. Those entities excluded under the 2001 Regulations are now bound by the 2011 Regulations. It should be noted that until 7 December 2012 public entities listed in Schedules 2, 3B and 3D to the PFMA are exempt from certain 2011 Regulations.⁶⁹¹

3 2 Point system

The 2001 Regulations provided for an 80/20 or 90/10 point system in terms of which 80 points were awarded for price in the case of contracts between R30 000 and R500 000 and 90 points in the case of contracts of more than R500 000. The remaining 20 or 10 points were allocated for preference.

⁶⁹⁰ For a thorough analysis of the 2001 Regulations see P Bolton *The Law of Government Procurement in South Africa* (2007) ch 10; "An analysis of the preferential procurement legislation in South Africa" (2007) 16(1) *PPLR* 36; "Government procurement as a policy tool in South Africa" (2006) 6(3) *Journal of Public Procurement* 193; "The use of government procurement as an instrument of policy" (2004) 121(3) *SALJ* 619.

⁶⁹¹ These are Regulations 2(2), 3-8, 10, 11(1)-(9), 11(11)-(13) and 12-13. See GG 34832 of 07-12-2011 <<http://www.treasury.gov.za/divisions/sf/.sc/PPPFA/1-34832%207-12%20NatTreas.pdf>> (accessed 07-09-2012).

In terms of the 2011 Regulations, the threshold for the 80/20 and 90/10 system has been raised. Regulation 5(1)(a) provides that the 80/20 ratio must be used for tenders with a value equal to or above R30 000 and up to R1 million. This formula may be used for price quotations with a value equal to or less than R30 000 in terms of Regulation 5(1)(b).⁶⁹² Regulation 6(1) in turn provides that the 90/10 formula is applicable to tenders with a value above R1 million. As under the 2001 Regulations, the remaining 20 and 10 points may be awarded for preference.

3.3 Criteria for which preference points may be awarded

In terms of Regulation 3(2) and 4(2) of the 2001 Regulations, a maximum of 20 or 10 points may be awarded to a tenderer for being an HDI and/or subcontracting with an HDI and/or achieving any of the specified goals stated in the Regulations.

Regulations 5(2) and 6(2) of the 2011 Regulations adopt a different approach and respectively provide that a maximum of 20 or 10 points must be awarded to a tenderer for its broad-based black economic empowerment (B-BBEE) status level. B-BBEE is defined in section 1 of the Broad-Based Black Economic Empowerment Act⁶⁹³ as “the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to-

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperative and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) public procurement; and
- (f) investment in enterprises that are owned or managed by black people”.

⁶⁹² See P Bolton “An analysis of the preferential procurement legislation in South Africa” (2007) 16 *PPLR* 36 49 who notes that the preference point system in the Act has been based on the assumption that contracts are awarded by way of tenders only.

⁶⁹³ 53 of 2003.

A tenderer's B-BBEE status is in turn defined in Regulation 1(d) of the 2011 Regulations as "the B-BBEE status received by a measured entity based on its overall performance using the relevant scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act". Accordingly a tenderer's B-BBEE status is calculated by using a generic scorecard which provides for seven elements for which points may be awarded. These are ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development initiatives.⁶⁹⁴ The total number of points a tenderer may be awarded for compliance with all seven elements is 100 points. This total is then converted to a number out of 10 or 20 points depending on whether the 80/20 or 90/10 formula is used in order to combine this score with 80 or 90 points for price.

A significant difference between the 2001 and 2011 Regulations is that under the 2001 Regulations, HDI ownership was a mandatory factor in awarding preference points. In terms of the 2011 Regulations, broad-based black economic empowerment as opposed to merely black ownership is considered.⁶⁹⁵ Various factors are thus taken into account in determining a contractor's B-BBEE status. In terms of the B-BBEE elements, tenderers are required to meet specific minimum requirements in order to attain the points for a B-BBEE status level. In other words, tenderers must implement socio-economic development initiatives and enterprise development. Under the 2001 Regulations, the implementation of specific goals provided for in section 2(1)(d) of the Act was not obligatory. Therefore, contractors can no longer themselves decide which policy objectives to adhere to in addition to their HDI ownership.⁶⁹⁶

3 4 Sale and letting of assets

Regulation 5(2) and 6(2) of the 2001 Regulations provided that the 80/20 or 90/20 point system be applied to contracts for the sale and letting of assets. In other words, 20 or 10

⁶⁹⁴ Codes of Good Practice on Black Economic Empowerment Code Series 000: Framework for measuring Broad-Based Black Economic Empowerment Statement 000: General principles and the generic scorecard para 8 GG 29617 of 09-02-2007.

⁶⁹⁵ P Bolton & G Quinot "Social policies in procurement: South Africa" in S Arrowsmith & R.D Anderson (eds) *The WTO Regime on Government Procurement: Challenge and Reform* (2011) 459 466.

⁶⁹⁶ 465-466.

points could be awarded for preference in a contract for the sale or letting of state assets where the tenderer was an HDI and/or contracted with an HDI or achieved any of the specified goals in Regulation 17. The award of preference in contracts for the sale and letting of assets has been excluded under the 2011 Regulations. This has been noted as unfortunate since these contracts have an important role to play in the implementation of preferential policies.⁶⁹⁷

3 5 Functionality

Regulation 8(1) of the 2001 Regulations provides that organs of state must indicate whether functionality and price will be evaluated in tenders. Regulation 8(2) and (3) further provide that the points for functionality and price should when combined not weigh more than 80 or 90 points depending on the value of the contract. A call for tenders may furthermore state that a tenderer must achieve a minimum number of points for functionality in order for the tender to be evaluated further.⁶⁹⁸ The points awarded for functionality and price must then be added to the points awarded for being an HDI and/or contracting with an HDI and/or achieving the specified goals.⁶⁹⁹

The court in *Sizabonke Civils CC t/a Pilcon Project v Zululand District Municipality*⁷⁰⁰ declared Regulations 8(2)-(7) to be invalid in that they were in conflict with section 2(1)(b) of the PPPFA which provides that 80 or 90 points must be awarded for price only. The court held that the Regulations purported to allow organs of state discretion with regard to the number of points to allocate for price which was not provided for in the Act. Regulations 8(2)-(7) were thus *ultra vires*.⁷⁰¹

Regulation 4(1) of the 2011 Regulations provides that an organ of state must state in its tender documents whether tenders will be evaluated based on functionality. The evaluation criteria for functionality must further be objective.⁷⁰² When tenders are

⁶⁹⁷ P Bolton "New preferential procurement regulations released" (2011) 13(3) *LGB* 7.

⁶⁹⁸ Regulation 8(5).

⁶⁹⁹ Regulation 8(7).

⁷⁰⁰ 2011 4 SA 406 KZP.

⁷⁰¹ Para 11.

⁷⁰² Regulation 4(2).

evaluated based on functionality, the evaluation criteria, the weight of each criterion, the applicable values and the minimum qualifying score for functionality must be stated in the call for tenders.⁷⁰³ Unlike the 2001 Regulations, Regulation 4(4) of the 2011 Regulations provides that tenders which do not achieve the minimum score for functionality must be considered to be unacceptable. Tenders which do achieve the minimum score must then be evaluated in terms of the point system for price and preference.⁷⁰⁴ Therefore, under the 2011 Regulations, functionality is used as a pre-qualification criterion for tenderers.

3.6 Local content⁷⁰⁵

In terms of Regulation 12(1) of the 2001 Regulations, an organ of state may in the evaluation of tenders, take account of the fact that the goods were manufactured locally. The Regulation further provides that specific tender requirements for locally produced goods may be included for goods procured from industries identified by the Department of Trade and Industry (DTI).⁷⁰⁶ This may be included in the points awarded for preference. In terms of Regulation 9(5) of the 2011 Regulations, tenders submitted which involve locally manufactured goods, services or works or locally manufactured goods with the relevant minimum threshold for local production and content must be evaluated in terms of the two-stage tendering process where the first stage involves functionality and local content and the second stage, price and B-BBEE.

⁷⁰³ Regulation 4(3).

⁷⁰⁴ Regulation 4(5).

⁷⁰⁵ Local content is defined in Regulation 1(m) as “that portion of the tender price which is not included in the imported content, provided that local manufacture does take place”. Imported content in turn means “that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry”. See Regulation 1(l).

⁷⁰⁶ This has now been done in accordance with Regulation 9(2) of the 2011 Regulations which provides that National Treasury will issue guidelines in order to comply with Regulation 9(1). These have been identified as the bus sector for which the minimum threshold for local content is 80%, the textile, clothing, leather and footwear sector and the power pylons sector for which the minimum is 100%. For the canned/processed vegetables sector, the minimum is 80% and for the rolling stock sector, 65%. See <<http://www.treasury.gov.za/divisions/sf/sc/Circulars/Circular%20-%202020%20Jan%202012.pdf>> (accessed 09-09-2012). See also Quinot JQR Public Procurement 2012 (1) 1.1.

3 7 Cancellation and re-invitation of tenders

With regard to the cancellation and re-invitation of tenders, the 2011 Regulations provide that where the 80/20 point system is applied and at least one tender received is within the relevant threshold of R1 million, all tenders must be evaluated in terms of the 80/20 point system. The same applies to the 90/10 point system.⁷⁰⁷ In the event that a tender is cancelled, a notice of cancellation must be placed in the Government Tender Bulletin or the media in which the original call for tenders was advertised in terms of Regulation 8(5).

3 8 Sub-contracting

Under the 2001 Regulations, a person who is awarded a contract as a result of preference for HDI ownership or contracting with an HDI, may not sub-contract more than 25% of the value of the contract to a person who is not an HDI or does not qualify for the same preference.⁷⁰⁸ Similarly, under the 2011 Regulations, a person who is awarded a contract may not sub-contract more than 25% of the value of the contract if that person does not have an equal or higher B-BBEE status level unless the sub-contractor is an Exempted Micro Enterprise (EME)⁷⁰⁹ which is capable of and has the ability to execute the sub-contract.⁷¹⁰ A person may further not be awarded preference points if it is indicated in the tender offer that more than 25% of the contract will be sub-contracted to a person who does not have an equal or higher B-BBEE status level unless the sub-contractor is an EME that is capable of and has the ability to execute the contract.⁷¹¹

4 Preferential procurement in the construction industry

Preferential procurement in the construction industry is provided for differently to that in the PPPFA Regulations. In what follows, the manner in which preferential procurement is provided for in construction contracts will be explained as well as the contractors who are

⁷⁰⁷ Regulations 8(1)(b) and 8(2)(b).

⁷⁰⁸ Regulation 13(12).

⁷⁰⁹ Regulation 10(1) provides that a tenderer with annual total revenue of R5 million or less qualifies as an EME in terms of the B-BBEEA.

⁷¹⁰ Regulation 11(9).

⁷¹¹ Regulation 11(8).

generally preferred and what they may be favoured for. Next, the role of resource specifications and the measures suggested for an increase in empowerment in construction contracts will be set out. Lastly, preferential procurement in terms of the Construction Codes of Good Practice for Broad-Based Black Economic Empowerment will be looked at.

4 1 Preference schemes used in public sector construction procurement

Preferential procurement in the construction industry is generally referred to as “targeted procurement”⁷¹² and may be implemented in various ways. In what follows, a description of these mechanisms in public sector construction procurement will be provided.

4 1 1 Set-asides

Set asides refer to a method of policy implementation whereby a percentage of the total value of all contracts in a specific sector is set aside for particular groups. Construction contractors may be required to set aside a percentage of the payroll for the employment of disabled people. A fixed number of evaluation points may be awarded for the allocation of 2.5% or 5% of the payroll.⁷¹³ Set asides lead to high political visibility⁷¹⁴ and can at times

⁷¹² R Watermeyer “Potential procurement strategies for construction industry development in the SADC region” Proceedings of the Second International Conference on Construction Industry Development, Botswana National Construction Industry Council in association with the Faculty of Engineering Technology, University of Botswana under the auspices of CIB, Gaborone, Botswana 2000 <<http://www.ssinc.co.za/Files/Doc/RWBPapers/T4-5.pdf>> (accessed 13-08-2011) notes that targeted procurement involves the provision of employment and business opportunities for marginalised or disadvantaged individuals and communities and that these individuals and communities are referred to as the target groups. Watermeyer further notes that targeted procurement provides opportunities for participation of targeted enterprises through various techniques which is done in a manner which does not guarantee contracts to such enterprises. In the case of small contracts, direct preference is awarded to developing enterprises to “tip the scales in their favour”. For larger contracts, tenderers are required to tender for the product to be procured and the social benefits which target groups will derive in the execution of the contracts. See Watermeyer “Potential procurement strategies for construction industry development in the SADC region”.

⁷¹³ CIDB Best Practice Guideline B1 “Formulating and implementing preferential procurement policies” March 2004 12 Table 4.

⁷¹⁴ In that the public and favoured groups can see the results in contracts awarded to the beneficiaries and the production of rapid economic results. See S Arrowsmith & P Kunzlik *Social and Environmental Policies in EC Procurement Law* (2009) 137.

have quick, short-term results. However, it may also lead to less competition and consequently higher prices or lower quality.⁷¹⁵

4 1 2 Qualification criteria

A means of ensuring that contractors comply with horizontal policies is by excluding contractors who do not meet requirements or qualification criteria. This is used as a sanction for non-compliance or as an incentive to comply in future. The procurement policy thus has a regulatory function.⁷¹⁶ When excluding contractors for failing to comply with qualification criteria, a distinction is made between exclusion for failing to comply with general rules such as legal rules found in criminal law and exclusion for failing to comply with rules which are specific to government contracts. In the South African context, CIDB prescripts indicate that where qualification criteria are used as a mechanism for implementing horizontal policies, the requirements set for contracts relate to the policy objective specifically and not the enforcement of legal rules.⁷¹⁷

4 1 3 Offering back

The offer-back mechanism is said to be a variation of set-asides. In this scheme a number of contractors tender for a contract but the most competitive tenderer in the targeted group is offered part of the contract if it is willing to match the offer of the best tender submitted in the competition as a whole. To ensure that tenderers who will not benefit from the preference participate, the part of the contract reserved for a targeted group must be small.⁷¹⁸ However, CIDB prescripts indicate that a targeted group can be given the opportunity to undertake the whole or part of the contract if the tenderer is willing to match the offer of the best tenderer.⁷¹⁹

⁷¹⁵ S Arrowsmith *The Law of Public and Utilities Procurement* (2005) 1244.

