

PUBLIC PROCUREMENT AND CORRUPTION: THE SOUTH AFRICAN RESPONSE

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INTRODUCTION

Public procurement refers to the purchasing by a government of the goods and services it requires to function and to pursue public welfare. In regulating procurement, a government tries to ensure that it obtains goods or services at the economically most advantageous price and that the process of obtaining them is transparent and competitive.¹ However, procurement may be subject to secondary criteria where a government employs procurement to achieve non-procurement related goals, such as the development of domestic industries,² the advancement of certain groups,³ or encouraging environmentally friendly manufacturing, by favouring particular groups or industries in contract awards.

Controlling corruption may also be a goal of procurement regulation. Eliminating corruption from the procurement process facilitates the awarding of contracts to the most competitive firms rather than those preferred for ulterior reasons.

The purpose of this article is to examine corruption within public procurement and the measures that may be used to address it, in particular, the South African response to procurement corruption in the Prevention and Combating of Corrupt Activities Act 2004 (hereafter 'the Corruption Act').⁴ The first part of the article briefly defines corruption and then considers the kinds of corrupt activity occurring in public procurement and the range of

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¹ Steven Schooner 'Desiderata: Objectives for a system of government contract law' (2002) 11 *Public Procurement LR* 103.

² E.g. under the National Industrial Participation Programme. See www.dti.gov.za.

³ Such as the groups previously discriminated against under apartheid. See the Broad-Based Black Economic Empowerment Act 53 of 2003; the Preferential Procurement Policy Framework Act 5 of 2000 (hereafter referred to as PPPFA). See Christian Rogerson 'Pro-poor local economic development in South Africa: The application of public procurement' (2004) 15 *Urban Forum* 180; Christian Rogerson 'The impact of the South African government's SMME programmes — A ten year review 1994–2004' (2004) 21 *Development Southern Africa* 765; Phoebe Bolton 'The use of government procurement as an instrument of policy' (2004) 121 *SALJ* 619; Ron Watermeyer 'The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects' (2000) 9 *Public Procurement LR* 226.

⁴ Act 12 of 2004.

measures that may be adopted against this kind of corruption. Finally, the article critically examines an important legislative response to procurement corruption, namely the requirement in the Corruption Act for excluding persons who have been convicted of corruption from obtaining public contracts, and concludes with an assessment of the utility of this requirement.

DEFINING CORRUPTION

Corruption as a concept can be hard to define. First of all, it is an issue that is steeped in morality⁵ and ethics,⁶ which even in secular societies is imbued with elements of moral disapprobation, shame and wrongdoing, making it a sensitive subject to address.⁷ Secondly, although corruption, broadly defined, might offend inherent (and possibly universal) values of morality and ethics, it has been suggested that corruption is culturally specific, with an often-argued dichotomy between western and non-western conceptualizations of corruption.⁸

In spite of these difficulties, definitions of corruption are not lacking. One widely used definition states that corruption is ‘behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence’.⁹ Simply put, corruption is the abuse of public office for private gain.¹⁰

Although corruption is characterized here from the view of the public official, this is not to deny that corruption occurs within the private sector. However, private sector corruption poses less of a problem to governments, since it is less likely to become systemic and is unsustainable, as the increased costs of doing business will decrease a firm’s competitiveness over time. Furthermore, private sector corruption does not generally produce the social

⁵ James Wilson ‘Corruption is not always scandalous’ in John Gardiner & David Olson (eds) *Theft of the City: Readings on Corruption in Urban America* (1968) 29.

⁶ John Noonan Jr *Bribes* (1984) 702.

⁷ Robert Klitgaard *Controlling Corruption* (1988) ix.

⁸ See Joongi Kim & Jong Bum Kim ‘Cultural differences in the crusade against international bribery: Rice cake expenses in Korea and the Foreign Corrupt Practices Act’ (1997) 6 *Pacific Rim Law & Policy Journal* 589; Daniel Treisman ‘The causes of corruption: A cross-national study’ 2000 *Journal of Public Economics* 401; Brian Harms ‘Holding public officials accountable in the international realm: A new multi-layered strategy to combat corruption’ (2000) 33 *Cornell International LJ* 159; Kenneth Surjadinata ‘Revisiting corrupt practices from a market perspective’ (1998) 12 *Emory International LR* 1021; Daniel Smith ‘Kinship and corruption in contemporary Nigeria’ (2001) 66 *Ethnos* 344; Steven Salbu ‘Are extraterritorial restrictions on bribery a viable and desirable international policy goal under the global conditions of the late twentieth century?’ (1999) 24 *Yale Journal of International Law* 223 at 235–6. See however, Daniel Kaufman ‘Anti-corruption within a broader developmental and governance perspective — Some lessons from empirics and experience’ *Statement to the High Level Political Signing Conference for the United Nations Convention Against Corruption in Mexico*, 9–11 December 2003, available at www.worldbank.org; David Kennedy ‘The international anti-corruption campaign’ (1999) 14 *Connecticut Journal of International Law* 455 at 465; Kimberly Elliott ‘Corruption as an international policy problem: Overview and recommendations’ in Kimberly Elliott (ed) *Corruption and the Global Economy* (1997) 175 at 177. Countries with predominantly non-western citizens may have accepted practices of ‘gift-giving’ which may amount to bribery in a western context.

⁹ Joseph Nye ‘Corruption and political development: A cost-benefit analysis’ (1967) 61 *American Political Science Review* 417.

¹⁰ World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8.

costs of public sector corruption such as the ‘contagion of corruption’¹¹ or the waste and inefficient allocation of public resources.¹²

PUBLIC PROCUREMENT AND CORRUPTION

Two international instruments against corruption to which South Africa is a party, namely the African Union Convention on Preventing and Combating Corruption¹³ and the United Nations Convention against Corruption,¹⁴ both require the maintenance of transparent, competitive and efficient procurement systems as part of the measures against corruption. This is because public procurement as a sphere of government activity is a major area in which bureaucratic corruption takes place. Some of the reasons why procurement appears to be so susceptible to corruption¹⁵ are the large sums involved; the (usually) non-commercial nature of contracting entities; the nature of the relationship between the decision-maker and the public body, which is such that deviating from the public interest will not normally affect the decision-maker’s personal finances;¹⁶ the presence of unsupervised discretion; bureaucratic rules; budgets that may not be tied to specified goals; as well as salaries that are not related to performance or are low.

The common types of corrupt activity in public procurement

Procurement corruption can take the form of public, private or auto-corruption.¹⁷ Public corruption moves from the supplier to the public official responsible for taking procurement decisions. This frequently takes the form of bribes or other non-monetary inducements given to the public official in order to influence the exercise of his discretion. A public official may improperly exercise his discretion in, for example, deciding to which firm to award the contract,¹⁸ or in deciding which firms to invite for tender, or by emphasizing or designing contract evaluation criteria to favour a preferred supplier.¹⁹ Improper exercises of discretion may also occur where a procurement official decides to split a large contract into several small contracts that fall below thresholds for complying with certain procedural requirements.²⁰ Other benefits that a supplier may corruptly seek include the

¹¹ Gerald Caiden & O P Dwivedi ‘Official ethics and corruption’ in Gerald Caiden, O P Dwivedi & Joseph Jabbar (eds) *Where Corruption Lives* (2001) 245.

¹² Susan Rose-Ackerman *Corruption and Government: Causes, Consequences, Reform* (1999) 3 at 30.

¹³ 43 ILM 5.

¹⁴ 43 ILM 37.

¹⁵ Tina Soreide *Corruption in Public Procurement: Causes, Consequences, Cures* (2002); Steve Kelman *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (1990); Frank Aneciarico & James Jacobs *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (1996) ch 8.

¹⁶ European Parliament Directorate General for Research Working Paper ‘Measures to prevent corruption in EU member states’ (1998).

¹⁷ Vladimer Key ‘Techniques of political graft’ in Arnold Heidenheimer (ed) *Political Corruption: Readings in Comparative Analysis* (1970) 46.

¹⁸ *Transnet Ltd v Sedhaba Photoscan (Pty)* 2005 (1) SA 299 (SCA).

¹⁹ Rose-Ackerman op cit note 12 at 64; Soreide op cit note 15 ch 3.

²⁰ Such as obligations under Part II of the Preferential Procurement Policy Framework Act Regulations GG 22549 of 10 August 2001 (hereafter referred to as the PPPFA Regulations).

avoidance of a government-imposed cost or requirement such as fees, taxes, or production of documents,²¹ and lax enforcement of contractual clauses in order to supply sub-standard products, to avoid complying with requirements preceding payment under the contract or to get away with unjustified delays.

Public corruption is arguably the most pervasive type of corruption occurring in public procurement²² and is one reason behind the criminalization of the bribery of foreign public officials in international anti-corruption instruments.²³

The second type of corruption occurring in public procurement is private corruption in the shape of collusion, price-fixing, maintenance of cartels or other uncompetitive practices engaged in by suppliers to the detriment of the government.²⁴ Thirdly, auto-corruption occurs when a public official wrongly secures for himself or an associate privileges rightly belonging to the public,²⁵ by by-passing or manipulating the formal procedures necessary for the award of these privileges. This might manifest itself where conflicts of interest²⁶ cause an official corruptly to favour the company in which he is interested,²⁷ or where an official uses a dummy corporation to hide awards involving personal interest.

MEASURES TO ADDRESS CORRUPTION IN PUBLIC PROCUREMENT

There is a range of measures that a government can use to combat procurement corruption. These may be classified into administrative, regulatory and social measures. Administrative measures are ones that may not be specifically required by legislation, but are permitted under the exercise of executive discretion. Regulatory measures are binding and obligatory measures which may be imposed where corrupt activity is discovered, including the use of penal sanctions. Social measures encompass the societal pressures, shame and infamy that attend corrupt activity where it is exposed.

These categories are not exclusive, and administrative and regulatory measures will frequently overlap, and in some cases, administrative measures may arise as a result of the implementation of regulatory measures. Social

²¹ Vito Tanzi 'Corruption around the world: Causes, consequences, scope and cures' (1998) WP/98/63 *IMF Working Paper* 6.

²² PWC *Global Economic Crime Survey (South Africa)* available at www.pwc.com.

²³ See for instance the United Nations Convention against Corruption supra note 14; the OECD Convention on Combating Bribery of Foreign Public Officials 37 *ILM* 1; Inter-American Convention against Corruption 35 *ILM* 724; Council of Europe Criminal Law Convention on Corruption 38 *ILM* 505; African Union Convention on Preventing and Combating Corruption supra note 13.

²⁴ Klitgaard op cit note 7 ch 6.

²⁵ Key op cit note 17 at 46–8.

²⁶ OECD *Managing Conflicts of Interest in the Public Sector* (2001) 2; Sue Arrowsmith, John Linarelli & Don Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 39–40.

²⁷ Hans-Joachim Priess 'Distortions of competition in tender proceedings: How to deal with conflicts of interest (family ties, business links and cross-representation of contracting authority officials and bidders) and the involvement of project consultants' (2002) 11 *Public Procurement LR* 154–5.

measures may also accompany the use of certain regulatory and administrative measures.

Administrative measures

Administrative measures may include placing restrictions on obtaining government patronage, licences, approvals or permits upon persons who are adjudged corrupt. An example is the refusal to register a company or other legal person²⁸ where the proposer has bankruptcies, criminal or fraud convictions against him. In public procurement such measures may take the form of denying corrupt persons access to government contracts or denying corrupt persons registration on qualifying lists for public contracts.²⁹

Other measures include increased public sector financial management, such as accounting and audit requirements. Public sector financial management is on the rise, as it becomes an important part of public sector reform and corruption control.³⁰ As a method of corruption control, public sector financial management seeks accountability in terms of results, not merely in terms of process.³¹ Specifically, auditing requirements are designed to identify and address areas of leakage in public finances.³² In addition to financial controls, increased supervision of public officials may be used to control corruption. This can be implemented through requiring multiple approvals before major decisions are taken or public contracts awarded. Supervision of public officials is closely tied to restricting the levels of discretion available to public agents, which some jurisdictions consider a necessary component of corruption control.³³ An administrative measure that may protect the government against conflicts of interest is a requirement for the rotation of procurement officials to prevent the formation of relationships that may lead to corruption.

Other measures, directed towards contractors, include the use of 'integrity pacts' or the extraction of a commitment from a supplier not to engage in corrupt activities. This might extend beyond a commitment not to bribe, and include commitments not to collude with competitors to obtain the contract. Similar undertakings are utilized by the World Bank in terms of which a bidder for a Bank-financed contract undertakes to comply with the borrower country's anti-corruption legislation.³⁴

²⁸ TMC Asser Institute *Prevention of and Administrative Action Against Organised crime: A Comparative Study of the Registration of Legal Persons and Criminal Audits in Eight EU Member States* (1997).

²⁹ Helen Xanthaki 'First pillar analysis' in Simone White (ed) *Procurement and Organised Crime* (2000).

³⁰ Anechiarico & Jacobs op cit note 15 ch 9.

³¹ Christopher Hood 'The new public management in the 1980's: Variations on a theme' (1995) 20 *Accounting, Organisations and Society* 93–100.

³² Cliff Walsh 'Creating a competitive culture in the public service: the role of audits and other reviews' (1995) 54 *Australian Journal of Public Administration* 325.

³³ Kelman op cit note 15 at 11–28; Cheryl Gray, Randi Ryterman & Joel Hellman *Anti-Corruption in Transition 2: Corruption in Enterprise-State Interactions in Europe and Central Asia 1999–2002* (2002) 11.

³⁴ World Bank *Guidelines: Procurement under IBRD Loans and IDA Credits* (2004) para 1.15.

Regulatory measures

Regulatory measures include the legislation and binding regulations that a government may adopt against corruption. These include the legal prohibition of corruption and criminal and civil penalties and forfeitures directed at the public and private sector. For instance, a fine or custodial sentence³⁵ may be imposed during a criminal trial, and a corrupt public official will invariably also lose his employment and may forfeit his pension and related benefits.³⁶ Obvious regulatory measures against corruption are criminal sanctions for bribery. Although the prohibition of bribery may not be located within procurement legislation, it is usually a criminal offence for a public official to accept bribes or other inducements in the exercise of public functions.³⁷

Recently, many jurisdictions, including South Africa, have followed the example set by the United States³⁸ and criminalized overseas bribery.³⁹ Thus, where a private individual is found to have bribed a foreign public official, that person will be liable to conviction in his home country.

Other regulatory measures directed at procurement officials may include rules prohibiting conflicts of interest.⁴⁰ Such rules may require the official with an interest in a public contract to disclose this interest as soon as possible and to take no part in the contract award procedure.⁴¹ Other measures could require officials to declare their assets at the inception and termination of public office,⁴² and require the disclosure of their business interests to ensure neutrality and impartiality.⁴³

In relation to contractors, some of the regulatory measures that could be employed include legislative provisions for blacklisting or disqualifying from public contracts contractors who are seen as unethical or corrupt,⁴⁴ and conversely, provisions which 'white-list' or grant access to public contracts to firms who can certify that they meet minimum ethical requirements.