⁷¹⁶ 1245. The author makes a distinction between this mechanism and set asides and notes that the distinction is a matter of degree in that set asides are used when contracts are reserved for a particular group. The qualification criteria mechanism, however, refers to an exclusion of contractors for failing to comply with a requirement. See Arrowsmith *The Law of Public and Utilities Procurement* 1245.

⁷¹⁷ CIDB Best Practice Guideline B1 3.

⁷¹⁸ Arrowsmith *The Law of Public and Utilities Procurement* 1245.

⁷¹⁹ CIDB Best Practice Guideline B1 3.

4 1 4 Providing for preference at the short listing stage

Preference may be given to contractors when procuring entities short list a number of contractors who may tender for a contract. It may be used when tenderers cannot be distinguished based on technical capability or financial standing. Horizontal objectives may thus be used without compromising value for money. However, administrative costs may be involved as well as a decrease in transparency.⁷²⁰ Preference is provided for at the short listing stage in the construction industry through an electronic database for which tenderers are ranked based on their status as targeted contractors.⁷²¹

4 1 5 Product or service specification

Some horizontal policies are implemented by determined product or service specifications. For example, including the specification that the materials used to provide the goods or services should be biodegradable or otherwise environmentally friendly. In the South African construction industry projects have been undertaken which involve labour-based construction methods as opposed to machinery.⁷²² It is noted that it is a usual practice for procuring entities to exclude contractors from participating if they believe that a contractor is unable to meet the specification. However, the procuring entity must accurately assess whether the possible additional cost which may arise from choosing particular goods or services in implementing the horizontal policy will outweigh the benefit of the policy.⁷²³ The specification chosen is generally included in the tender documents and therefore becomes a contractual obligation.⁷²⁴

⁷²⁰ Arrowsmith *The Law of Public and Utilities Procurement* 1250.

⁷²¹ CIDB Best Practice Guideline B1 17 para 5.

⁷²² See R Watermeyer "Community-based construction: Mobilising communities to construct their own infrastructure" (1993) XXIst International Association for Housing Science World Housing Congress, Cape Town, South Africa; "Community-based construction: A route to sustainable development and job creation" (1995) 36(1) *SAICE* 6-10; "Labour-based construction, the development of emerging contractors and the RDP" (1995) Construction Management Programme, Stellenbosch, South Africa; "Labour-based construction and the development of emerging contractors in South Africa" (1995) Regional seminar on Labour-based Roadworks, University of the Witwatersrand, Johannesburg, South Africa.

⁷²³ Arrowsmith *The Law of Public and Utilities Procurement* 1243.

⁷²⁴ Arrowsmith & Kunzlik *Social and Environmental Policies in EC Procurement Law* 131.

4 1 6 Award criteria

Compliance with horizontal policies may be considered in the award criteria of a tender. Providing for preference by means of award criteria may limit the price paid for horizontal policies and may provide some indication to the procuring entity of the cost of the policy.

A fixed price preference may be given to a contractor who meets minimum requirements. In the construction industry, a price preference of 5-10% as a minimum of the total contract price will in future be awarded to contractors who contractually agree to employ previously disadvantaged individuals.⁷²⁵ Another approach involves preference according to the extent to which a tenderer complies with horizontal policies. In other words, a score for compliance with horizontal policies is awarded in accordance with the degree of preference provided for by a tenderer. Tenderers themselves in this case submit proposals on how horizontal policies should be addressed in the performance of the contract.⁷²⁶ At present (November 2012) a variable number of points are awarded to a construction tenderer depending on the degree to which it complies with horizontal policies. The minimum percentage expected of contractors is 10% of the contract value. In other words, a contractor who provides for the minimum percentage which is 10% will be given the least number of points. Contractors who exceed 10% will be awarded more points depending on the formula used by the procuring entity.⁷²⁷

4 1 7 Direct and indirect preference

It appears that preference in construction procurement is primarily implemented by means of award criteria in the form of contract participation goals which may be provided for either directly or indirectly.⁷²⁸ Direct preference involves the award of a contract to a tenderer because of its status as a targeted enterprise.⁷²⁹ In other words, a contractor may be

⁷²⁵ CIDB Draft Standard for Indirect Targeting for Enterprises Development through Construction Works Contracts 1.

⁷²⁶ Arrowsmith *The Law of Public and Utilities Procurement* 1252.

⁷²⁷ See CIDB Best Practice Guideline B1 12 Table 4.

⁷²⁸ CIDB Practice note 10 "Attaining social and economic deliverables" February 2008 3. See also CIDB Best Practice Guideline B1 11 para 4.2.4.

⁷²⁹ CIDB Best Practice Guideline B1 11 para 4.2.4.1. Watermeyer "The use of procurement as an instrument of poverty alleviation and job creation in infrastructure projects" (2000) 5 *PPLR* 226 237 notes that direct

awarded a contract based on direct preference because it is a BEE contractor, meaning that it has a certain percentage of black owners. Indirect preference, on the other hand, refers to the award of a contract to a tenderer that agrees to employ targeted enterprises or targeted labour or both in the execution of the contract.⁷³⁰

4 1 7 1 Targeted contractors in the construction industry

Examples of those enterprises or contractors which may be favoured in the construction industry include Black Business Enterprises,⁷³¹ Black Women Enterprises,⁷³² Black-empowered Enterprises⁷³³ and Small, Medium and Micro Enterprises.⁷³⁴ Local Business

preferences are usually provided for in contracts involving the disposal of property and the letting of property and facilities.

⁷³⁰ CIDB Best Practice Guideline B1 11 para 4.2.4.1. Watermeyer is of the view that contract classification is another method of indirect preferencing. In classifying contracts according to prime, joint venture or small contractors, specific targets can be set for these contracts. For example, a contract category may be for major prime contractors where SSMEs which are owned and controlled by previously disadvantaged individuals can be targeted. Or, a category can be given to structured joint ventures where emerging or developing enterprises owned and controlled by previously disadvantaged individuals can be targeted. See R Watermeyer, SM Gounden, DR Letchmiah & S Shezi "Targeted procurement: A means by which socio-economic objectives can be realized through engineering and construction works contracts" (1998) 40(4) *SAICE* 15 19-20.

⁷³¹ A black business enterprise is defined as an enterprise "a) whose management and daily operations are in the Control of one or more Black Persons, and b) which is at least 50,1 percent Owned by one or more Black Persons who are Principals". CIDB Best Practice Guideline B2 "Methods and procedures for implementing preferential procurement policies" March 2004 8. However a different definition is provided in CIDB Best Practice Guideline B1 20 which is an "[e]nterprise which is in the control of one or more black persons and is at least fifty one percent owned by one or more black persons who are principals".

⁷³² These are Black Business Enterprises which have at least half of its principals who are women and which are at least 25,1% owned by one or more women. CIDB Best Practice Guideline B2 8. As in the case of Black Business Enterprises, a different term and definition is provided in CIDB Best Practice Guideline B1 20. A Woman Business Enterprise is defined as an enterprise which is in the control of one or more women and is at least 51% owned by one or more women who are principals. A second definition for a Woman Business Enterprise is provided in the prescripts which is a sole trader, partnership or legal entity which adheres to statutory labour practices, is registered with SARS and is a continuing and independent enterprise which provides a commercially useful function. The enterprise must further have at least a quarter of its principals who are women and which is at least 25,1% owned by one or more women who are principals. A commercially useful function is in turn defined as "[t]he performance of real and actual work, or the provision of services, in the discharge of any contractual obligation which shall include but not be limited to the performance of a distinct element of work which the business has the skill and expertise to undertake and the responsibility for management and supervision". CIDB Best Practice Guideline B2 9.

⁷³³ These are partnerships of legal entities which adhere to statutory labour practices, are registered with SARS and are continuing and independent enterprises which provide a commercially useful function and which have at least one third of its principals who are black persons and which are at least 25,1% owned by one or more black persons who are principals.

⁷³⁴ SMMEs are defined as sole traders, partnerships or legal entities which adhere to statutory labour practices, are registered with SARS and are Separate and Distinct Business Entities which include co-operative enterprises and non-governmental organisations and are managed by one owner or more which including its branches or subsidiaries are predominantly carried out in any sector or sub-sector of the economy mentioned in the Small Business Act 102 of 1996 and which can be classified as a micro, a very small, a small or medium enterprise in terms of the Small Business Act. CIDB Best Practice Guideline B2 10.

Enterprises⁷³⁵ and Local Labour⁷³⁶ appear to be targeted at local government level only. At national and provincial government level, Community-Based Organisations may be favoured.⁷³⁷

4 1 7 2 Targets for preferred contractors

Enterprises can be targeted based firstly on their locality, secondly on their status as an SMME, or thirdly on their ownership, operational responsibilities and control or a combination of these by marginalised groups or a combination of these three.⁷³⁸ Labour can be targeted based on gender, race, ethnicity, residency, age, disability, period of unemployment and level of skill.⁷³⁹ Where labour is targeted by way of indirect preference, a tenderer may be required to use appropriate technology and methods of construction, manufacture or a combination thereof and to indicate in its tender that it intends to sub-contract in order to fulfill these goals.⁷⁴⁰

The CIDB further has a generic Specification for Social and Economic Deliverables.⁷⁴¹ Various preference goals are set in this document. These include providing employment opportunities including employment skills and development opportunities as well as business opportunities for target labour, utilising local resources, procuring sub-contractors for certain parts of contracts, providing support and mentoring services to targeted enterprises, providing for contracts to be concluded with joint ventures which have targeted partners and the promotion of HIV/AIDS awareness. This specification is applicable to construction contracts above R10 million.

CIDB Best Practice Guideline B1 20 provides a definition for a Small Business Enterprise as an enterprise which satisfies the definition of a micro or small business in terms of the Small Business Act.

⁷³⁵ Defined as enterprises which have their sole office or head office located within the jurisdiction of the relevant municipality. CIDB Best Practice Guideline B2 20.

⁷³⁶ This is referred to as "South African citizens who permanently reside within the municipal boundaries and earn wages and allowances that are no more than one and a half times the minimum wage established for construction related work". CIDB Best Practice Guideline B2 20.

⁷³⁷ These are defined as enterprises of which the management and daily business is in the control of one or more black persons and which are at least 50% owned by one or more black persons or empowerment shareholders. CIDB Best Practice Guideline B2 22.

⁷³⁸ CIDB Best Practice Guideline B1 11 para 4.2.4.2.

⁷³⁹ CIDB Best Practice Guideline B1 11 para 4.2.4.2.

⁷⁴⁰ CIDB Best Practice Guideline B1 11 para 4.2.4.1.

⁷⁴¹ See

<http://www.cidb.org.za/documents/kc/cidb_publications/proc_doc_social_and_economic_specification_editon_1.pdf> (accessed 11-09-2-12).

4 2 Methods of awarding preference

When evaluating tenders for the purpose of awarding preference points, three methods are used to do this. Firstly, a fixed number of points are awarded for attaining a specific goal. For example, if a tenderer indicates in its tender offer that it has the percentage black ownership required in tender documents in its control. Secondly, a variable number of points in proportion to the degree to which a tenderer complies with a particular goal. Thirdly, points may be awarded on a comparative basis in terms of which the best offer received scores the maximum number of points and the least favourable offer scores no points. The remaining offers are given points between these limits.⁷⁴²

4 2 1 Method One

Where method one is used, specific requirements exist for tenderers to be awarded points on this basis. A tenderer must have the status of a black business enterprise for which 20 points may be awarded, a transforming enterprise for which six points may be awarded, a woman business enterprise for which twelve points may be awarded or an engendered enterprise for which eight points may be awarded.⁷⁴³ Proof of a tenderer having this status must be given on an enterprise declaration affidavit. In order to be awarded points in terms of method one, a tenderer may further sub-contract a percentage of the contract to a targeted contractor. In other words, a tenderer may be awarded a fixed number of points if it allows participation of 10% of the value of the contract with a targeted enterprise and may be awarded one point. It may allow 20% participation for two points, 30% for five points and 40% for ten points. A tenderer may also be awarded a fixed number of points if it undertakes to set aside a percentage of the payroll for the employment of disabled persons. Where 2.5% is set aside, two points may be awarded and where 5% is set aside, four points.⁷⁴⁴

⁷⁴² CIDB Best Practice Guideline B1 11 para 4.2.3.

⁷⁴³ See para 4 1 7 1 of this chapter for the definitions of women business enterprises and black business enterprises. However, somewhat problematic is that no definitions are provided for a transforming enterprise or an engendered enterprise.

⁷⁴⁴ CIDB Best Practice Guideline B1 12 Table 4.

4 2 2 Method Two

Where method two is used in terms of which a variable number of evaluation points is awarded, it is a requirement that a tenderer agrees to contract for the participation of targeted enterprises. The minimum participation goal is indicated as 10%.⁷⁴⁵ In other words, a contractor is awarded points in proportion to the degree to which it complies with a particular contract participation goal.

4 2 3 Method Three

Where method three is used in terms of which points are awarded on a comparative basis, a tenderer is required to agree to undertake to set aside a percentage of the payroll for the training of black persons, women and disabled persons. Four points may be awarded for the most favourable proposal, zero points for the least favourable proposal and the remaining proposals must be evaluated in proportion to their ranking. Furthermore, a tenderer may be required to contract with a targeted enterprise in fulfillment of a contract participation goal.⁷⁴⁶ As in the case of method two, the minimum percentage of participation is 10%. It is further indicated that a tender may not be considered to be unacceptable if a tenderer fails to tender a contract participation goal. The tenderer will merely not be awarded any preference points.⁷⁴⁷

4 2 4 Electronic rotating database

Preference in construction contracts may also be provided for in nominated procedures where a rotating database is used. This nominated procedure may be operated by registering interested tenderers on the database and ranking them based on their date of entry and their targeted enterprise status. A minimum of five tenderers can be selected to submit tenders. They are chosen based on their ranking on the database and may be required to fulfill certain criteria which relates to locality, the services they offer, their expertise and their capacity to deliver. Preference is then provided for in the consideration

⁷⁴⁵ CIDB Best Practice Guideline B1 12 Table 4.

⁷⁴⁶ CIDB Best Practice Guideline B1 12 Table 4.

⁷⁴⁷ CIDB Best Practice Guideline B1 12.

of these tenders for placement on the database. In other words, preference is given when short-listing tenderers. After a contract has been awarded, tenderers (successful and unsuccessful) are repositioned on the database based on their targeted enterprise status and their record of previous contracts awarded to them.⁷⁴⁸ CIDB Best Practice Guideline B1⁷⁴⁹ indicates that this means of awarding preference allows for preference to be considered on two occasions, once being at the short-listing stage and again at the evaluation of tenders.⁷⁵⁰

4 3 Functionality in the construction industry

Functionality and quality are considered to be synonymous and is defined as “the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs”.⁷⁵¹ No definition for quality or functionality is provided in the 2001 Regulations. However, Regulation 1(k) of the 2011 Regulations defines functionality as “the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer”. Quality is therefore a component of functionality in terms of the 2011 Regulations.