There are other regulatory measures which are not solely directed towards corruption in public procurement but serve to create an environment where corruption cannot thrive. These include requirements for transparency, competition and cost-effectiveness. In South Africa, these requirements have

³⁵ See e.g. s 26 of the Corruption Act.

³⁶ Gary Becker & George Stigler 'Law enforcement, malfeasance and compensation of enforcers' (1974) 3 *Journal of Legal Studies* 1–19.

³⁷ Sections 3 to 10 of the Corruption Act.

³⁸ Foreign Corrupt Practices Act 1977, Pub L No 95–213, 91 Stat 1494. See Natasha Colton 'Foreign Corrupt Practices Act' (2001) 3 *American Criminal LR* 891

³⁹ Section 5 of the Corruption Act.

⁴⁰ Arrowsmith, Linarelli & Wallace op cit note 26 ch 2.

⁴¹ Regulation 16A8.4 of the Public Finance Management Act Regulations GG 22219 of 9 April 2001 (hereafter referred to as PFMA Regulations). Also see s 6(2)(a)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (hereafter referred to as PAJA).

⁴² See art 7 of the African Union Convention on Preventing and Combating Corruption.

⁴³ See National Treasury *Municipality/Municipal Entity Code of Conduct for Supply Chain Management Practitioners* available at www.treasury.gov.za; Priess op cit note 27 at 156.

⁴⁴ Section 28 of the Corruption Act.

been given constitutional status.⁴⁵ Transparency may be interpreted as requiring publicized contracts; disclosure of the rules governing procurement in general and governing specific procurements; rule-based decision making and opportunities for verification and enforcement.⁴⁶ It has been suggested that the constitutional provisions on transparency are a response to the culture of secrecy in the former apartheid regime which was used to restrict the access of black South Africans to economic opportunities.⁴⁷ Transparency has anti-corruption implications where the rules that define the procurement process are clear and the opportunities for contracting are publicly available, making it difficult to conceal improper practices.

The requirement for open competition is one of the pillars of developed procurement systems.⁴⁸ Open competition supports anti-corruption efforts by ensuring that all qualified suppliers have access to available contracts, and limits the scope for corruption-induced favouritism, in addition to removing the restrictions to participation created against non-corrupt suppliers.

A third regulatory obligation which may support anti-corruption measures is that of requiring contracting entities to obtain the best value for money. Best value is a policy goal that pursues the best bargain.⁴⁹ Best value supports anti-corruption efforts by ensuring that the government does not pay uncompetitive prices owing to an underlying corrupt transaction. However, the objective of best value could conflict with anti-corruption measures where these are expensive to implement, thus causing transactional inefficiencies in the procurement process.⁵⁰

Social measures

Social measures against corruption are the disapprobation which society shows towards corruption, including the shame, ridicule and disgrace that should normally follow the exposition of corrupt activity. Social sanctions are hardly used as primary instruments against corruption, since they are largely informal and unorganized. Nevertheless, they might accompany the

⁴⁵ Section 217 of the Constitution of the Republic of South Africa, 1996. See Chaskalson P in *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 4: 'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.' See Clive Plasket 'Tendering for government contracts: Public procurement and judicial review' in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 160–1.

⁴⁶ Sue Arrowsmith *The Law of Public and Utilities Procurement* (2005) 430; Sue Arrowsmith 'Towards a multilateral agreement on transparency in government procurement' (1998) *International and Comparative LQ* 796; Simon Evenett & Bernard Hoekman 'Transparency in procurement regimes: What can we expect from international trade agreements' in Sue Arrowsmith & Martin Trybus (eds) *Public Procurement: The Continuing Revolution* (2002).

⁴⁷ Ron Watermeyer 'Transparency within the South African public procurement system' in Bernard Hoekman (ed) *Unpacking Transparency in Government Procurement* (2004) 173.

⁴⁸ Schooner op cit note 1 at 105.

⁴⁹ *Ibid.*

⁵⁰ Frank Anechiarico & James Jacobs 'Purging corruption from public contracting: The solutions are now part of the problem' 1995 *New York Law School LR* 143; Arrowsmith, Linarelli & Wallace op cit note 26 at 28–31.

use of regulatory tools, where, for instance, the press sensationalizes corruption scandals and publishes the names of the parties involved, possibly at the conclusion of criminal trials. This may be used even in the absence of criminal convictions. For instance, in the Philippines, government officials who were found to be corrupt had their details published in national media. This amounted to a serious disgrace on their family name to the extent that some of the officials committed suicide.⁵¹ Similarly, where a supplier has been convicted of corruption, the infamy that results from such a conviction where it becomes public knowledge will frequently lead to a loss of business and may signal the end for that company.⁵²

THE SOUTH AFRICAN RESPONSE TO PROCUREMENT CORRUPTION

South Africa has adopted a comprehensive anti-corruption policy, which is part of its broader fight against crime.⁵³ A number of initiatives have been adopted to implement this policy. One of these is the Public Service Anti-Corruption Strategy.⁵⁴ This was developed to provide a coherent and integrated approach to combating public-sector corruption through a combination of prevention, investigation, prosecution and public participation initiatives. In focusing on the elimination of corruption in procurement, the strategy proposed the exclusion of corrupt private firms from obtaining government contracts. This proposal was implemented through the Corruption Act.

The Corruption Act was designed as a comprehensive piece of legislation against domestic corruption, and also to ensure that South Africa complies with its obligations under international anti-corruption treaties.

The Act defines a general offence of corruption⁵⁵ and creates certain offences that may be committed by defined categories of persons, such as public officials, judicial and legislative officers.⁵⁶ The Act also creates two offences that are peculiar to the procurement context⁵⁷ and further prohibits a public official from acquiring a private interest in a contract connected with the public body in which he is employed.⁵⁸

The Act details penalties where it is violated. Thus, a person who commits *inter alia* the general offence of corruption or offences relating to procurement is liable on conviction to a fine or life imprisonment if convicted by the High Court, or to a fine or imprisonment for up to 18 years if convicted by a regional court.⁵⁹ In addition, a person guilty of the offences

⁵¹ Klitgaard *op cit* note 7 ch 3.

⁵² For instance as a result of allegations of corruption, fraud and bribery, Enron shares in 2001 fell from \$90 to 30 cents. The company filed for bankruptcy in 2002. See www.chron.com.

⁵³ See the National Crime Prevention Strategy (Department of Safety and Security, 22 May 1996).

⁵⁴ Available at www.dpsa.gov.za.

⁵⁵ Section 3.

⁵⁶ Sections 4–9.

⁵⁷ Sections 12 & 13.

⁵⁸ Section 17(1) & (2).

⁵⁹ Section 26.

relating to procurement may be excluded from government contracts by means of an endorsement on the Register for Tender Defaulters.⁶⁰

Exclusion: Meaning, nature and rationale

Exclusion is an administrative remedy used by governments to disqualify contractors from obtaining public contracts or acquiring extensions to existing contracts for breaches of law or ethics.⁶¹ Exclusion includes disqualification for three kinds of behaviour. First, exclusion could be directed at past violations of law, ethics or anti-corruption norms that may be unrelated to public procurement.⁶² Secondly, exclusion could disqualify a supplier from a particular procurement for a breach of the rules of that process.⁶³ Third, a supplier could be excluded from future contracts for past procurement violations. It is in this last sense that exclusions are used in South Africa.