CIDB prescripts state that quality/functionality may be introduced into the evaluation of tenders. It may form part of the specific goals for which preference is provided⁷⁵² as well as other objective criteria in section 2(1)(f) of the PPPFA which provides that a tender must be awarded to the highest scoring tenderer unless other objective criteria justify the award to another tenderer. Quality/functionality may further be included as eligibility criteria, in other words as part of the qualification criteria when contractors are selected to tender. Quality/functionality may form part of the price used for comparative purposes or

⁷⁴⁸ CIDB Best Practice Guideline B1 17 para 5.

⁷⁴⁹ 18.

⁷⁵⁰ CIDB Best Practice Guideline B1 18 para 4.

⁷⁵¹ CIDB Standard for Uniformity in Construction Procurement May 2010 5 published in GG 33239 of 28-05-2010.

⁷⁵² It is stated that the PPPFA merely provides examples of what specific goals could constitute and that discretion is given to organs of state to formulate their own specific goals. Therefore, quality can be a specific goal for which preference points are awarded. See CIDB Best Practice Guideline A4 “Evaluating quality in tender submission” December 2007 3 footnote 2.

as part of the tender offer.⁷⁵³ The distinction between these two is, however, unclear. The mechanisms for implementing quality/functionality criteria in construction contracts which are actually used it appears are awarding preference points for quality as a specific goal, including quality as part of the qualification criteria for contractors and at the award stage of the tender process where points are awarded for quality and price and are combined to 80 or 90 points as permitted by the 2001 Regulations prior to the *Sizabonke* decision.⁷⁵⁴

Awarding points for quality as a preference, in other words where quality/functionality is a specific goal, can be used in any of the procurement procedures employed in the construction industry except in the case of the negotiation or single-source procurement.⁷⁵⁵ CIDB Best Practice Guideline A4 indicates that this mechanism is recommended where procuring entities tend to reward tenderers for high quality standards or good performance on previous contracts.⁷⁵⁶ It is recommended that not more than 50% of the points awarded for preference should be for quality/functionality. The remainder of the points can be used for awarding preference for specific goals such as HDI ownership or RDP goals.⁷⁵⁷ Where quality is considered in expressions of interest, it should weigh 100 points. If points for preference are involved, 90 or 80 points should be given for quality depending on the value of the contracts. This is done when tenders are pre-qualified. In the case of the proposal procedure, the same principle applies in that 80, 90 or 100 points are awarded for price and quality depending on the value of the contract. The score for quality should in this case not exceed 85% of the number of points allotted for both price and quality.⁷⁵⁸

In the use of quality/functionality in the qualification criteria various factors may be looked at. For example, in the case of construction works contracts, factors such as health and safety measures, the qualifications of a contractor's staff, a contractor's experience in previous contracts of a similar nature, aesthetic or functional characteristics of the works to be performed and the projected life cycle costs of the works.⁷⁵⁹ Quality/functionality in services, including professional services contracts, the contractor's managerial ability, qualifications, demonstrated experience, quality assurance systems and the manner in

⁷⁵³ CIDB Best Practice Guideline A4 3-4.

⁷⁵⁴ CIDB Best Practice Guideline A4 8.

⁷⁵⁵ See chapter 3.

⁷⁵⁶ 9 para 6.2.

⁷⁵⁷ CIDB Best Practice Guideline A4 9 para 6.2.

⁷⁵⁸ 11.

⁷⁵⁹ CIDB Practice note 9 "Evaluation of quality in tender submissions" November 2007 6.

which the contractor intends to perform the contract are considered amongst other factors.⁷⁶⁰ Where supplies are procured, quality/functionality is evaluated based on after sale service, the safety and environmentally friendly benefits that could be gained, product reliability and performance and life cycle costs.⁷⁶¹

CIDB Best Practice Guideline A4⁷⁶² indicates that preference points may be awarded for quality/functionality in the case of straightforward or routine work, it may be considered in qualification criteria for complex work and as part of the price in the case of specialist work.

4 4 Resource specifications

Resource specifications are used to ensure that horizontal policies are complied with in the construction industry. These are specifications which describe the general requirements for sub-contracting with targeted groups or targeted labour and specify the percentage participation to be achieved. Arrowsmith notes that “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”.⁷⁶³

4 5 Increasing empowerment in construction contracts

CIDB prescripts note that empowerment can be accelerated by awarding larger and longer contracts and that this does not amount to the exclusion of smaller contractors from participation in the procurement process.⁷⁶⁴ CIDB prescripts further indicate that larger and longer contracts instead have the potential to involve smaller contractors more effectively. Although the unbundling of contracts⁷⁶⁵ has been proven to be successful, it has at the

⁷⁶⁰ 6.

⁷⁶¹ 6.

⁷⁶² 9.

⁷⁶³ Arrowsmith et al *Regulating Public Procurement* 269.

⁷⁶⁴ CIDB Practice note 10 2 para 1.

⁷⁶⁵ This refers to breaking down of contracts into smaller contracts to enable developing contractors to participate in public procurement and be awarded government contracts. See CIDB Best Practice Guideline

same time placed strain on public sector capacity by impeding its ability to deliver at a large scale and spend capital budgets. It has also reduced the number of medium-sized contractors which are awarded government contracts.⁷⁶⁶ Furthermore, the work opportunities and the development of targeted contractors may be accelerated in the award of contracts to larger contractors who possess the required expertise. These contractors may be required to provide the necessary support to small contractors and as an incentive, be awarded a price preference at tender stage should they undertake in their tender offers to achieve a contract participation goal related to this. They may also be offered an incentive bonus should they equal or exceed the contract participation goal.⁷⁶⁷

4 6 Construction Codes of Good Practice for Broad-Based Black Economic Empowerment⁷⁶⁸

A specific series of Codes of Good Practice⁷⁶⁹ have been published for preferential construction procurement.⁷⁷⁰ The Codes apply B-BBEE in the same way as the generic scorecard and determines a construction contractor's B-BBEE status level based on the same seven elements.⁷⁷¹ However, different weightings are attached to the elements. A distinction is made between contractors in general and built environment professionals. The Code indicates that it should be read in conjunction with the generic scorecard⁷⁷² but where principles, definitions and methodologies differ from the generic scorecard, the Construction Codes of Good Practice will take precedence. An entity which derives most of its annual turnover from construction related activities is bound by the Code. If an entity

B1 13 para 4.2.4.4 where it is noted that small contractors (grades 2-4) can either contract directly with an organ of state or as a subcontractor. However, the unbundling of contracts is not always justifiable, particularly in the case of engineering and construction works contracts. Reasons provided for this include the division of responsibility, duplication of establishment charges and the under-utilisation of resources. The unbundling of contracts can also have a negative impact on costs and the time involved in a project and may place a considerable administrative burden on a procuring organ of state. Therefore, the conclusion of larger contracts is advocated. These contractors may then subcontract to smaller contractors to facilitate their participation in the process. Such an arrangement may be included in a contract as a requirement and thus reduces the burden on the organ of state. This may further lead to networking between small and large contractors. CIDB Best Practice Guideline B1 13 para 4.2.4.4.

⁷⁶⁶ CIDB Practice note 1 "Scaling up delivery and accelerating empowerment" August 2006 6 para 5.

⁷⁶⁷ CIDB Practice note 1 6-7 para 5. See also Arrowsmith et al *Regulating Public Procurement* 270 who notes that a price mechanism may be used to reward contractors which undertake to better minimum participations goals.

⁷⁶⁸ GG 32305 of 05-06-2009.

⁷⁶⁹ Code series 2100-2700.

⁷⁷⁰ The Code is applicable for seven years from the date of publication. Therefore, it will apply to preferential construction procurement until June 2016.

⁷⁷¹ See para 3 3 of this chapter.

⁷⁷² Series 000 in GG 29617 of 09-02-2007.

derives an equal amount of turnover from construction related activities as from any other activities, the entity has a choice as to whether it applies the Code in its procurement practices or not.⁷⁷³

5 Implications of the 2011 PPPFA Regulations on the construction industry

The 2011 PPPFA Regulations have brought about a number of changes in the approach to preferential procurement in the public sector including public sector construction procurement. The effect of these new Regulations on the construction industry will now be discussed.

5 1 Organs of state bound by the 2011 PPPFA Regulations and the point system

As noted, under the 2001 Regulations the entities which were bound were those indicated in section 1(iii) of the PPPFA. In terms of the definition of an organ of state in the PPPFA, the CIDB would fall under section 1(iii)(f) of the Act. However, since no institutions were identified by the Minister as bound by the Act, the CIDB was not bound by the PPPFA and was thus not obliged to apply preferential procurement in accordance with the Act. Therefore, the various schemes used for implementing preferential procurement may have been used in the construction industry provided that the schemes complied with section 217(1) of the Constitution in that they were fair, equitable, transparent, competitive and cost-effective.

Regulation 2(1) of the 2011 Regulations, however, states that entities in Schedule 3A, amongst others, to the PFMA are bound by the Act and its Regulations. Therefore, the CIDB being an entity in Schedule 3A now falls within the ambit of the Act and Regulations. Consequently, it must implement preferential procurement policies in accordance with the framework provided for in the PPPFA, which is the point system. The CIDB in drawing up its prescripts must therefore provide for preference at the award stage of the procurement process and must award a maximum of 10 or 20 points for preference depending on the value of the contract.

⁷⁷³ Construction Codes of Good Practice 8.

5 2 Criteria for which preference points may be awarded

The CIDB which was not bound by the PPPFA under the 2001 Regulations could implement preferential procurement policies in accordance with its own rules. However, under the 2011 Regulations the CIDB is afforded much less discretion in terms of preference. Like other entities bound by the Act, the CIDB is now obliged to award preference in terms of a contractor's B-BBEE status level certificate which indicates its level of compliance with the elements to be achieved in terms of the BBBEEA Codes of Good Practice. Preference in the construction industry it appears focuses in the main on the development of black ownership. The preference goals to be achieved in terms of the BBBEEA are, however, focused on broad-based black economic empowerment. Therefore, preference policies which are used in the construction industry as stated by CIDB prescripts should be brought in line with the goals of the BBBEEA in order for construction contractors to qualify for B-BBEE status level certificates.

5 3 Sale and letting of assets

As noted, preference points in contracts for the sale and letting of assets are excluded under the 2011 Regulations. However, no express prohibition exists against preference policies in sale and letting contracts.⁷⁷⁴ It was noted in chapter three that competitive tendering may be used for the sale of state assets in the construction industry.⁷⁷⁵ Therefore, preference could arguably be provided for in terms of the PPPFA in these contracts.

⁷⁷⁴ See *CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality, Oudtshoorn Municipality v CSHELL 271 (Pty) Ltd* (1427/2011) [2012] ZAWCHC 25 (30 March 2012) para 36 where the court held that no reference is made in section 217 of the Constitution, the PPPFA and its Regulations to the disposal of assets. The disposal of property by a municipality is regulated solely by s 14 of the MFMA. S 14 of the MFMA regulates the disposal of capital assets at local government level.

⁷⁷⁵ See para 5 5 of chapter 3 and CIDB Best Practice Guideline A2 "Applying the procurement prescripts of the CIDB in the Public Sector" December 2007 58 para 4.1.5.

5 4 Functionality

The amendments regarding functionality in the 2011 Regulations have a few consequences for the way in which it is evaluated in construction contracts. Various ways have been used in the construction industry for the evaluation of quality/functionality in construction contracts. It has direct bearing on the cost-effectiveness principle and as such is an important factor to be considered in construction contracts.

The definition of quality/functionality as used in the construction industry should be amended to be brought in line with the 2011 Regulations in order to ensure that all tenders are evaluated based on the same criteria. The effect of the 2011 Regulations regarding functionality is that it can no longer be evaluated as part of the number of points to be awarded for price. In other words, functionality and price can no longer when combined amount to 80 or 90 points depending on the value of the contract. Regulation 4(4) and (5) now provide for functionality to be considered as a qualification criterion after which tenders may be evaluated based on price and preference. Therefore, evaluation methods three and four discussed in chapter five are no longer permitted under the 2011 Regulations and should be amended.

5 5 Local content

Local content has been promoted in construction preferential policies through the targeting of Local Business Enterprises and Local Labour. These were given preference through the use of contract participation goals in either awarding a contract to a local labourer or Local Business Enterprise or by means of awarding a contract to a tenderer who contractually agrees to sub-contract a part of the contract to local labourers or a Local Business Enterprise.

The CIDB may publish prescripts which allow for local production and content to be promoted by making it a qualification criterion in construction contracts.⁷⁷⁶ The construction industry is not a designated sector for which a prescribed minimum threshold

⁷⁷⁶ See Regulation 9(5) of the 2011 Regulations.

for local production and content is set. Therefore, it may evaluate local content at its discretion when tenderers are qualified for participation in the tender process.

5 6 Cancellation and re-invitation of tenders

The cancellation and re-invitation of tenders in the construction industry is discussed in chapter five⁷⁷⁷ and allows for conditions under which tenders may be cancelled which are not provided for in the 2011 Regulations. An entity procuring construction works or goods and services in the construction industry may accept or reject any variation or deviation of a tender offer or alternative tender offer and may cancel the tender process before the conclusion of a contract. According to CIDB prescripts, the procuring entity will not incur any liability for doing so but should provide written reasons for its decisions upon request.⁷⁷⁸ Reasons provided for the cancellation of a tender process have been to define the scope of work and to enable the procuring entity to test market prices. Further reasons are that the goods, works or services are no longer needed, that no funding is available or that the preferred tenderer did not submit a tender or did not submit the best tender offer. The CIDB prescripts regarding cancellation of tenders should thus be amended to be brought in line with the PPPFA Regulations.

5 7 Sub-contracting

Currently, (November 2012) up to 40% of a construction contract value may be sub-contracted to targeted enterprises.⁷⁷⁹ Under the 2001 Regulations, this was permissible since the CIDB was not bound by the Act. However, Regulation 11(9) of the 2011 Regulations prohibits more than 25% of the contract value to be sub-contracted to a tenderer who does not have an equal or higher B-BBEE status level. A tenderer may furthermore not be awarded points for preference if it is indicated in the tender documents that the tenderer intends to sub-contract more than 25% of the contract value to a tenderer who does not have an equal or higher B-BBEE status level.⁷⁸⁰ Future CIDB prescripts will,

⁷⁷⁷ Para 2 8.

⁷⁷⁸ CIDB Standard for Uniformity 35 para F.1.5.1. See also para 2 8 of chapter 5.

⁷⁷⁹ CIDB Best Practice Guideline B1 12 Table 4 which indicates the different forms of preference which may be provided for.

⁷⁸⁰ Regulation 11(8).

however, provide that at least 5% and a maximum of 25% of the contract value may be sub-contracted to targeted enterprises. However, this will affect only those contractors registered in the general building and civil engineering classes of construction work where these are the prime contractors. Sub-contractors may be in the civil engineering, electrical engineering, general building and mechanical engineering classes of construction work.⁷⁸¹

6 Recent and future developments in public sector preferential construction procurement

Recently, the CIDB has published information regarding new developments in the award of preference and the development of contractors in the construction industry. In what follows, these developments and what they aim to achieve will be discussed.

6 1 CIDB Best Practice Project Assessment Scheme

Section 23 of the CIDB Act provides that a best practice project assessment scheme must be established in terms of which construction contractors will be subject to an assessment of their compliance with CIDB best practice standards and guidelines.⁷⁸² CIDB prescripts indicate that growth of the emerging sector in the construction industry can be facilitated through two mechanisms. Firstly, it can be facilitated through direct preference methods or secondly by means of indirect targeting.⁷⁸³ The Best Practice Project Assessment Scheme involves the indirect targeting of construction works contractors for the development of smaller contractors. The aim of the Scheme is to promote enterprise development by introducing the requirement that a minimum of 5% of the total project value of selected contracts must be undertaken by developing joint ventures⁷⁸⁴ or must be sub-contracted to

⁷⁸¹ See para 6 of this chapter.

⁷⁸² See s 23(1)-(2) of the Act.

⁷⁸³ CIDB Best Practice Project Assessment Scheme; Framework for Indirect Targeting for Enterprise Development through Construction Works Contracts February 2012 1. <http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/Framework_for_Indirect_Targeting_2012_02_22.pdf> (accessed 25-07-2012).

⁷⁸⁴ A joint venture has been defined in the CIDB Draft for Public Comment: Standard for Indirect Targeting for Enterprise Development through Construction Works Contracts 14 February 2012 2 <http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/Standard_for_Indirect_Targeting_2012_02_14.pdf> (accessed 25-07-2012) as a “grouping of two or more contractors acting as one legal entity, where each is liable for the actions of the other”.

emerging or developing contractors which will also be the beneficiaries of enterprise development support from the prime contractors.

The requirements for indirect targeting will be applicable to contracts above a certain tender value and above approximate project duration of at least six months. The targeted contractors will be those registered in grading designation seven to nine. The requirements will further be applicable to only those contractors registered in the general building and civil engineering classes of construction works.⁷⁸⁵

It would appear that a contractor's compliance with enterprise development will be determined at the qualification stage of the tender process. Tenderers who will be required to comply with indirect targeting will be those who indicate that they intend to sub-contract at least 25% of the contract to contractors in the civil engineering, electrical engineering, general building works or mechanical engineering classes of construction works. It is stated that these requirements must be indicated in the tender documents.⁷⁸⁶ Organs of state will be permitted to increase the minimum of 5% of the total project value to be sub-contracted or performed by a developing joint venture partner, but may not decrease the minimum percentage.⁷⁸⁷

Therefore, a developed or prime contractor will be required to be registered as at least a grade seven general building or civil engineering contractor in order to comply with the Scheme.⁷⁸⁸ In the case of a joint venture, at least one of the joint venture partners must be registered as a grade seven general building or civil engineering contractor. The prime contractor or joint venture partner will be responsible for the development support to the developing contractor or joint venture partner.⁷⁸⁹ A relationship agreement between the developed and developing contractors must be established. A developed contractor may further not have an equity holding of more than 20% in the developing contractor. All developing contractors will be required to be registered with the CIDB, they must have

⁷⁸⁵ CIDB Best Practice Project Assessment Scheme Framework 2.

⁷⁸⁶ CIDB Best Practice Project Assessment Scheme Framework 2.

⁷⁸⁷ CIDB Best Practice Project Assessment Scheme Framework 3.

⁷⁸⁸ Contractors are graded in accordance with the maximum value of contracts they are permitted to perform. Grade one contractors may contract for the lowest amount at R200 000 and grade nine contractors for an unlimited amount. See chapter 4 where the qualification criteria for the various grading designations are explained.

⁷⁸⁹ CIDB Best Practice Project Assessment Scheme Framework 3.

permanently employed staff and must be at least 50% owned by black persons⁷⁹⁰ or at least 30% black women owned.⁷⁹¹ Developing contractors must further be appointed by a prime contractor, they must have the potential to be developed and must be willing to commit to participating in the development process.

CIDB draft prescripts note that before the Scheme is to be implemented in each project, a needs analysis must be developed for the developing contractors. Based on the needs analysis, a development programme pertaining to the specific project in which at least two areas of development per beneficiary must be identified. The possible areas of development have been noted as but are not limited to skills development leading to nationally accredited outcomes,⁷⁹² labour skills transfer, planning, tendering and programming skills transfer, legal compliance, procurement skills transfer and contractual knowledge transfer.⁷⁹³ The prime contractor will be obliged to submit a report to the organ of state within a week of practical completion.⁷⁹⁴

Enterprise development co-ordinators will be appointed by the prime contractors to oversee the compliance of development objectives. Enterprise development inspectors will in turn be appointed by the CIDB to monitor the co-ordinators and the development that takes place nationally.⁷⁹⁵ Failure by developed contractors to comply with all requirements

⁷⁹⁰ Fifty percent black owned has been defined as “an enterprise in which black people: a) hold more than 50% of the voting rights that are not subject to any limitation; and b) hold more than 50% of the economic interest”. CIDB Standard for Indirect Targeting 2.

⁷⁹¹ CIDB Best Practice Project Assessment Scheme Framework 3. “Black people” are defined in the CIDB Standard for Indirect Targeting as “natural persons who are African, Coloured or Indian and who are a citizen of the Republic of South Africa: a) by birth or decent; or b) naturalisation occurring before the commencement date of the Constitution of the Republic of South Africa Act 200 of 1993 occurring after the commencement date of such Act, but who, without the Apartheid policy would have qualified for naturalisation before then”. Thirty percent black woman owned is defined as “an enterprise in which black people who are women: a) hold more than 30% of the voting rights that are not subject to any limitation; and b) hold more than 30% of the economic interest”. CIDB Standard for Indirect Targeting 3.

⁷⁹² See CIDB Framework Best Practice Project Assessment Scheme: Construction Skills Development February 2012 <http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/Framework_for_Construction_Skills_Development_2012_03_01.pdf> (accessed 01-08-2012) and CIDB Draft for Public Comment: Standard for Developing Skills through Construction Works Contracts <http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/Standard_for_Construction_Skills_Development_2012_02_28.pdf> (accessed 01-08-2012) for the new framework and draft standard for skills developments in construction works contracts.

⁷⁹³ See CIDB Best Practice Project Assessment Scheme Framework 4.

⁷⁹⁴ Practical completion is defined as “the state of completion at the end of construction required in terms of the contract”. It is noted that the date of completion will be as indicated in the specific form of contract which is used. Practical completion is also more commonly understood to be “a state of readiness for occupation of the whole works although some minor work may be outstanding”. CIDB Standard for Indirect Targeting 2.

⁷⁹⁵ CIDB Best Practice Project Assessment Scheme Framework 4-5.

may result in fines or penalties being imposed as provided for by the Regulations to the CIDB Act.⁷⁹⁶

6.2 Incorporating “green building” in preferential construction procurement⁷⁹⁷

The need for energy efficiency procedures in the construction industry has been identified and as such the CIDB has embarked upon bringing its policies in line with that of the Green Building Council of South Africa (GBCSA) by introducing the Green Star SA certification.⁷⁹⁸ One Star will earn a contractor ten points and represents minimum practice compliance. A Two Star certification will equal 20 points and represents average practice. In the case of a Three Star certification, a contractor will be awarded 30 points and is an indication of good practice. A Four Star certification will amount to 45 points and indicates best practice by a contractor. A contractor, who is certified for Five Star, will earn 60 points and represents South African excellence. In the last instance, a Six Star certification will earn 75 points and represents world leadership in “green” construction practices.⁷⁹⁹

Contractors are encouraged or may be required to be certified to build, renovate, design and construct in accordance with a Four Star Green Star SA standard, where such a standard exists for the particular classes of construction works being procured. Contractors are further encouraged to take their rating into account as part of their qualification criteria in the case of the lease of an office space.⁸⁰⁰

Contracts above a determined value at the planning stage and for a type of facility to be determined by the Minister of Public Works as well as all public sector buildings for which the planning stage has begun must be designed and/or constructed in accordance with a Four Star Green Star SA certification. Contractors registered in grades seven to nine will

⁷⁹⁶ CIDB Best Practice Project Assessment Scheme Framework 5.

⁷⁹⁷ See P Bolton “Incorporating environmental considerations in government procurement in South Africa” (2008) 1 *TSAR* 31. See also S De la Harpe “Green Public Procurement – An Option for South Africa?” (2008) 2 *Speculum Juris* 53.

⁷⁹⁸ CIDB Best Practice Project Assessment Scheme; Requirements and Guidelines for Green Building Certification January 2011 1
<http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/BestPracProjAsmntScheme_ReqAndGuidelines_GBCertification_12Jan2011.pdf> (accessed 25-07-2012).

⁷⁹⁹ CIDB Best Practice Project Assessment Scheme: Green Building Certification 1.

⁸⁰⁰ CIDB Best Practice Project Assessment Scheme; Green Building Certification 1.

be subject to these requirements.⁸⁰¹ The requirements pertaining to “green building” must be stated in the call for tenders and the contract.⁸⁰²

It is not indicated at what stage of the procurement process the points will be awarded to tenderers. However, specific reference is made to the use of Green Building Certification Status as eligibility or qualification criteria in the case of lease contracts.⁸⁰³ It would appear that for other types of contracts, a Green Building Certification Status certificate would have to be provided when a contractor applies for registration on the Register of Contractors.

7 Constitutional compliance of preferential construction procurement

In what follows, the extent to which the use of preferential procurement in the construction industry complies with section 217 of the Constitution will be examined. Firstly, the compliance of preferential construction procurement as stated in CIDB prescripts will be tested against the principles in section 217(1). Following this, sections 217(2) and (3) which make specific reference to the use of procurement as a policy tool will be examined in relation to preference in the construction industry.

7 1 Section 217(1) of the Constitution

7 1 1 Fairness

As noted in chapter two, fairness in the procurement context requires *inter alia* that tenderers have sufficient access to the procurement process, that they are sufficiently informed of all tender information and that they are aware of the rules or criteria to be applied. The information regarding the provision of preference in construction contracts is published in CIDB prescripts where it is further indicated that information should be placed

⁸⁰¹ CIDB Best Practice Project Assessment Scheme Green Building Certification 5.

⁸⁰² CIDB Best Practice Project Assessment Scheme Green Building Certification 6.

⁸⁰³ CIDB Best Practice Project Assessment Scheme Green Building Certification 16.

in tender documents.⁸⁰⁴ Tenderers are informed of the type of preferential procurement to be applied in the process and the percentage of preference that will be evaluated.⁸⁰⁵ Therefore, the information is publicly available and tenderers are made aware of the applicable rules. Fairness in the procurement context further requires that there should be sufficient participation in the process. CIDB prescripts note that tenderers which do not comply with preference requirements may not be eliminated from the tender process. They will simply not be awarded points for preference.⁸⁰⁶ Therefore, all tenderers may participate in the process, however only those which tender for preference points are targeted. Since the focus is on larger contractors, direct preference for smaller contractors is therefore excluded. However, these contractors are assisted by means of indirect participation. In the interest of equity, the targeting of contractors which provide for a preference component in their tenders is justified.⁸⁰⁷ Participation in the procurement process is further promoted by the use of the rotation system. Contractors are placed on the database based on their status as targeted enterprises and when selected to tender, are again evaluated based on preference. However, in the case of set asides and offering back, the participation in the process will be decreased since the contract in these schemes is reserved for certain targeted contractors only. Where qualification criteria, preference at the short listing stage and product specifications are used as preference schemes, tenderers should be notified in tender documents.

The first method of awarding preference, where a fixed number of points are awarded, still falls within the ambit of the PPPFA point system in that no more than 20 points may be awarded for preference. However, since the 2011 PPPFA Regulations have come into operation, tenderers are evaluated for preference points based on their B-BBEE status

⁸⁰⁴ See CIDB Best Practice Guidelines B1 and B2 where preference in the construction industry is discussed.

⁸⁰⁵ See CIDB Best Practice Guideline B1 14 para 4.3 where it is stated that contract participation goals should be clearly defined to make them contractually enforceable. It is further stated that the monitoring of the goals cannot commence until the criteria for evaluating the goals is understood and accepted by all parties involved. See CIDB Best Practice Guideline B1 15 para 4.4. See further CIDB Standard for Uniformity 32 Annex E where a sample preferencing schedule is given in the case of direct preference (or indirect preference) and provides for the percentage of participation goal to be achieved. Therefore, tenderers will be informed of the preference they are expected to fulfil.

⁸⁰⁶ CIDB Best Practice Guideline B1 12.

⁸⁰⁷ See Bolton *The Law of Government Procurement in South Africa* 256 where it is noted that although much progress has been made in terms of affirmative action, obstacles to equal opportunity and discriminatory treatment still persist. Therefore, the use of procurement as a policy tool and the targeting of particular groups is justified.

level. Therefore, the points they are awarded must be based on the B-BBEE certificate they are required to submit.⁸⁰⁸

In terms of method two where a variable number of points are awarded for preference, a continuum in terms of which tenderers are evaluated on an objective basis should be established in order for tenderers to be treated fairly. Where in terms of method three the best offer is awarded the highest number of points, the least favourable no points and the remaining offers are rated between the two scores, the evaluation is entirely subjective. Although the 2001 PPPFA Regulations point system provided for a measure of discretion in that 10 or 20 points could be awarded depending on the value of the contract for the goals stated in the tender documents, the 2011 PPPFA Regulations clearly indicate the number of points to be awarded based on the B-BBEE score a tenderer has on its certificate. Therefore, method three is inconsistent with the evaluation of preference as prescribed by the PPPFA Regulations. Where this method is used, reasons would have to be provided as to why and how tenderers scored points for preference in light of a tenderer's right to written reasons as a component of procedural fairness.