The rationale behind the South African exclusions is two-fold. First, the exclusions support the government's anti-corruption policies and indicate lack of tolerance for corruption,⁶⁴ while acting as a deterrent against breaches of anti-corruption legislation by increasing the economic costs of corruption. The exclusions are also punitive,⁶⁵ because in addition to the immediate detrimental financial effect on the excluded supplier, the exclusion can damage the reputation of the firm, affecting its ability to obtain business from other sectors.⁶⁶ In public procurement, exclusions are regarded as punitive if they are tied to the objectives of deterrence or retribution, and are imposed as a result of the contractor's past conduct, without regard to his present integrity.⁶⁷ Although there have been no explicit statements as to their purpose, the South African exclusions are presumably intended to be punitive, since they are imposed at the same time as criminal sanctions, and, as will be seen, no derogation from an exclusion is permitted once it has been imposed.

⁶⁰ Sections 28, 30 & 31.

⁶¹ Steven Schooner 'The paper tiger stirs: Rethinking exclusion and debarment' (2004) 13 *Public Procurement L R* 212–13.

⁶² Christopher Yukins 'Suspension and debarment: Re-thinking the process' (2004) 13 *Public Procurement L R* 256.

⁶³ Arrowsmith, Linarelli and Wallace op cit note 26 at 41–9, see also art 15 of the UNCITRAL Model Law on the Procurement of Goods, Construction and Services with Guide to Enactment 34 *ILM* 718 (hereafter referred to as the UNCITRAL Model Law).

⁶⁴ See the Public Service Anti-Corruption Strategy supra note 54; Green Paper on Public Sector Procurement Reform GG 17928 of 14 April 1997 Ch 2.

⁶⁵ Rachel Kramer 'Awarding contracts to suspended and debarred firms: Are stricter rules necessary?' (2005) 34 *Public Contract LJ* 543.

⁶⁶ See the US case of *Gonzalez v Freeman* 334 F2d 570, 574 (D C Cir 1964), where the impact of exclusion was stated to be 'a sudden contraction of bank credit, adverse impact on market price of shares of listed stock . . . "loss of face" in the business community . . . in addition to the loss of specific profits from the business denied as a result of the debarment.'

⁶⁷ Edwin Tomko & Kathy Weinberg 'After the fall: Conviction, debarment and double jeopardy' (1991–92) 21 *Public Contract LJ* 355 at 363–5.

Excluding contractors under the Corruption Act

The provisions of the Corruption Act providing for exclusion⁶⁸ from public contracts for corruption offences are located in s 28 of the Act. Section 28(1) provides that a court convicting a person of the relevant procurement-related corruption offences may, in addition to imposing the sentences contemplated by the Act, issue an order that the particulars of the convicted person, the conviction and the sentence be endorsed on the Register for Tender Defaulters.⁶⁹ This Register, which contains information on firms excluded from government contracts, is managed by the National Treasury and is available electronically. In addition, the court may also issue an order to endorse on the Register the particulars of certain persons who are related to the primary convict.⁷⁰ This will be discussed below.

Relevant offences

There are two offences that could lead to endorsement on the Register. The first is 'corrupt activities in relation to contracts'. This offence is defined in the Act to include situations where a person accepts or agrees to accept, offers or agrees to offer, or gives, any gratification, for his benefit or the benefit of another person, in order to influence in any way the promotion, execution or procurement of a contract with a public entity.⁷¹ It primarily covers bribery in public contracting. The second offence is 'corrupt activities in the procuring and withdrawal of tenders'. This offence relates to situations where a person offers, agrees to offer or to accept, or accepts, any gratification as an inducement to or in order to influence another person to award a tender, make a tender or withdraw a tender for a contract.⁷²

These offences are concerned with violations of the procurement process and endorsement is therefore not required for general or non-procurement related corruption. This is in contrast to some jurisdictions where the offences required for exclusion include general corruption.⁷³ The exclusion provisions do not apply to corrupt activity occurring outside public procurement, such as fraudulently obtaining licences or documents, corrup-

⁶⁸ The Corruption Act provides for the endorsement of contractors guilty of the relevant offences. The result of this endorsement is the exclusion of such contractors from public contracts. For this reason, the terms 'endorsement' and 'exclusion' are used interchangeably in this article.

⁶⁹ Sections 28(1)(a) and 29.

⁷⁰ Section 28(1)(b), (c) and (d).

⁷¹ Section 12.

⁷² Section 13.

⁷³ For the US, see FAR 9.406-2 and 9.407-2; James McCullough 'Government contract suspension and debarment: What every contractor needs to know' (2004) 13 *Public Procurement LR* 240. For the United Kingdom, see reg 23 of the Public Contracts Regulations, S I 5, 2006. For the EC see art 45 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O J L 134/114; Elisabetta Piselli 'The scope for excluding providers who have committed criminal offences under the EU procurement directives' (2000) 9 *Public Procurement LR* 267; Sope Williams 'The mandatory exclusions for corruption in the new EC procurement directives' (2006) 31 *European Law Review* 711.

tion intended to secure waivers of fees, for tax avoidance purposes or to induce the lax enforcement of government regulations.⁷⁴

The narrowness of the range of offences covered might result in the exclusions not being wholly effective in combating public corruption, as they will only affect persons who have been convicted of procurement-related corruption and who are government contractors. This also raises the issue of the possible unfairness of the measures, as it means that government contractors convicted of procurement corruption receive a more severe sanction than government contractors and other persons convicted of non-procurement corruption.

The range of persons subject to endorsement

An important issue with implications for the effectiveness of the exclusion policy is the range of persons who may be subject to an endorsement order. Unfortunately, s 28 is not exactly clear in this regard and poses some difficulties of interpretation. On one reading, s 28(1)(a) is an umbrella provision dealing with the endorsement of all persons, natural or juristic, who might be convicted of a procurement offence.⁷⁵ The difficulty with this reading, however, is the resultant relationship between s 28(1)(a) and s 28(1)(b). Section 28(1)(b) mandates endorsements where ‘the person so convicted is an enterprise’. This clearly refers back to s 28(1)(a), creating the impression that s 28(1)(b) stands in addition to the preceding paragraph rather than as an alternative. However, such an interpretation will render s 28(1)(b)(i) and (iii) redundant since the endorsements provided for in those sub-paragraphs are already mandated in s 28(1)(a). On the other hand, if one takes account of the very broad definition of ‘enterprise’ in s 28(7)(b),⁷⁶ then s 28(1)(b) could be read as the umbrella provision mandating endorsement of all persons. This interpretation would, however, render s 28(1)(a) redundant. To add to the confusion, a number of provisions appear to treat ‘person’ and ‘enterprise’ as mutually exclusive terms⁷⁷ while others clearly do not.⁷⁸ There seems to be no easy way out of this poor drafting.

In our view, for purposes that will become apparent below, the best approach is to take s 28(1)(a) as the general provision mandating the endorsement of all convicted persons, and to treat s 28(1)(b) as requiring, where the convicted person is an enterprise, also the endorsement of the particulars of any partner, manager, director or other person who wholly or partly exercises or may exercise control over that enterprise and who was

⁷⁴ See Klitgaard op cit note 7 ch 2.

⁷⁵ Such a reading would flow from the usual interpretation of ‘person’ as including all natural and juristic persons, see s 2 of the Interpretation Act 33 of 1957; J R de Ville *Constitutional & Statutory Interpretation* (2000) 108–9.

⁷⁶ This provides that “‘enterprise’ includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity’.