The use of resource specifications in the monitoring of preference provides for a fair and equitable system. All tenderers are evaluated and monitored in terms of the same specification to ensure that all tenderers adhere to the preference requirements of a tender call. Competition is promoted in the use of resource specifications since provision is made for the documentation of the progress of tenderers and adjustments which may be made to bring preference goals in line with the scope of work.

The focus of increase in empowerment in larger construction contracts excludes smaller contractors from direct development by the procuring organ of state. However, as noted, in the interest of equity and cost-effectiveness the focus on larger contractors may be justified provided that smaller contractors are in fact developed by the larger contractors in the development programmes.

⁸⁰⁸ See Regulations 5(2), 6(2) and 10 of the 2011 PPPFA Regulations.

7 1 2 Equity

7 1 2 1 Policy promotion in terms of legislation

The CIDB Act and its Regulations provide for the implementation of equity in the construction industry. Regulation 5 provides that from the Register of Contractors, an organ of state may identify potentially emerging contractors within particular contractor grading designations for the purpose of development programmes which target the improvement and progress of contractors. Regulation 6(1)(b) further provides that a contractor's grading designation is determined by *inter alia* the status of the contractor as a potentially emerging enterprise. Section 1(k) of the CIDB Act in turn defines an emerging enterprise as "an enterprise which is owned, managed and controlled by previously disadvantaged persons and which is overcoming business impediments arising from the legacy of apartheid". Regulation 13 further provides that a potentially emerging enterprise is classified as such by identifying the principals which are previously disadvantaged persons, by establishing whether these principals own at least 50% of the enterprise and by establishing whether the previously disadvantaged principals possess and exercise the authority to manage the assets and daily operations of the enterprise and whether they possess the appropriate managerial and financial authority in determining the policies and directing the operations of the enterprise.⁸⁰⁹

In taking a contractor's status as a potentially emerging enterprise into consideration, such a contractor may be permitted to tender for a contract in a grading designation which is one level higher than the contractor is registered for. In other words, if a contractor is a grade five potentially emerging contractor, the contractor may tender for a contract which would have a grade six value. However, where this occurs, the organ of state must be satisfied that the contractor has the potential to develop and qualify to be registered in the higher grade and must ensure that the contractor has the necessary financial, management or other support to enable the contractor to execute the contract successfully.⁸¹⁰

⁸⁰⁹ See Regulation 13(a)-(c).

⁸¹⁰ See Regulation 25(8)(a)-(b).

7 1 2 2 Equity in preference schemes

The aim of preference schemes such as offering back, set asides, qualification criteria, preference provided for at the short listing stage and product or service specification is for the attainment of equity in the procurement process. However, this may limit other principles such as fairness in the case of set asides for example.⁸¹¹ In light of the importance of preferential procurement this may be justified by the equity principle. Organs of state should, however, use the preference schemes which best comply with section 217(1) as a whole.

7 1 2 3 Equity in future construction contracts

In terms of future implementation of equity in the construction industry, the Best Practice Project Assessment Scheme has been created. Section 23 of the CIDB Act provides that the CIDB must establish a best practice project assessment scheme based on the best practices identified by the CIDB in section 5 of the Act. Section 5 in turn provides for the promotion and implementation of projects, programmes and policies for the purpose of *inter alia* supporting the emerging enterprise sector.⁸¹² As noted, the aim will be that a minimum of 5% of the total project value will be sub-contracted to smaller contractors (meaning contractors in grades one to six).⁸¹³ The work to be sub-contracted will be to those contractors registered to perform works in the civil engineering, electrical engineering, general building or mechanical engineering classes of construction works. CIDB statistics indicate that 80% of grade two to four general building and civil engineering

⁸¹¹ National Treasury Practice Note SCM 2 of 2006 prohibits the use of set asides as a means of awarding preference. Although the CIDB was not bound by the PPPFA under the 2001 Regulations at the time the Practice Note came into operation, the award of preference points for set asides in construction contracts cannot be regarded as fair under the 2011 Regulations.

⁸¹² S 5(1)(a)(i).

⁸¹³ It is noted that developed enterprises will be awarded the contracts. These are defined as "a) in the case of a single enterprise operating as the main contractors, must be registered in a CIDB Grade 7 or higher in the General Building (GB) or Civil Engineering (CE) Classes of Works, and must be accountable for providing the enterprise development support or b) in the case of a JV agreement, at least one JV partner must be registered in a CIDB Grade 7 or higher in the General Building (GB) or Civil Engineering (CE) Classes of Work, and must be accountable for providing the enterprise development support". See CIDB Draft for Public Comment: Standard for Indirect Targeting for Enterprise Development through Construction Contracts
<http://www.cidb.org.za/Documents/KC/cidb_Publications/Best_prac_scheme/Framework_for_Indirect_Targeting_2012_02_22/pdf> (accessed 01-08-2012). Therefore, the developing contractors will be those registered in grades 1-6.

contractors are black owned. The same percentage is found in grade five and six general building and civil engineering contractors.⁸¹⁴ Therefore, a large percentage of the work to be sub-contracted to developing contractors (grades one to six) will be for the benefit of black-owned enterprises.

The requirements for the Best Practice Project Assessment Scheme indicate that the developing enterprises which will benefit from the development programme managed by the developed contractors must at least be 50% black owned or 30% women owned. Therefore, a minimum equity requirement is needed. The use of an enterprise development co-ordinator will ensure that the minimum requirements are fulfilled and therefore that equitable practices take place within the procurement process and the execution of a contract.

7 1 2 4 Additional methods aimed at policy promotion

A further initiative aimed at equitable practices in the construction industry is the National Contractor Development Programme (NCDP). It is a programme aimed at improving contractor grading designations, performance and quality as well as equity and targeted ownership. Learnerships are provided to grade one and two contractors, contractor development to grades two to six and performance improvement for grades four to seven.⁸¹⁵

The points awarded for preference in construction contracts further indicates that equity is implemented within the industry. The idea that larger contractors are targeted for the award of contracts involves the requirement that these contractors develop smaller contractors. Therefore, equitable practices are implemented.

⁸¹⁴ See CIDB “Quarterly Monitor” (2010) 34
<http://www.cidb.org.za/Documents/KC/cidb_Publications/Ind_Reps_QM/ind_reps_Quarterly_Monitor_July_2012.pdf> (accessed 01-08-2012).

⁸¹⁵ See
<http://www.cidb.org.za/Documents/KC/cidb_Publications/Brochures/brochure_NCDP_Framework_March2012.pdf> (accessed 01-08-2012).

The Construction Codes of Good Practice for Broad-Based Black Economic Empowerment further provides for the implementation of equity. However, as noted, the preference models indicated in CIDB prescripts appear to prefer black-owned enterprises only. The Construction Codes of Good Practice on the other hand, like the generic scorecard for general public procurement, involves broad-based black economic empowerment. Therefore, the targets of the Construction Codes of Good Practice and the CIDB prescripts are at odds.

7 1 2 5 Equity in terms of section 217 of the Constitution

On the whole it would appear that the principle of equity is complied with in the construction industry. However, a specific condition in tender documents to exclude a specific category of contractors in the form of a set-aside would be unfair and inequitable in terms of the 2011 Regulations by which the CIDB is bound.

7 1 3 Transparency

As previously noted, a transparent system is one which is “open” in which all information is easily accessible. The manner in which preference is dealt with is published in CIDB prescripts. However, in a particular procurement process, the method of evaluation and the specific participation goals or percentage direct preference to be awarded or the specific preference scheme to be applied should be made known to all tenderers in order to ensure a transparent system. As indicated in CIDB prescripts,⁸¹⁶ penalties will be imposed where tenderers fail to comply with preference requirements. It is therefore ensured that preference in construction contracts is applied and is also seen to be applied.

The role of resource specifications in the process contribute to an open system in that tenderers are monitored throughout the process. This includes their progress, and the manner of implementation. Resource specifications thus go a long way in ensuring a transparent system. Transparency is further promoted in an annual report which must be submitted to the municipal council in the case of procurement at local government level

⁸¹⁶ See CIDB Best Practice Guideline B1 21, 23.

and to the relevant minister in the case of provincial and national government. The report must indicate the value of the contracts which are associated with targeting strategies and the work performed by target groups. This ensures that the target groups are the beneficiaries of the targeting strategies and that value for money is thus attained.⁸¹⁷

With regard to future preference policies, the specific goals to be achieved and the percentage of the project value to be sub-contracted to developing contractors should be made clear in order to ensure that those tenderers who comply with the requirements participate in the process. This will also promote competition in the process and value for money in that tenderers know what they tender for and do not tender at a loss. Transparency will be promoted in the future Best Practice Project Assessment Scheme where prime or developed contractors are required to submit a report within a week of practical completion. The report will provide information regarding the contract participation goal which was involved in the contract, the registration information of the targeted enterprises and the value of the works which was sub-contracted.⁸¹⁸

Where “green building” requirements will be enforced, transparency will be promoted in the Green Star SA Star certificate which will have to be submitted. Therefore, organs of state will be able to verify whether contractors are in fact “green” contractors and ensure value for money in the process. As in the case of equity requirements, the qualification criteria for “green building” should be placed in the tender call and the subsequent contract. Similar to the Best Practice Project Assessment Scheme, a report must be submitted by contractors within a week of practical completion. The registration information of targeted enterprises, the information regarding the extent to which the contract participation goal was fulfilled and the value of the work which was sub-contracted must be provided in the report. This will ensure that the process is open and thus complies with the principle of transparency.

⁸¹⁷ CIDB Best Practice Guideline B1 19-23. It is noted in CIDB Practice note 10 3 that the participation of target groups should be measured in monetary terms since monetary terms can be verified and audited. The participation of targeted enterprises can be measured in terms of receipts for work or services rendered or for the provision of supplies. The participation of targeted labour on the other hand, can be measured in terms of the amount spent on wages and allowances to targeted labourers.

⁸¹⁸ CIDB Draft Standard for Indirect Targeting for Enterprises Development through Construction Works Contracts 4.

7 1 4 Competition

Where preference plays an important role in a particular procurement, the competition may be somewhat limited especially in the case of set asides and offering back schemes. In the construction industry, as noted, the focus has shifted to larger or more developed contractors as the target group for construction contracts. This decreases the pool of contractors which would tender for a contract since there are more developing contractors than developed contractors which are registered with the CIDB.⁸¹⁹ Furthermore, not all contractors who fall within the developed grading designations will be able to tender successfully as only those who are targeted will be able to. In other words, contractors which do not have the minimum targets stated in the tender documents will be able to tender, but will not be awarded preference points for lack of compliance with the preference requirements.⁸²⁰

Competition is, however, promoted where use is made of the database to award contracts. Tenderers are ranked in the order of entry onto the database and are re-positioned after having participated in the procurement process. Therefore, all tenderers are given a fair opportunity to participate in the process.

Where “green building” is an important preference tool, competition may be decreased as not many tenderers in South Africa have focused on environmentally friendly procurement practices. Therefore, the few which have or are able to tender in this instance will be able to tender successfully.

7 1 5 Cost-effectiveness

It has been noted that the cost-effectiveness of procurement where policy objectives are to be implemented has been a controversial issue. Where policy objectives form part of a

⁸¹⁹ See www.cidb.org.za.

⁸²⁰ This would also depend on the number of points or weight to be awarded for preference. Tenderers who do not have a preference component may still be awarded a contract, despite the points awarded for preference provided that such tenderers score the maximum number of points for price and those tenderers which do have a preference component score below the minimum threshold. See Bolton *The Law of Government Procurement in South Africa* 277 where an example which illustrates this is provided.

tender process, costs are invariably involved. The tender period may be longer due to the involvement of target groups, the goods or services to be procured may be more costly due to the decrease in competition, administrative costs are involved in the process and the possible lack of training and other resources the contractors may have.⁸²¹ It has further been noted that very often the benefits of preferential procurement policies are doubtful or minimal. Even where benefits can be attained, they must be weighed against the cost of implementing it through procurement means. The costs involved in the enforcement of the policies and the risk of not complying with primary procurement objectives must also be considered.⁸²²

7 1 5 1 Effectiveness of policy promotion

Watermeyer notes that typical concerns where procurement is used as a policy tool are loss of economy and efficiency in procurement, the exclusion of eligible tenderers from the tender process, the reduction in competition, unfair and inequitable treatment of contractors, lack of integrity or fairness, lack of transparency in the procurement procedures and the failure to achieve policy objectives through the procurement itself.

He notes that the use of procurement as a policy tool may compromise a fair, equitable, transparent, competitive and cost-effective procurement system.⁸²³ Based on a risk assessment done by Watermeyer, he found that methods such as preferencing at the short listing or award stage are the least likely to compromise the principles in section 217(1) of the Constitution.⁸²⁴ The author further notes that where loss of economy and inefficiency in procurement occurs, tenderers are not awarded the most advantageous offer. The tenders received do not represent value for money and the time taken to solicit tender offers is excessive. A further concern is that a contract may be awarded to a tenderer who is not able to deliver on time or the standard of quality which is required. Contractors which fall outside the requirements for targeted enterprises in terms of the policy objective to be achieved in a specific procurement are excluded from the tender

⁸²¹ Bolton *The Law of Government Procurement in South Africa* 257.

⁸²² R Watermeyer "Implementing preferential procurement policies in the public sector in South Africa" (2003) 45(3) *Journal of the South African Institution of Civil Engineers* 11 13.

⁸²³ R Watermeyer "A generic and systemic approach to procurement: the case for an international standard" (2005) 1 *PPLR* 39 4.

⁸²⁴ Watermeyer (2005) *PPLR* 4-5.

process or are discouraged from tendering. Watermeyer notes that tenderers are not confident in the predictability of the system and as such do not submit tenders. Competition is thus reduced. In terms of unfair and inequitable treatment of contractors, Watermeyer is of the view that a double standard exists with regard to the treatment of contractors and that the ability and capability of contractors is not the main concern of organs of state. He further notes that the procurement procedure is not managed honestly, transparently and with integrity and that this does not inspire public confidence. Where lack of transparency is found, tenderers are not informed of the reasons why they were not awarded a contract. In the end, socio-economic objectives are not achieved despite the numerous mechanisms in place and as such cost-effectiveness is not complied with.⁸²⁵

In a study conducted by Gounden, the author researched the impact of the National Department of Public Works Affirmative Procurement Policy (APP) on the participation and growth of Affirmable Business Enterprises (ABEs) in the South African construction industry during the period August 1996 to July 1998. Gounden found that there was a magnitude increase in ABE participation in contracts above the value of R2 million where ABEs were involved as subcontractors. In contracts below the value of R2 million, there were noticeable increases, but not to the extent found in contracts above R2 million. Gounden further found that participation of ABEs was significantly higher in the building class of construction works and that limited increases were found in the civil, electrical and mechanical engineering classes. It was found that ABEs formally registered as contractors⁸²⁶ during the study period and that there was a significant increase in the number of joint ventures formed between ABEs and non-ABEs. It was noted that ABEs derived more benefit via skills transfer from joint venture agreements than from participating as sub-contractors.⁸²⁷ Based on this study it would appear that engaging with the emerging sector by means of joint ventures rather than sub-contracting agreements, is more advantageous in achieving policy objectives and value for money.