⁷⁷ E.g. s 28(3)(a) and (c).

⁷⁸ E.g. s 28(5) and (6).

involved in the offence concerned, or who knew or ought reasonably to have known or suspected that the enterprise committed the offence.

Further, by virtue of s 28(1)(c), in addition to the endorsement of the 'primary convict' under s 28(1)(a), the Register may also be endorsed with the particulars of any other enterprise owned or controlled by the convicted person or the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over such an enterprise, where that enterprise, partner, manager, director or other person was involved in the offence concerned, or such a partner, manager, director or other person knew or ought reasonably to have known or suspected that such other enterprise was involved in the offence concerned.

Section 28(1)(d) provides that an endorsement applies, unless otherwise directed, to every enterprise to be established in the future, if that enterprise is wholly or partly controlled or owned by the person or enterprise so convicted or endorsed.

The broad range of persons subject to endorsement indicates the government's awareness of the fact that in practice firms do not necessarily cease to seek government contracts because they have been excluded⁷⁹ as they may continue to bid 'under different corporate identities and through different officers . . . or as subcontractors'.⁸⁰ This problem has been recognized and legislated against in other jurisdictions where exclusions are utilized.⁸¹ Although related persons may be excluded in these jurisdictions, this does not usually depend on the complicity, participation or knowledge of the related person as is the case in South Africa. The South African approach is preferable as related persons must have a connection with the corrupt activity before they may be endorsed.

(1) Primary convict and related persons

A court may order the endorsement of the primary convicted person as well as that of specified related persons, namely other enterprises wholly or partly controlled by the convicted person,⁸² other persons who may wholly or partly control such other enterprise⁸³ and/or persons wholly or partly controlling the convicted person.⁸⁴ In addition, unless the court directs otherwise, the endorsement will apply to any enterprise which may be established in the future, wholly or partly controlled by the convicted person or any of the listed related persons.⁸⁵

These provisions raise two issues. The first is how to determine without lengthy and expensive investigations whether a firm is 'owned or controlled'

⁷⁹ Paragraph 24 of the Public Service Anti-Corruption Strategy *supra* note 54.

⁸⁰ Anechiarico & Jacobs *op cit* note 50 at 172; Dick Thornburgh *Report Concerning the Debarment Processes of the World Bank*, available at www.worldbank.org.

⁸¹ See e.g. U.S. FAR 9.406-1(b) and 9.403; cl 13(d) of the World Bank Sanctions Committee Procedures (2001), available at www.worldbank.org.

⁸² Section 28(1)(c)(i).

⁸³ Section 28(1)(c)(ii).

⁸⁴ Section 28(1)(b)(ii).

⁸⁵ Section 28(1)(d).

by the convicted person and secondly, whether a partner, manager, director or other person in this firm ‘owned and controlled’ by the convicted person knew or ought reasonably to have known or suspected that the firm was involved in the offence concerned.

(a) *Endorsement of other enterprise owned or controlled by convicted person*

In determining whether or not an enterprise is owned or controlled by the convicted person, a firm should only be subjected to an endorsement where it is clear that the convicted person is a majority shareholder in the firm or is the ‘directing mind and will’ of the firm, as this is the established test that is used to impute liability on the basis of control in company law.⁸⁶ Where the convicted person is an enterprise, its subsidiaries may thus also be liable to endorsement. This is one important consequence of reading s 28(1)(a) as a general provision. Since s 28(1)(c) only refers to orders contemplated in s 28(1)(a), endorsements of subsidiaries in terms of s 28(1)(c) is only possible if s 28(1)(a) covers juristic persons. Any alternative interpretation of s 28 will preclude the endorsement of subsidiaries, which in our view would be a highly anomalous position.

(b) *Endorsement of persons who knew or ought to have known of commission of offence by other enterprise*

Determining whether a ‘partner, manager, director or other person knew or ought reasonably to have known or suspected that such other enterprise was involved in the offence concerned’ is more difficult, as it requires an inquiry into the state of mind⁸⁷ of the relevant people. Section 28(1)(c)(ii)(bb), in stating that a related person may be endorsed if he *knew* or *ought reasonably to have known* about the commission of the corrupt activity, appears to propose two tests for determining this, an objective one and a subjective one. This is in line with the approach taken in s 2(1) and (2) to the interpretation of ‘knowledge’ in the Act generally.

Under the subjective test, for a person to be entered on the Register, it must be proved that he was aware that the firm was involved in the commission of the corrupt activity. This test will be met where there is evidence of some knowledge pointing either to his complicity or turning a blind eye to the prohibited activity. Section 2(1)(b) further broadens this subjective test by placing a duty on a person to ‘obtain information to confirm the existence of the fact’ where that person ‘believes that there is a reasonable possibility of the existence of that fact’. The subjective test is thus not only aimed at establishing what a person actually knew to be the case, but also includes that which he believed to be reasonably possible.

⁸⁶ *Robinson v Randfontein Estates Gold* 1921 AD 186; *Mawere v Minister of Justice, Legal and Parliamentary Affairs* (2005) JOL 15336 (ZH). See J T R Gibson *South African Mercantile and Company Law* 8 ed (2003) ch 8.

⁸⁷ See Jonathan Burchell & John Milton *Principles of Criminal Law* (2005) chs 29–32.

The objective test, on the other hand, will be met where it can be shown that, although the person was not aware of the firm's involvement in the offence, a reasonable person in his position would have known or at least suspected that the corrupt activity was taking place.⁸⁸ Section 2(2) defines this reasonable person standard again with both a subjective and objective dimension in relation to the related person as 'a reasonably diligent and vigilant person having both — (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and (b) the general knowledge, skill, training and experience that he or she in fact has'.

Once either test is met, the court may then issue an order to endorse the affected person on the Register. These requirements, stringent as they are, will provide an incentive for internal monitoring within government contractors.⁸⁹

(c) Endorsement of a person in control of convicted firm

In deciding whether a person 'wholly or partly exercises or may exercise control over that enterprise and was involved in the offence committed' or knew or reasonably ought to have known that the firm committed that offence, the approach will be similar to that described above. Thus a relevant person may be endorsed once the court deems that either the subjective test for determining his state of knowledge has been met, or the objective test in determining the knowledge of a reasonable person in his position has been met. The inclusion of 'other person' in s 28 (1)(b)(ii) allows holding or parent companies to be endorsed following conviction of their subsidiaries.

(d) Endorsement of firms to be established in future

The Act permits the endorsement of firms to be established in future by the convicted person or any of the related persons liable to endorsement.⁹⁰ Although the provisions are silent as to whether the endorsement can apply to firms established beyond the time when the endorsement ceases, it is clear that such an endorsement will only apply to future firms established by the primary convicted or endorsed person as long as his endorsement remains in

⁸⁸ This interpretation found support in the parliamentary deliberations on the Corruption Bill where it was stated that there should be some form of knowledge or participation that could be *attributed* to a person in relation to the commission of the relevant offence. See statement of Chairperson Adv J de Lange, Parliamentary Justice and Constitutional Development Portfolio Committee Deliberations, 16 October 2003, available at www.pmg.org.za. In this regard, the committee deliberating the Bill was ensuring that knowledge of the offence could be imputed to a related person where a reasonable person in the place of the related person would have been aware of the corrupt activity. Although the drafting history of legislation is traditionally not relied upon to interpret the provisions of a statute in South African law, such background information may indeed be helpful to ascertain the mischief at which the particular provision was aimed and is increasingly relied upon, especially in the constitutional context, see De Ville *op cit* note 75 at 226–32.

⁸⁹ US Department of State *Fighting Global Corruption: Business Risk Management* (2003) 3–7.

⁹⁰ Section 28(1)(d).

place. This is similar to what obtains under the World Bank debarment procedures.⁹¹

(e) *Endorsement of sister enterprises*

One curious omission from the list of related persons that may be liable to endorsement is persons that may be conveniently called ‘sister enterprises’. These are other firms that are owned or controlled by persons in control of convicted firms or firms related to convicted firms. It seems strange that such firms are not open to endorsement in terms of the Act while future firms to be established by those in control of convicted firms are. The only difference between such future firms and sister enterprises is the date they are established. This seems hardly to be a convincing reason for treating them differently. It stands to reason that where an enterprise is convicted of corrupt activity and subsequently endorsed and those persons in control of such enterprise are also endorsed because of their active involvement in the corrupt activity, sister enterprises pose similar corruption risks. Allowing such sister enterprises to operate without endorsement simply invites the continuation of corrupt activities under the guise of other legal entities.

However, establishing whether a particular firm is owned or controlled by a convicted person or person in control of a convicted person is not an easy matter. For instance, empirical evidence shows that even when firms have been excluded from government contracts they are still often able to secure contracts through a complex network of subsidiaries, affiliates and related companies owned by the same proprietors of the excluded firm. This is possible partly because of the prohibitive costs of investigating the networks of company ownership (it costs an estimated \$2000 to \$10 000 to investigate an applicant for a public contract), and also because such firms are not averse to denying previous convictions.⁹²

One potential route to address the concern regarding sister enterprises is through s 28(1)(a)(iii) or s 28(1)(b)(iii). These provisions permit the court, in addition to ordering the endorsement of the convicted person/enterprise and the named categories of related persons, to make ‘any other order of the court consequent thereupon’. A broad interpretation of these clauses may allow the court the flexibility to make an order to endorse a person not specifically named within the Act, such as sister enterprises. It remains to be seen, however, whether the courts will employ these provisions in this manner.

(2) Persons implicated by the conviction

A relevant issue concerns the provision in the Regulations regarding the Register for Tender Defaulters,⁹³ which, in specifying the information that ought to be listed in the Register, includes the ‘names of persons identified

⁹¹ Clause 13(d) of the World Bank Sanctions Committee Procedures *supra* note 81.

⁹² Anecharico & Jacobs *op cit* note 50 at 162–72.

⁹³ GG 27365 of 11 March 2005 (hereafter Register Regulations).

by the court of law to have been implicated by the conviction⁹⁴ as well as ‘enterprises linked to the convicted enterprise’.⁹⁵ These Register Regulations appear to go beyond the scope of the Corruption Act in two respects. First, in calling for the endorsement of firms linked to a convicted firm — at least part of this category of persons is, as indicated above, omitted from the Act. Secondly, they appear to imply that those persons ‘implicated by the conviction’ need not have been on trial themselves. They consequently would not have had an opportunity to defend themselves, and this raises the issue of the lack of due process that may attend the endorsement of such persons.⁹⁶

Further, it is not clear whether the Register Regulations refer to the category of related persons liable to endorsement by s 28(1)(b) and (c) of the Act, or include persons unrelated to the primary convicted person in a business sense but implicated during the trial. If the Register Regulations refer to a category of persons unrelated to the primary convicted person in a business sense and not contemplated by the Act, then clarification is required on the ‘degree of implication’ and circumstances that will warrant such a mention in the Register. It is also unclear whether the inclusion of such a person on the Register is an endorsement with the same consequences as the endorsement of the primary convicted person, or whether it merely serves as a warning to public bodies that the integrity of those persons is in doubt. If the latter is the case, then the Act clearly does not provide any legislative basis for it.

It is suggested that the Register Regulations are ineffective in so far as they conflict with the Corruption Act on the basis of the ultra vires doctrine.⁹⁷ Since the Act provides that an endorsement on the Register should only take effect after any appeal against the conviction or sentence has been finalized by the court,⁹⁸ or may operate on the basis of the relationship between the primary convicted person and related persons, it is clear that the Act did not contemplate the endorsement of a non-related person. A related person is tainted by the conviction of the primary convicted person, and thus justifiably subject to sanctions, either because the related person knew or ought to have known that the corrupt activity took place, or because it may be assumed that they are an indivisible entity or form part of a ‘unitary organisation of personal, tangible and intangible elements’ pursuing specific

⁹⁴ Regulation 1(g) of the Register Regulations.

⁹⁵ Regulation 1(h) of the Register Regulations.

⁹⁶ Procedural fairness is a requirement of the exclusion process in other jurisdictions. See *Transco Security Inc. of Ohio v Freeman* 639 F 2d 318 (1981) at 323 where it was held that insufficient information was made available to the contractors to enable them to make representations in response to their proposed exclusion. Similarly, in *Victoria v Master Builders' Association of Victoria* (1994) 7 VAR 278 it was held that contractors had a legitimate interest in protecting their reputations or at least defending their reputations against a proposed blacklisting.

⁹⁷ Phoebe Bolton ‘The exclusion of contractors from government contract awards’ (2006) 10 *Law, Democracy and Development* 25.

⁹⁸ Section 28(3)(b).

economic aims that are determined in the same way,⁹⁹ or because that one firm is merely a façade for the attainment of the corrupt objectives.¹⁰⁰

(3) Subcontractors

Although the Act does not mention subcontractors, a procuring entity may have to decide whether a main contractor may use an endorsed subcontractor in a public contract. The use of subcontractors is permitted in public contracts, in so far as the subcontracting is done in accordance with the terms of the contract.¹⁰¹ As contractual provisions may not override the Act which obliges government departments to ignore *any offer* tendered by *a person* who is endorsed on the Register and further oblige a public body to disqualify any such person or enterprise from making any offer or from obtaining any *agreement* relating to the procurement of a specific supply or service,¹⁰² these provisions may be interpreted as prohibiting a public body from entering into a contract involving a convicted subcontractor.

The procuring entities which must abide by the endorsement order

Section 28(3)(a)(iii) of the Corruption Act provides that, once the Register has been endorsed, ‘the National Treasury, the purchasing authority or any government department’ must either ignore any tender made by the person or firm subject to the endorsement, or disqualify that person or firm from making any offer or obtaining any agreement in relation to the procurement of goods and services. When this is read in conjunction with the PFMA Regulations which apply to all national and provincial authorities and oblige public bodies to consult the Register before awarding a contract to ensure that a bidder has not been endorsed,¹⁰³ it is evident that the exclusions under the Corruption Act are to be applied by all the departments that are subject to the PFMA Regulations, as well as the bodies specified in s 28(3)(a)(iii).

The endorsement will thus be acted on by all national and provincial departments,¹⁰⁴ the National Treasury, and public entities such as parastatals and other bodies designated by the Public Finance Management Act (hereafter referred to as the PFMA).¹⁰⁵ Although no enforcement mechanism exists to ensure that public bodies consult the Register and comply with the order, it is possible that a failure to consult the Register will be regarded as a dereliction of an accounting officer’s duties under s 38 of the PFMA, which makes the officer responsible for the maintenance of an appropriate procurement system¹⁰⁶ and compliance with all commitments required by

⁹⁹ *Ladysmith Lindgens Leathers (Pty) Ltd and Another v Lindgens Ladysmith Trimming (Pty) Ltd and Another* (1997) JOL 1507(SE).

¹⁰⁰ *Airlink Pilots Association SA v SA Airlines (Pty) Ltd* [2001] 6 BLLR 587 (LC).