⁸²⁵ Watermeyer (2005) *PPLR* 13-14.

⁸²⁶ These contractors were informal contractors who were not registered with a specific body in order to execute construction contracts.

⁸²⁷ Gounden *The Impact of the Affirmative Procurement Policy* 5.44-5.46. See also Watermeyer "Potential procurement strategies for construction industry development in the SADC region".

7 1 5 2 Cost-effectiveness in terms of section 217 of the Constitution

As noted in previous chapters, cost-effectiveness in the procurement context refers to the capability of tenderers to perform in terms of the contract and the submission of a tax clearance certificate. A contractor's capability in terms of preferential procurement is provided for in Regulation 25(8) of the Construction Industry Development Regulations. This Regulation provides that a contractor may submit a tender offer or expression of interest if the contractor is a potentially emerging contractor registered in a grading designation lower than that advertised. However, the organ of state awarding the contract must be satisfied that such a contractor has the potential to develop and qualify to be registered in the higher grade and must ensure that the contractor has the financial, management or other support necessary to successfully execute the contract.⁸²⁸ Therefore, where this provision is complied with, the targeted potentially emerging contractor should be able to perform satisfactorily in terms of the contract. However, this Regulation applies to prime contractors and not sub-contractors. Therefore, in the case of indirect preferencing, the organ of state runs the risk that a contractor who is not capable of successfully executing the sub-contracted work is granted the opportunity to do so. The requirements of the new Best Practice Project Assessment Scheme where at least 5% of the total project value must be sub-contracted or awarded to a joint venture should thus provide for the assurance that emerging or developing contractors are capable of performing.

The Best Practice Project Assessment Scheme does, however, provide that developed contractors must indicate that they will implement the development programmes in terms of their contracts. They will further be obliged to submit a report in order to indicate the extent to which contract participation goals were achieved. This will ensure that policy objectives are achieved and that the costs involved in the implementation of preferential procurement assist in the attainment of value for money.

Cost-effectiveness will further be promoted in the provision of grade seven contractors and higher as the target groups. These contractors, as noted in chapter four, are required to have the necessary financial and technical resources and the minimum number of

⁸²⁸ See Regulation 25(8)(a)-(b).

personnel to perform the work in order to ensure that contracts are properly performed and that developing contractors are in fact assisted in the development programmes. The developing contractors, on the other hand, must be at least 30% women owned or 50% black owned in order to qualify as developing contractors in fulfillment of a contract participation goal. Therefore, measures will be in place to ensure that the correct contractors are targeted and the desired contractors benefit from the indirect preferencing methods. Although competition will be limited, where compliance with the requirements is ensured, value for money will be achieved.

7 2 Section 217(2) and (3) of the Constitution

Section 217(2) provides that organs of state are not prevented from implementing a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) in turn provides for a national legislative framework in terms of which the policy contemplated in section 217(2) must be implemented.

It has been noted that section 217(2) does not place an obligation on organs of state to implement a preferential procurement policy and that such an obligation should instead be imposed by legislation.⁸²⁹ As noted in chapter two,⁸³⁰ organs of state bound by the PPPFA and its 2001 Regulations, were those indicated in section 1(iii) of the Act. Regulation 2(1) of the 2011 PPPFA Regulations provides that those entities in section 1(iii) of the Act and those in Schedule 2, 3A, 3B, 3C, 3D of the PFMA and municipal entities are bound by the 2011 Regulations. Therefore, a wider group of public entities are now obligated to implement a preferential procurement policy in terms of the PPPFA. The CIDB as a Schedule 3A entity is thus one of these.

In terms of the 2001 PPPFA Regulations, the CIDB was not an organ of state as defined in section 1(iii) of the Act. Although the CIDB is an organ of state in terms of section 239(b)(ii)

⁸²⁹ Bolton *The Law of Government Procurement in South Africa* 264.

⁸³⁰ See para 7 1.

of the Constitution since it performs a public function in terms of legislation,⁸³¹ it was not recognised by the Minister in a notice in the Government Gazette as an institution or category of institutions to which the Act applies as stated in subsection (f) of the definition of “organ of state” in the Act. However, CIDB prescripts indicate that a preferential procurement policy was indeed implemented in the construction industry.

As noted, the 2011 PPPFA Regulations prescribe a point system to be used in terms of which preference must be awarded to contractors at the evaluation stage of the procurement process.⁸³² Therefore, even though some of the methods indicated in the CIDB prescripts such as the use of qualification criteria, preference at the short-listing and award stage as well as indirect preference may comply with section 217(1) overall, they do not comply with the prescribed system for public entities in the PPPFA Regulations as required by section 217(2) and (3) of the Constitution and as such fall foul of section 217 as a whole.

8 Conclusion

Various methods exist in terms of which preferential procurement policies may be used. However, it appears that the primary method in the construction industry is that of contract participation goals. This entails that policy objectives or goals are set by providing for preference directly to contractors which are equity contractors. In other words, they are actively black-owned and controlled. Alternatively, preference goals may be set in requiring that developed contractors execute contracts and allow a percentage of the contract value to be performed by developing or emerging contractors. These developing contractors are in turn expected to be 30% women owned or 50% black owned. This method of implementing preferential procurement therefore ensures that the emerging sector is involved and developed. The targeting of developed contractors as the recipients of public sector construction contracts may contribute to ensuring greater cost-effectiveness in the procurement process.

⁸³¹ The CIDB Act.

⁸³² See Regulations 5 and 6.

It has been noted that developing contractors experience many difficulties in executing a contract successfully. These contractors do not possess the necessary resources to firstly complete a contract and secondly complete it within the timeframe provided in the contract.⁸³³ Therefore, the direct targeting of developing contractors does not provide for a cost-effective procurement system. Shifting the responsibility of developing the emerging contractors to developed contractors will decrease the burden of doing so on organs of state. However, to ensure that the emerging sector benefits from the developing programmes and in order for equity and cost-effectiveness to be complied with, the development of these contractors should be well regulated and enforced.

The methods employed in the construction industry for the attainment of policy objectives are fair in that they provide sufficient opportunity for participation by those contractors which qualify to do so. As noted, several measures are in place which ensures that equity is enforced in the industry. Transparency is complied with insofar as tenderers and the public are aware of the methods used to implement preferential procurement in construction contracts. However, exact specifications with regard to the goals to be achieved by contractors should be provided in tender documents. Tenderers should further be informed of the reasons as to why they were unsuccessful in order to promote a transparent system. Although competition may be decreased due to the targeting of specific contractors, this is justified by the equity principle. Cost-effectiveness of the preferential procurement policy is, as noted, a contentious issue. The Regulations to the CIDB Act provide that an organ of state in awarding a contract to an emerging contractor must ensure that such contractor has the necessary resources and support to perform in terms of the contract.⁸³⁴ Furthermore, the minimum equity requirements of targeted contractors and developing contractors where indirect preference is awarded further ensure that the desired contractors derive benefit from the policies and that the developed contractors who are responsible for the execution of the contract are capable of doing so. Where these requirements are strictly enforced, cost-effectiveness will be attained.

Overall it would appear that section 217(1) is complied with in the use of preferential construction procurement. However, section 217(3) of the Constitution requires that

⁸³³ MJ Magoro & PA Brynard "Difficulties associated with the implementation of the preferential procurement policy in conjunction with a low-cost housing programme: a South African contextualization" (2010) 29(3) *Politeia* 4 12.

⁸³⁴ Regulation 25(8).

preferential procurement policies must be implemented within the framework provided for in the PPPFA. Therefore, the CIDB must award preference in the award stage of evaluating construction contracts by using the point system in the PPPFA. Reference is made to the PPPFA and its point system in CIDB prescripts. However, other methods of implementation are employed. The Construction Codes of Good Practice are aligned with the PPPFA and the generic scorecard used in public sector procurement. The CIDB prescripts should therefore be brought in line with these Construction Codes to create a more uniform procurement system within the construction industry and to ensure overall compliance with section 217 of the Constitution.

CHAPTER SEVEN

CONCLUSION

1 Introduction

Section 217 of the Constitution is the standard for government procurement in South Africa. Section 217(1) provides that organs of state in the national, provincial or local sphere of government or those organs of state identified in national legislation to which section 217 applies, must contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Organs of state are not prevented from implementing policies which provide for preference in the allocation of contracts in terms of section 217(2). Section 217(3) in turn provides that national legislation must be enacted to provide a framework in terms of which preference policies must be implemented.

Construction procurement refers to procurement in the construction industry and includes the invitation, award and management of contracts.⁸³⁵ For the purpose of regulating public sector construction procurement, the Construction Industry Development Board (CIDB) Act⁸³⁶ has been promulgated and establishes the Construction Industry Development Board. The CIDB is responsible for the regulation of public sector construction procurement in South Africa and thus performs a public function in terms of legislation. All procurement decisions made by the CIDB are therefore subject to judicial review in terms of the Promotion of Administrative Justice Act (PAJA).⁸³⁷ The CIDB may furthermore publish best practice guidelines for the regulation of construction procurement. The rules contained in these guidelines, the CIDB Act and its Regulations were discussed and analysed in this thesis for the purpose of establishing whether they comply with section 217 of the Constitution.

⁸³⁵ Regulation 1 of the Construction Industry Development Regulations published in Government Notice (GN) R8986 in Government Gazette (GG) 31603 of 14-11-2008.

⁸³⁶ 38 of 2000.

⁸³⁷ 3 of 2000.

2 Constitutional standard for government procurement in South Africa

2 1 The meaning of public procurement

Government or public procurement is generally referred to as the purchasing of goods and services by the government from outside bodies.⁸³⁸ In the South African context, however, it has been noted that public procurement should be considered as the purchasing, sale and letting of goods and services by the government.⁸³⁹ In support of this interpretation, it has been said that public procurement legislation such as the Public Finance Management Act (PFMA)⁸⁴⁰ and the Local Government: Municipal Finance Management Act (MFMA)⁸⁴¹ which regulate the alienation of goods or assets and reiterate the principles found in section 217(1) of the Constitution subject the disposal of assets by the state to section 217. Public procurement has also been defined as a process which includes the hiring of anything, disposal and acquisition or granting of any rights and concessions and thus promotes a wider definition.⁸⁴² Under the 2011 Regulations to the Preferential Procurement Policy Framework Act (PPPFA),⁸⁴³ however, a point system in the case of contracts for the sale and letting of assets has been excluded and noted as unfortunate.⁸⁴⁴

2 2 Legal regulation of public sector procurement in South Africa

The law applicable to public procurement is the private law of contract. However, because the government is a party to the contract and is obligated to act in the public interest, administrative law is applicable as well. Accordingly, section 33 of the Constitution which protects the right to just administrative action applies to public procurement. In order to give effect to section 33, PAJA has been enacted and is thus applicable. As noted, sections 217(2) and (3) refer to the use of procurement policies for the advancement of categories of persons in the allocation of government contracts. The PPPFA and its

⁸³⁸ G Penfold & P Reyburn "Public Procurement" in S Woolman, T Roux, J Klaaren, D Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed. (OS: 12-03 2011) 25-1 25-7, 25-8.

⁸³⁹ P Bolton *The Law of Government Procurement in South Africa* (2007) 67-68.

⁸⁴⁰ 1 of 1999.

⁸⁴¹ 56 of 2004.

⁸⁴² R Watermeyer "A generic and system approach to procurement: the case for an international standard" (2005) 14(1) *PPLR* 39 39.

⁸⁴³ 5 of 2000.

⁸⁴⁴ P Bolton "New Preferential Procurement Regulations released" (2011) 13(3) *LGB* 7.

Regulations⁸⁴⁵ have been enacted to give effect to these sections and therefore directly regulate public procurement. The PPPFA has further been brought in line with Broad-Based Black Economic Empowerment Act (B-BBEEA)⁸⁴⁶ in order to provide for uniform preference in government contracts and therefore also applies. At national and provincial government level, the PFMA and its Regulations⁸⁴⁷ regulate financial management and therefore public procurement. Similarly, at local government level, the MFMA which governs financial management and the Local Government: Municipal Systems Act⁸⁴⁸ which regulates municipal services find application.

2 3 Organs of state bound by section 217 of the Constitution

The organs of state bound by section 217 are those in the national, provincial or local sphere of government and those identified in national legislation as institutions to which section 217 applies. Since organs of state in section 239(b) of the Constitution are not organs of state in a sphere of government, they will not be bound by section 217. Therefore, only those organs of state in section 239 (a) are subject to section 217. Entities identified in national legislation are those in the PFMA such as departments, entities in Schedules 2 and 3 to the Act, constitutional institutions and provincial departments. Entities regulated by the PPPFA and its Regulations are also bound by section 217 since the purpose of the Act is to give effect to section 217(3) of the Constitution. Entities excluded under the 2001 Regulations such as state-owned enterprises are now subject to the 2011 Regulations.

2 4 The meaning of “contracts for goods or services” in section 217(1)

The phrase “contracts for” in section 217(1) should be read to include pre-contractual activities such as a call for tenders or negotiations irrespective of whether a contract is subsequently concluded. The goods or services which may be procured are those which

⁸⁴⁵ GN R502 in GG 34350 of 08-06-2011.

⁸⁴⁶ 53 of 2003.

⁸⁴⁷ PFMA Public-Private Partnership Treasury Regulation 16 GN R1737 in GG 25773 of 28-11-2003; PFMA Supply Chain Management Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the PFMA GN R225 in GG 27388 of 15-03-2005.

⁸⁴⁸ 32 of 2000.

are tangible and intangible respectively. The regulation of purchasing, selling and letting of immovable state property at national and provincial government level is found in the Regulations to the PFMA⁸⁴⁹ and the Government Immovable Asset Management Act.⁸⁵⁰ At local government level, the Municipal Asset Transfer Regulations⁸⁵¹ govern immovable state property. Therefore, the procurement of immovable state property is subject to section 217 of the Constitution. Services which are considered to be intangible include construction works which therefore do not form a separate category of procurement in South Africa.