¹⁰¹ Regulation 1(n) PPPFA Regulations supra note 20.

¹⁰² Section 28(3)(a)(iii).

¹⁰³ Regulation 16A9.1(c) of the PFMA Regulations supra note 41.

¹⁰⁴ Section 3(a) of the Public Finance Management Act 1 of 1999.

¹⁰⁵ Section 3(b) of the PFMA.

¹⁰⁶ Section 38(1)(a)(iii) of the PFMA.

legislation.¹⁰⁷ There is also the possibility that a procurement decision following a failure to consult the Register could be reviewable under s 6(2)(e)(iii) of PAJA ‘because . . . relevant considerations were not considered’.

The duration of the endorsement

Under the Corruption Act, it is the National Treasury, and not the court, that determines the period of time for which an endorsement will remain on the Register.¹⁰⁸ This separation of functions between the body imposing the endorsement and the body prescribing its duration might lead to delays between the time when the order to endorse is made and the moment when the length of the endorsement is known. Although the court staff are enjoined to ‘forthwith forward the court order to the Registrar and the Registrar must forthwith endorse the Register accordingly’,¹⁰⁹ it is possible for delays to occur.

This situation has arisen in the United States, with severe consequences for the contractor. In *JB Kies Construction Co*,¹¹⁰ the bidder for a public contract obtained a three-year debarment which started three years and two months before the challenged tender proceedings. However, the government agency only placed the firm on the list of excluded contractors three months after the debarment was supposed to have begun. As a result, the firm was still considered debarred at the time of bid opening and its bid, which was the lowest, was rejected as a result. The firm’s subsequent protest was denied on the basis that the administrative delay in listing was not sufficient ground for the debarment to be waived.¹¹¹

This case illustrates how easily a firm may be eliminated from competition by processing delays.¹¹² It is suggested that the National Treasury should put in place sufficient mechanisms to prevent such delays and, where they do occur, should adjust the period of endorsement accordingly. Alternatively, it may be better for the period of endorsement to be determined by the courts rather than the National Treasury, as this would minimize the risk of administrative delays.

There is, moreover, a serious conflict between the Register Regulations and the the Corruption Act. Whereas the Act specifies that the period of endorsement should be between five and ten years, and that the National Treasury must remove the particulars of the person or enterprise concerned from the Register once the period of endorsement ends, the Register Regulations provide that the information regarding a particular person or firm should be retained in the Register for 20 years.¹¹³

¹⁰⁷ Section 38(1)(e) of the PFMA.

¹⁰⁸ Section 28(3)(ii).

¹⁰⁹ Section 28 (2).

¹¹⁰ *JB Kies Construction Co*. Comp. Gen. B-250797, 93-1 CPD ¶ 127 at 2-4.

¹¹¹ For an explanation of this and similar cases, see Kramer op cit note 65.

¹¹² *Ibid*.

¹¹³ Regulation 3.

It is not clear from the Regulations whether the endorsement as such should last for 20 years or whether merely information as to the (prior) existence of an endorsement should be retained in the Register for 20 years. However, either interpretation conflicts with the Act which in clear terms requires the information to be removed from the Register upon expiry of the period of endorsement.¹¹⁴ The retention of information in the Register may have the same practical consequences for a contractor as the endorsement itself, depending on the supplier's dependency on government contracts. As contracting authorities must consult the Register before awarding public contracts, any information on a contractor in the Register may adversely affect the contractor's ability to secure public contracts.

Since the power to retain information in the Register is granted under an enabling provision in the Corruption Act,¹¹⁵ the period stated in the Register Regulations may not override the provisions of the Act and the Register Regulations are ineffective to the extent that they conflict with the Act.

Cancellation of ongoing contracts

Where an endorsement has been made on the Register, the National Treasury, after consultation with the relevant purchasing authority, may terminate any agreement¹¹⁶ with the person subject to the endorsement, provided that the Treasury considers a range of factors. The factors listed in the Act are the extent and duration of the agreement concerned; whether it is likely to conclude a similar agreement with another person or enterprise within a specific time frame; the extent to which the agreement has been executed; the urgency of the services to be delivered or supplied in terms of the agreement; whether extreme costs will follow such termination; and any other factor which may impact on the termination of the agreement.

The cancellation of on-going contracts where a contractor has been excluded from public contracts for corruption or other breach of procurement rules is a known, but not widely used concept in public procurement.¹¹⁷ An indication of the reluctance of procurement systems to cancel existing contracts may be found in the UNCITRAL Model Law which does not expressly provide for the cancellation of a contract, although the guidance notes accompanying the Model Law do not preclude national systems from utilizing cancellation in cases of fraud or corruption.¹¹⁸

The possibility of terminating on-going contracts under the Corruption Act may have far-reaching consequences that may not have been considered by the legislature. Some of the issues which will be raised by a contract termination include whether or not the contractor will be paid for work completed or other benefits that the public body may have received under

¹¹⁴ Section 28(4)(b).

¹¹⁵ Section 33(1)(d).

¹¹⁶ Section 28(3) and (7) of the Corruption Act.

¹¹⁷ Arrowsmith, Linarelli & Wallace op cit note 26 at 785–95.

¹¹⁸ Article 54 para 12 *Guide to Enactment of UNCITRAL Model Law*. See Don Wallace 'UNCITRAL Model law on procurement of goods, construction and services' (1994) 3 *Public Procurement L R* CS2–9.

the contract, and whether the public body will be entitled to recover amounts paid out under the contract. Further, who bears the costs of the wasted procurement procedure and a possibly new procedure?

Where a contract is terminated by the government on grounds of endorsement under the Act, this may open the government to a legal challenge by the contractor in question. Where there is fraud or corruption involving the contractor, however, South African common law treats the contract as voidable on the ground of improperly obtained consent.¹¹⁹ In *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk*¹²⁰ the court declared that the law views bribery as immoral and unlawful and will not allow the briber to enforce a contract concluded on a bribe or hold the innocent party to such contract.¹²¹ This view was affirmed in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd*,¹²² where the court refused to enforce a contractual claim against the defendants because of the plaintiff's corrupt behaviour in concluding the contract. The court declared that 'bribery is a form of corrupt conduct that will not be countenanced by any court of law'¹²³ and held the contract to be voidable.¹²⁴ The court further underlined its willingness to assist an innocent party in such a case by excusing the innocent defendants from tendering restitution of the goods or its equivalent received under the contract upon cancellation.¹²⁵

However, where an endorsement relates to a person or enterprise other than the primary convict, the termination of an ongoing contract with such person or firm following an endorsement may not be justifiable on the basis of *Plaaslike Boeredienste*¹²⁶ and *Extel Industrial*.¹²⁷ In those cases the judges stressed their abhorrence at the corrupt conduct of one of the contracting parties to the agreement under scrutiny.¹²⁸ In the first of these in particular the court noted that it was the unconscionability of the method used in concluding the particular contract that led to its being voidable.¹²⁹ Where the corrupt conduct of a third party in an unrelated transaction leads to the endorsement of a party to an ongoing state contract,¹³⁰ the validity of the termination of the contract would be doubtful under the common law. In

¹¹⁹ Schalk van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles 2* ed (2003) 115–16.

¹²⁰ 1986 (1) SA 819 (A).

¹²¹ At 848.

¹²² 1999 (2) SA 719 (SCA).

¹²³ At 728.

¹²⁴ At 728–9. The court made a distinction between the 'bribery agreement' itself in terms of which the bribe is effected and the 'follow-up agreement' concluded as a result of the bribe. While the former is void, the latter is only voidable.