2 5 The meaning of the principles

The principles found in section 217(1) operate as a system and are “interconnected and interrelated”.⁸⁵² The weight of each principle may further differ at times and they may not all be present at the same time. They should, however, be balanced to ensure overall compliance with section 217(1).⁸⁵³

2 5 1 Fairness

Fairness in the public procurement context generally refers to procedural fairness and involves a dual relationship between the procuring organ of state and tenderers and the organ of state and tenderers in relation to each other.⁸⁵⁴ The first relationship requires that tenderers have sufficient access to the procurement process, that procurement opportunities should be publicly available and that tenderers should be familiar with the rules applicable to the process. With regard to the second relationship, tenderers should be treated fairly in relation to one another. In other words, no tenderer should have an advantage above another in the process. Although fairness in the procurement context refers to procedural fairness, it cannot be entirely separated from substantive fairness. To this end fairness and equity are intertwined and requires that based on the Constitutional

⁸⁴⁹ See Regulation 16A.7 and 21.3.

⁸⁵⁰ 19 of 2007.

⁸⁵¹ GN R878 in GG 31346 of 22-08-2008.

⁸⁵² Bolton *The Law of Government Procurement in South Africa* 56.

⁸⁵³ 56.

⁸⁵⁴ 47.

Court's substantive interpretation of the right to equality,⁸⁵⁵ the socio-economic circumstances of tenderers should be considered in the procurement process. Therefore, substantive fairness requires that tenderers are assisted in understanding the requirements of the process and that they may receive preference when tenders are evaluated.

2 5 2 Equity

Equity in section 217(1) refers to addressing the inequalities of the past. Therefore, organs of state should use procurement as a tool for the advancement of tenderers who were denied access to the procurement process in the past.

2 5 3 Transparency

A transparent procurement system is one which is open and ensures that tenderers have confidence in the process. It requires that sufficient information should be available throughout the procurement process so that accountability on the part of the government is promoted and corruption is prevented. A transparent procurement system in turn provides for increased competition and ensures that government procurement is conducted in an impartial and open manner. Transparency has been described in terms of the relationship between the government and the procuring public body of which the purpose is to control the actions of the public body so that it procures in the interest of the government. Transparency has further been described in terms of the relationship between the public body and tenderers in that sufficient information should be available to enable a well-informed procurement decision.⁸⁵⁶

⁸⁵⁵ See *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 53; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) 23 para 41; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) 60 para 35 and 62 para 41.

⁸⁵⁶ P Trepte *Regulating Procurement* (2004) 393.

2 5 4 Competition

The principle of competition is intertwined with cost-effectiveness. In order to have a cost-effective procurement system, the best possible value for money should be attained by ensuring the maximum number of comparable tender offers usually brought about by the use of a tendering system. However, there may be circumstances where the use of tendering may not be cost-effective such as in the case of an emergency. Alternative procurement procedures may then be more appropriate.

2 5 5 Cost-effectiveness

In the past, a cost-effective procurement system meant that a tender must be awarded to the tenderer who offered the lowest price. However, in terms of section 217(1), cost-effectiveness in the South African public procurement context now refers to a multitude of factors to be taken into account when a tender is awarded. For example, the time, nature, size and value of the procurement and whether it is proportional to the goods or services sought to be procured. In particular, two general factors appear to constitute cost-effectiveness. Firstly, the capability or ability of tenderers to execute and complete a contract on time and satisfactorily and secondly, the submission of tax clearance certificates by tenderers.⁸⁵⁷ In order to ensure full compliance with the cost-effectiveness principle, various factors should be considered and include price, whole-life costs, the nature and quality of the goods or service, the track record of tenderers, after-sale service and a sufficient number of trained personnel.⁸⁵⁸

⁸⁵⁷ Bolton *The Law of Government Procurement in South Africa* 103.

⁸⁵⁸ S De la Harpe *Procurement Law: A comparative analysis* PhD thesis University of South Africa (2009) 292 para 5.3.2 (f).

3 Construction procurement procedures

3 1 Classification of construction contracts

In order for contractors to tender for a construction contract, they must be registered in the specific category of contract for which a tender is advertised. A prescribed table of contract categories and corresponding procurement procedures is used by the CIDB. Four categories can be distinguished.

Firstly, contractors may tender for engineering and construction works contracts which are for “the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure”.⁸⁵⁹ Secondly, supply contracts may be tendered for and are “contracts for the provision of materials or commodities made available for purchase”.⁸⁶⁰ The third category of contracts is for services other than professional services which are “for the provision of labour or work, including knowledge-based expertise, services carried out by hand, or with the assistance of equipment and plant”.⁸⁶¹ Contracts for the procurement of professional services appear to be regulated by the same procedures with additional factors to be taken into account and are therefore discussed separately. The last category provides for disposals which CIDB prescripts indicate should be managed in terms of the PFMA. These have been described as contracts for “the divestiture of assets, including intellectual property and other rights and goodwill by any means, including sale, rental, lease, license, tenancy, franchise, auction or any combination thereof”.⁸⁶²

⁸⁵⁹ S 1(j) of the CIDB Act.

⁸⁶⁰ CIDB Standard for Uniformity in Construction Procurement May 2010 5 published in GG 33239 of 28-05-2010.

⁸⁶¹ CIDB Standard for Uniformity 5.

⁸⁶² R Watermeyer “A standardised approach to procurement” (2004) 29(10) *IMIESA* 13 16.

3.2 Procurement procedures

The procedures used to procure construction works, goods and services are based on those used in general public sector procurement but are adjusted in accordance with the demands of the industry. Three main procedures are used namely the negotiation procedure which is generally known as single-source procurement, the competitive selection procedure and lastly the competitive negotiation procedure.

The negotiation procedure complies with section 217(1) the least in that no tender call is advertised, a single tenderer is approached and therefore competition is absent. Fairness and transparency is in turn affected and there is limited scope for the equity principle to be applied. Therefore, the procedure should be used only where necessary in the case of urgency or an emergency since a tendering procedure would not be cost-effective.

In terms of the competitive negotiation procedures, fairness appears to be complied with since provisions exist for tendering opportunities to be made publicly available as well as all tender information. Clarification or site meetings may be held and promote substantive fairness in the process. CIDB statistics indicate that most contracts in the lower grading designations were awarded to black-owned enterprises. Equity thus appears to be complied with.

In the interest of transparency, tenders procured by way of one of the competitive selection procedures are opened in public or in the presence of at least two officials. Provision is made for all tender information to be made available on the CIDB website which promotes a transparent system. However, the time given to tenderers for the preparation of tenders in the various legislative provisions and CIDB prescripts appear to be inconsistent. CIDB prescripts do, however, provide that the rights and liabilities of all parties involved should be clear and unambiguous and that internal controls throughout the procurement process are present to ensure an open system. It appears that the various competitive selection procedures provide for sufficient competition. However, in some instances competition may be reduced depending on the value of the contract involved. The reduction in competition is thus limited by the cost-effectiveness principle. Due to the various

procedures available to procuring organs of state, value for money is promoted. Provision is made for procedures in the case of low value contracts where a tendering procedure would not be cost-effective and also higher value contracts where the maximum competition is required in order to ensure that a well-informed decision is made so that value for money is achieved.

3 2 1 Current and suggested procurement of professional services

A profession is said to be “an occupation in which an individual uses an intellectual skill based on an established body of knowledge and practice to provide a specialised service in a defined area, exercising independent judgment in accordance with a code of ethics and in the public interest”.⁸⁶³ The same negotiation and competitive selection procedures are used to procure professional services as for construction works, supplies and general services. However, the specific procedure to be used is determined based on the scope of the assignment, the quality of the service, the complexity of the assignment and whether the assignment is of a routine nature or requires specialist knowledge. Professional service contracts are categorised according to routine, specialist and complex projects.

The CIDB is currently in the process of restructuring the procurement of professional services and proposes that a Register of Professional Service Providers should be created. It is suggested that in the first instance, professional services should be procured in terms of the nominated procedure in which case service providers will compete based on the price they indicate in their tender offers and the preference they provide for or the quality of the service, the price and preference indicated. In the second instance, service providers will be pre-qualified in order to be placed on an electronic database, after which the professional services will be procured in terms of a normal open tendering procedure. In the case of complex projects, the two-envelope competitive selection procedure may also be used. Lastly, it is suggested that pre-qualified professional service providers should compete on the basis of price, quality and preference in terms of the competitive negotiation, qualified or two-envelope procedures.

⁸⁶³ CIDB Practice note 6 “Competitive selection of professional service providers” May 2007 2.

The suggested system for the procurement of professional services appears to comply with the fairness principle in that tender information will be publicly available and tenderers will be required to apply for admission to the register and will be placed in the sequence in which they are received. This will ensure that capable tenderers and comparable offers will be evaluated. Fairness may be impeded where tenderers who are unable to tender will automatically be placed at the bottom of the register. This may, however, be justified in light of the cost-effectiveness principle. It appears that professional service providers will be evaluated in terms of preference in all three suggested categories of procurement. Therefore, the equity principle will be complied with. The system further appears to be transparent in the availability of tender information on the register and CIDB website. The procedures to be used provide for sufficient competition in the nomination and pre-qualification of tenderers to be placed on the register. Cost-effectiveness in the procurement of professional services will be ensured in the pre-qualification of tenderers which in turn entails confirmation of the capability of tenderers to execute a contract. Factors to be considered such as the qualifications, competence and experience of tenderers will further promote the attainment of value for money.

3 2 2 Disposals

No specific procurement procedures are indicated for the disposal of assets in the construction industry. However, CIDB prescripts indicate that it should be regulated in terms of section 42 of the PFMA.⁸⁶⁴

4 Qualification of construction works contractors and professional service providers

4 1 Qualification criteria for placement on the Registers

The qualification of construction works contractors is regulated by two registers, namely, the Register of Contractors and the Register of Projects established in terms of the CIDB

⁸⁶⁴ CIDB Best Practice Guideline A2 “Applying the procurement prescripts of the CIDB in the Public Sector” December 2007 24.

Act. In order to submit tender offers or expression of interest, construction works contractors must apply to be placed on the Register of Contractors. Contractors are evaluated based on their works and financial capability which determines the grading designation in which they will be placed which in turn determines the maximum value of contracts for which they may tender. Nine designations exist with grade one which provides for the lowest value of contracts for which contractors may tender and grade nine with an unlimited value, the highest. A contractor may be registered in more than one class of construction works but may not hold more than one grading designation.

Prescribed criteria for placement on the Register of Contractors are found in the Regulations to the CIDB Act. A distinction is made between criteria for contractors in grading designation two to nine and contractors in grading designation one. A further distinction is made between the works and financial capability criteria for grade two to four contractors and those in grade five to nine. It appears that no works and financial capability is required for grade one contractors to execute construction works contracts as the only indication of a grade one contractor's financial ability to perform a contract is a tax clearance certificate submitted for the purpose of placement on the Register. Contractors are further required to comply with criteria for the submission of construction works contracts.

4.2 Qualification criteria for construction works contracts in terms of section 217(1)

The qualification criteria for construction works contractors are found in the Regulations to the CIDB Act, CIDB prescripts and the CIDB website. The invitation for construction works tenders are further required to be advertised in terms of the requirements in national and local government legislation. The information is therefore widely available and provides for sufficient participation. In evaluating tenderers based on their works and financial capability, a fair process is ensured in that comparable tenders are received. The absence of works and financial capability of grade one contractors may be justifiable in the light of the fact that they contract for the procurement of goods or services of a value lower than R200 000 which means that they do not participate in the tender process and conclude contracts by means of quotations. Therefore, the process involved is much more informal and does not require the strict regulation of a tender process. However, it is suggested that

grade one contractors be developed and that appropriate qualification criteria should be set for grade one contractors in order to become competitive contractors.

One of the aspects of a fair procurement system is that the criteria advertised is the criteria on which tenders are evaluated. In terms of the Construction Industry Development Regulations, a procuring entity must determine the final lowest category of registration required for the tender advertised after tenders have been received.⁸⁶⁵ It is further provided that a tender which does not comply with the final lowest category of registration must be rejected.⁸⁶⁶ Based on the fairness principle in section 217(1) it would appear unfair to adjust tender requirements after the submission of tender offers since the various registration categories provide for contract amounts which differ vastly. Therefore, a tenderer who submits a tender offer based on the tender advertisement may possibly be rejected once a lower category of registration is determined and will have tendered at a loss. In order to avoid this, provision is made in construction procurement procedures for the submission of expressions of interest in order to inform a procuring organ of state of the products available. Moreover, the Regulations to the CIDB Act provide that an alternative class of construction works may be advertised in a call for tenders where more than one but not more than two classes adequately describe the work to be procured.

The Regulations to the CIDB Act make provision for a number of opportunities where equitable practices may be implemented in the construction procurement process. A contractor's status as a potentially emerging enterprise and its B-BBEE status level may be considered when being pre-qualified to tender for a contract. At the same time, the Regulations provide that a procuring entity must ensure that emerging contractors have the ability and capability to execute a contract successfully. It appears that various measures are in place to ensure that the construction procurement process is a transparent one. The CIDB Act binds all participants in the construction procurement process to the Code of Conduct which contains various provisions for transparent practices. The documents used to pre-qualify tenderers further require that the qualification criteria should be set in clear and unambiguous terms and that all rights and obligations are to be defined. The CIDB Act furthermore imposes sanctions for not

⁸⁶⁵ Regulation 25(7).

⁸⁶⁶ Regulation 25(10).

registering a construction project on the Register of Projects. The transparency principle in section 217(1) is therefore complied with.

The Register of Contractors provides for registration of contractors in various classes of construction works and varying contract values for which contractors may tender. The possibility of registration in a higher grading designation provides an incentive for contractors to develop their works and financial capabilities and also for the submission of competitive tenders. Emerging contractors and joint ventures are permitted to submit tender offers for contracts in grading designations higher than they would be able to compete for without the status as emerging contractors or individually. Competition is therefore promoted in the Regulations which allow for this. As noted, the cost-effectiveness of a procurement system is determined by various factors. In South Africa, the capability and submission of tax clearance certificates establish whether a contractor will be able to perform in terms of a contract. The consideration of a contractor's works and financial capability in terms of the CIDB Act and its Regulations provides for a cost-effective system in that not only are comparable tenders received but procuring entities are also able to determine whether tenderers will be able to execute a contract in accordance with the tender requirements. The pre-qualification of tenderers at various stages of the procurement process further ensures that capable tenderers are awarded government contracts. The Regulations do, however, permit a contractor who is not registered to submit an expression of interest or a tender offer. This is contrary to the CIDB Act which requires that a contractor must be registered in order to undertake a construction works contract. A cost-effective system may consequently be undermined.

4.3 Proposed qualification criteria for professional service providers

For the procurement of professional services, the CIDB has proposed a Register of Professional Service Providers which will operate in the same way as the Register of Contractors. Professional service providers will be required to submit certain information in order to be placed on the Register. However, the criteria for these providers should be included in the Regulations to the CIDB Act in order to ensure that it is publicly available and that it will allow for sufficient participation. As in the case of construction works contracts, further detail regarding the submission and opening of tenders as well as

provision for the correction of information should be provided. In compliance with substantive fairness, briefing sessions should be held to ensure that all tenderers are aware of the rules of the process and are thus treated fairly in relation to one another.

The consideration of a provider's B-BBEE status level will ensure that the equity principle is complied with. However, in order to give effect to the transparency principle the qualification criteria should be made publicly available. The CIDB Act and Regulations as well as specific CIDB prescripts should therefore provide all information relating to the procurement of professional services. The rotating Register will allow for sufficient competition in that all tenderers will be given an opportunity to submit a tender offer. Joint ventures will also be able to pool their resources in order to win a tender. However, the fact that the Register will be applicable to only the most commonly required services in the industry may limit the competition that the Register could potentially provide for.

Requirements such as registration with a professional body, proof of annual turnover and a provider's experience are factors which will promote a cost-effective system. Service providers will be pre-qualified which will further enhance the attainment of value for money. Placement on the Register will indicate that tenderers have the necessary resources and will assure organs of state that providers are capable of performing so that a cost-effective system will be maintained.

5 The evaluation and award of construction contracts

The process of evaluation and award of construction contracts begins upon the receipt of tender offers, after which tenders are opened and the procuring entity then determines whether all tender offers are complete and responsive. According to CIDB prescripts a responsive tender is one which complies with all the terms, conditions and specifications in the tender documents and does not detrimentally affect the scope, quality or performance of the works, supplies or services procured. The tender offer should also not significantly change the risks and responsibilities of all parties involved, nor affect the competitive position of other tenderers. Of note is that at the time of testing responsiveness, a tenderer is expected to have signed a form of offer and acceptance. This is a form signed by a

tenderer after it has been informed that its tender was the best offer received in order to conclude a contract. Therefore, tenderers cannot be expected to have completed a form of offer and acceptance at this stage of the procurement process.

CIDB prescripts indicate that procuring bodies may accept or reject any variation, deviation of a tender offer or alternative tender offer and may also cancel the tender process at any time before the formation of a contract without incurring any liability to a tenderer for such cancellation and rejection. Cancellation may be permitted when the scope of work must be refined or finalised, when funding is no longer available or the tender prices exceed the budget for the procurement, in order to test market prices and when the preferred tenderer did not submit a tender offer or did not submit the best tender offer. There may further be insufficient competition or no responsive tenders were received.

A fair procurement system is found in the opening of tenders immediately after the time of receipt which ensures that no tenderer is given an advantage over another. Tenderers are, however, permitted to submit outstanding information after the submission date provided that it does not affect the competitive position of tenderers and is done within a reasonable time. Clarification meetings ensure substantive fairness, however, care should be taken to limit the discussion to clarification only and that it does not lead to an amendment of tender offers. Where amendments are permitted, the tender after its amendments should still comply with the tender specifications. An evaluation report which includes reasons for decisions taken ensures that procedural fairness is complied with. Permitting tenderers in the competitive negotiation procedure more opportunity to correct mistakes or offer explanations for ambiguities in their tender offers is justified by the purpose of the procedure which is to receive competitive tenders which are improved after each round of negotiations. The process therefore remains fair.

Currently, only two of the evaluation methods allow for preference to be considered. Where only the price of a tender offer is evaluated as well as price and quality, provision should be made for the evaluation of a preference component in tender offers as prescribed by the PPPFA. These methods are used to evaluate contracts of a value which fall within the ambit of the 80/20 or 90/10 point system. Preference must therefore be considered in these contracts in order to fully comply with the equity principle.

Several CIDB prescripts provide the rules which govern the evaluation process and require that all tender information should be clear and that tenders must be evaluated in accordance with the criteria advertised. This provides for a transparent system which is further promoted by the public opening of tenders and the tender information which is made publicly available. The preparation of an evaluation report provides that tenderers will be able to determine whether the process was conducted in accordance with the tender specifications and will also be able to improve their offers in future.

Competition in the evaluation and award of construction contracts is applicable to the competitive selection and competitive negotiation procedures. Tenderers are permitted in the latter procedure to improve their offers after each round of negotiations which provides for a competitive process. However, the cancellation of a tender process where a preferred tenderer did not submit a tender offer or did not submit the most favourable offer amounts to custom-made contracts which undermine the fairness of the process and inhibits competition.

It appears that various measures are in place to ensure that a cost-effective system is maintained. When tenders are evaluated, a procuring entity considers whether a tenderer has the necessary financial resources to execute a contract. It may further determine whether a tender contains an unrealistic price offer which ensures that it does not pay more for the contract than is necessary. Value for money is thus attained. The evaluation of functionality in tender offers is a further measure aimed at a cost-effective procurement system since it assists in ensuring that the goods procured are of an acceptable standard or quality. A risk analysis further ensures that the preferred tenderer is in fact capable of performing the contract. However, where a tender process is cancelled because the scope of work must be refined or the preferred tender did not participate, cost-effectiveness will be compromised as tenderers have a right to expect that the process will be held and that it will be done in accordance with the specifications in the tender documents. It is suggested that the negotiation procedure or single-source procurement should be used where an organ of state wishes to contract with a specific tenderer provided that a non-competitive process is justified. Furthermore, cancellation due to insufficient competition may be avoided by publishing clear tender specifications in order for tenderers to be well-informed and tender their best offers so that value for money is attained.

6 Policy promotion in public sector construction procurement

Preferential policies in public sector procurement is provided for in sections 217(2) and (3) of the Constitution where it is stated that a national legislative framework must prescribe the manner in which preference to certain groups is allocated in government contracts. The national legislative framework is found in the PPPFA which provides for points to be awarded to contractors at the evaluation stage of the procurement process. In terms of the 2001 Regulations to the Act, points were awarded for preference if contractors were Historically Disadvantaged Individuals (HDIs) or contracted with HDIs or if they fulfilled any of the goals of the Reconstruction and Development Programme (RDP). Under the 2011 Regulations, however, preference is linked to a contractor's Broad-Based Black Economic Empowerment (B-BBEE) status level.

6 1 Construction procurement in terms of the 2011 PPPFA Regulations

In terms of the 2011 Regulations, a wider group of organs of state are obligated to implement preference in government contracts in accordance with the Act. Those entities excluded under the 2001 Regulations, including the CIDB, are now subject to the PPPFA. The value of the contracts to which the dual point system is applicable has been raised to above R1 million for the 90/10 point system and below R1 million for the 80/20 system. Under the 2001 Regulations, tenderers had discretion in deciding which of the RDP goals they chose to fulfil in order to be awarded preference points in addition to being an HDI or sub-contracting with an HDI. However, the 2011 Regulations make compliance with the B-BBEE elements in the generic scorecard for B-BBEE, compulsory. Furthermore, a fixed number of points are awarded to contractors who submit valid B-BBEE certificates in accordance with their degree of compliance. The award of preference points in contracts for the sale and letting of assets has unfortunately been excluded under the 2011 Regulations. However, no express prohibition against the award of preference points in these contracts exists. Therefore, organs of state may arguably evaluate preference at the award stage in construction contracts for the sale and letting of state assets.

Functionality, which is an important factor in construction contracts, has now been made a criterion to be considered at the pre-qualification stage of the procurement process. Tenders which do not comply with this should be regarded as unresponsive. Therefore, the consideration of functionality as a specific goal or as an objective criterion or the inclusion of points for functionality as part of the total points for price as is currently used in the construction industry is not permitted by the 2011 Regulations.

In terms of the rules regulating the cancellation of a tender process, CIDB prescripts allow for circumstances in terms of which a call for tenders may be cancelled which are not permitted by the 2011 Regulations. These provisions in the CIDB prescripts should thus be amended. Similarly, in the case of sub-contracting, a larger percentage of construction contracts may be sub-contracted than is permitted by the Regulations. However, future CIDB prescripts appear to be aligned with the 2011 Regulations.

6 2 Implementation of preference in construction procurement

Various schemes or methods are used to implement preference policies in construction procurement. For example, set-asides, qualification criteria, offering back, providing for preference at the short listing stage, product or service specification and award criteria. However, the primary method of implementing preference in the construction industry appears to be by means of award criteria in the form of contract participation goals. This can be done directly, by awarding a contract to a tenderer because of its status as a targeted or preferred tenderer. It can also be implemented indirectly where a contract is awarded to any deserving tenderer who agrees to subcontract (in other words, ensure the participation of) a minimum of 10% of its total project value to a tenderer who is a targeted contractor. Black business enterprises, black women enterprises, black-empowered enterprises, SMMEs, local business enterprises, local labourers and community-based organisations may be targeted contractors. They are required to be at least 50% black owned or 30% women owned. They may further be targeted based on their locality. When contractors are local labourers, they may be targeted based on gender, race, ethnicity, residency, age, disability, period of unemployment and level of skill.

In addition, the CIDB has a specification for the implementation of preference in contracts above R10 million. Like the generic scorecard for general public procurement, specific Construction Codes of Good Practice for Broad-Based Black Economic Empowerment have been published for the regulation of B-BBEE in construction procurement. These codes are aligned with the general B-BBEE Codes of Good Practice and where they differ, the construction codes take precedence.

Once a construction tender has been submitted, preference may be awarded in one of three ways. Firstly, a fixed number of points may be awarded for a tenderer's status as a targeted tenderer. Secondly, a variable number of points may be awarded to a tenderer who agrees to contract for the participation of targeted contractors. The minimum a contractor may agree to, is 10% and will be awarded the minimum number of points. The higher the percentage of participation a contractor allows, the higher the number of points to be awarded for preference. Lastly, points may be awarded on a comparative basis. An electronic database is also used in terms of which tenderers are ranked based on their date of entry on the database and their status as targeted contractors. In this case, preference is used at the short listing stage of the process.

6.3 Construction procurement in terms of section 217(1) of the Constitution

Information regarding preference in construction procurement is made publicly available and provides for sufficient competition in that tenderers who do not comply with preference requirements are still permitted to participate in the tender process. The electronic database further contributes to participation in the construction procurement process. The exclusion of smaller contractors from the award of contractors may be justified in light of the equity and cost-effectiveness principles. However, the methods of awarding preference points in construction procurement allow for discretion not permitted by the 2011 Regulations. The resource specifications used in the construction industry ensure that a fair and equitable process is maintained in confirming that all tenderers are evaluated on the same criteria.

In allowing tenderers who are emerging enterprises to tender for contracts in categories which are higher than that for which they are registered, implementation of the equity principle is promoted. The aim of the preference schemes used in the construction industry is for the advancement of targeted groups, mainly black-owned enterprises. This further ensures that the equity principle is complied with. However, preferential policies in construction procurement appear to promote black economic empowerment only and not broad-based black economic empowerment which the 2011 PPPFA Regulations prescribe and which are also provided for in the Construction Codes of Good Practice. It appears that future CIDB policies will exclude the award of contracts to smaller contractors. However, in light of the equity principle, these contractors will be developed by the larger contractors who will be awarded the contracts. Overall the equity principle appears to be complied with.

In terms of a transparent preferential system, it appears that several mechanisms are in place to ensure that an open system is maintained. The information pertaining to the preference policies in construction contracts is published in CIDB prescripts and penalties are imposed where tenderers fail to comply. The role of resource specifications in monitoring tenderers' progress throughout the tender process goes a long way in ensuring that transparency is complied with. This is promoted by the annual report to be submitted which indicates that preference was applied and that the correct beneficiaries were targeted. The same applies to future preference policies. However, specific information regarding the type of preference scheme to be used or the specific participation goal to be achieved must be published in tender documents to ensure that all tenderers are aware of the criteria to be applied and to ensure in turn that procuring entities apply the advertised criteria.

Where preference is an important component of a particular procurement, competition will be limited as not all tenderers will be able to comply with the preference requirements. These tenderers will, however, not be denied an opportunity to tender, they simply will not be awarded points for preference at the evaluation stage of the process. In targeting larger, more developed contractors, fewer developing contractors will be able to participate as prime contractors. Competition will thus be reduced. Competition will further be affected in future green building requirements which will exclude a large number of contractors who have not yet incorporated environmentally friendly practices. However, where use is made

of the electronic database competition is promoted in allowing all tenderers on the database an opportunity to submit a tender offer.

The cost-effectiveness of preference policies in a procurement process is a contentious issue as it leads to additional costs and may therefore not achieve value for money. In the context of construction contracts, however, it appears that the CIDB Act and its Regulations make provision for the assurance that contractors are capable of performing and submit their tax clearance certificates. These requirements are necessary for placement on the Register of Contractors as a point of departure in participating in the construction procurement process. Therefore, theoretically all tenderers on the Register are permitted and able to be awarded and execute construction contracts. Where developing contractors are permitted to tender for high value contracts, provision is made for organs of state to ensure that the contractors are capable of performing. It further appears that in future, the submission of an annual report that contract participation goals were achieved and that the developing programmes for smaller contractors were indeed implemented will ensure that value for money is attained.

7 Conclusion

Section 217 is the constitutional standard for government procurement in South Africa. The CIDB, which is empowered in terms of national legislation to regulate construction procurement in South Africa, is a Schedule 3 entity to the PFMA and is therefore obligated to do so in accordance with section 217. The procedures used to award government construction contracts overall appear to comply with section 217(1). The qualification criteria for contractors who perform construction works contracts appear to be equitable, transparent, competitive and cost-effective. The fairness principle, however, does not appear to be fully complied with in allowing a change to tender requirements after the receipt of tender offers. The Regulations govern the pre-qualification of construction works contracts only therefore the criteria for supplies and services contracts remain unregulated. When the proposed Register for Professional Service Providers comes into operation, greater value for money will be ensured in the procedures and qualification criteria for these contractors.

The rules which regulate the evaluation and award of construction contracts appear to comply with the principles overall. However, two of the evaluation methods do not apply the equity principle and should therefore be amended. In terms of the 2011 PPPFA Regulations, the CIDB is bound by the Act and its regulations. The schemes currently used to implement preference policies overall appear to comply with section 217(1). However, as an organ of state bound by the Act, the CIDB must implement its preference policies in accordance with the framework in the PPPFA. The general Codes of Good Practice for B-BBEE and the Construction Codes of Good Practice are aligned with the PPPFA. CIDB prescripts should therefore be brought in line with the relevant legislation in order to best give effect to section 217 as a whole.

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