¹²⁵ At 730–3.

¹²⁶ Supra note 121.

¹²⁷ Supra note 123.

¹²⁸ Van der Merwe et al op cit note 119 at 115.

¹²⁹ *Plaaslike Boeredienste v Chemfos* supra note 120 at 848, quoted with approval in *Extel Industrial v Crown Mills* supra note 122 at 728. In the latter case the court also placed much emphasis on the respective guilt and innocence of the parties in distinguishing between the voidness of the 'bribery agreement' and the voidability of the 'follow-up agreement'. See Schalk van der Merwe & L F van Huyssteen 'Improperly obtained consensus' (1987) 50 *THRHR* 78 at 79.

¹³⁰ Such as persons in control of a convicted firm, see s 28(1)(b)(ii) of the Corruption Act.

this type of situation the lawfulness of the termination would turn on the question whether the Corruption Act can be said to provide statutory authority that overrides the state's obligations under contract law.

It should be noted, however, that the Corruption Act limits the power of the National Treasury to terminate a contract. The National Treasury may only terminate a contract where the endorsement applies to a convicted natural person, a convicted firm, or persons in control of a convicted firm.¹³¹ Thus, termination is not permitted where a firm was endorsed because of a relationship with a convicted natural person or persons in charge of such a firm.

A contract that the government has been induced to enter on the basis of corruption is tainted with the illegality of the underlying corrupt transaction between the public official and the contractor. As a result, recovery of outstanding payments should be refused, on the basis of the rule denying payment under an illegal transaction.¹³² It may also be possible for the government to make a claim on the basis of the unjust enrichment of the contractor,¹³³ if the government can prove that it has been impoverished and that the contractor has been enriched at its expense.¹³⁴

In determining whether the government may make a claim for a wasted procurement procedure, the Corruption Act provides that where the National Treasury has terminated an agreement, it may, in addition to any other legal remedy, recover from the person or enterprise any damages incurred or sustained by the state as a result of the tender process or the conclusion of the agreement, or any losses which the state may suffer by having to make less favourable arrangements thereafter.¹³⁵ However, a supplier may on the basis of contractual mitigation of loss principles claim that the state need not conduct a new procurement procedure, but merely call upon, where appropriate, the other tenderers in the previous process.

Finally, the termination of contracts may have extreme resource and cost implications, especially in the construction context.¹³⁶ Another consideration is that cancellation may open the government to difficult legal challenges, in cases where the corrupt activity of a main contractor affects a subcontractor, or where the cancellation arises as a result of the endorsement of a person or firm related to the primary endorsee, or there is a lack of due

¹³¹ See s 28(3)(a)(i).

¹³² See *Vuurman v Universal Enterprises Ltd* 1924 TPD 488 where it was held that a plaintiff is only entitled to recover upon an obligation connected with an immoral transaction if, upon a consideration of all the facts of the case and of the real objects of the parties, the obligation sought to be enforced is separable from the immoral transaction and is not itself tainted with illegality. See also *Chipunza v Muzangaza NO* (2004) JOL 12880 (ZH) where it was held that the purpose of the rule is to prevent a party who has acted disgracefully by making performance under an illegal contract from recovering such performance.

¹³³ *Trotman v Edwick* 1951 (1) SA 443 (A) at 449B-C.

¹³⁴ See *McCarthy Retail Ltd v Shortdistance Carriers* 2001 (3) SA 482 (SCA).

¹³⁵ Section 28(3)(c).

¹³⁶ It may also be noted that cl 60.5 of the National Treasury's Standardised Provisions for Public-Private Partnerships (PPP) contain extensive provisions permitting the termination of a PPP agreement where the private partner, its employees or subcontractors are engaged in corrupt acts.

process in the decision to terminate.¹³⁷ Termination may not always be in the public interest and it is therefore important to note that the provisions regarding termination are permissive.

Derogations from the requirement to exclude a contractor endorsed on the Register

Once the order to endorse has been made, all public bodies must comply by excluding the endorsed person/firm from public contracts.¹³⁸ There is no flexibility to derogate from the endorsement order by continuing to do business with a person so endorsed. In other jurisdictions, procuring entities may derogate from the requirement to exclude a convicted supplier,¹³⁹ or may waive the debarment order,¹⁴⁰ where justified under the circumstances. For example, the EC procurement directives permit derogations from the mandatory requirement to exclude corrupt suppliers in the 'general interest'. Although 'general interest' is not specifically defined, it means, if interpreted similarly to other derogations in European jurisprudence, that any derogations would have to be appropriate, necessary and proportionate to the objective sought, and may not be used to discriminate against contractors of other Member States.¹⁴¹ In the United States, a contractor's suspension/debarment is effective unless 'the (government) agency head . . . states in writing the compelling reasons justifying the continued business dealings between that agency and the contractor'.¹⁴² US regulations do not define 'compelling reasons' but many agency-specific procurement regulations give illustrations such as national defence,¹⁴³ urgency,¹⁴⁴ and the availability of only one capable contractor.¹⁴⁵

It would have been preferable for permissible derogations also to exist in South Africa. The current lack of flexibility for procuring entities may result in exclusions that are not in the best interests of the public. The courts operate outside the public procurement 'realm' and may not be aware of factors necessitating the continuation of a business relationship between the contractor and the government. Such factors may include public health or public security concerns, the availability of only one supplier, the unduly prohibitive costs of finding alternative suppliers, or the resultant reduction in competition as a result of the exclusion of a particular contractor from that market. Further, the South African approach denies procuring entities the

¹³⁷ Contractual remedies may, where appropriate, be available against the government: see Cora Hoexter with Rosemary Lyster (Iain Currie ed) *The New Constitutional and Administrative Law Volume II — Administrative Law* (2002) 167.

¹³⁸ Section 28(3)(a)(iii).

¹³⁹ Article 45 of the Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O J L 134/114.

¹⁴⁰ US FAR 9.406-1(c).

¹⁴¹ Case C-318/86, *Commission v French Republic* [1988] E C R 3559. See Williams op cit note 73.

¹⁴² FAR 9.407-1(d), 9.406-1(c).

¹⁴³ Defence Federal Acquisition Regulations (DFARS) 209.405(a)(iv).

¹⁴⁴ DFARS 209.405(a)(ii).

¹⁴⁵ US Department of Health and Human Services Acquisition Regulations 309.405(a)(1)(i).

flexibility to deal with peculiar or one-off cases that could not have been anticipated.

Remedies for affected suppliers

The Corruption Act does not indicate whether remedies are available to a supplier who is wrongly endorsed in the Register. Whilst this issue may not arise where a primary convict is endorsed by the courts, it is possible for a person to be wrongly excluded where he is a related person/firm, or is one of the persons ‘implicated’ by the conviction who is to be endorsed under the Register Regulations.

An endorsement of the primary convict may be challenged in an appeal against the conviction, or the sentence which includes the endorsement order.¹⁴⁶ Alternatively, where the order is issued by a lower court, the High Court, in the exercise of its supervisory jurisdiction over such courts, may review the lower court’s procedures where there is an alleged breach of due process.¹⁴⁷

A *related* person who was not convicted of corruption but endorsed on the Register by order of the court, and who seeks to challenge the endorsement, may not have any remedy, due to a lack of standing,¹⁴⁸ unless the person is able to petition the court as a person affected by the court’s decision. Such a person would not have a remedy under PAJA, which does not apply to judicial decisions.¹⁴⁹

However, where information on an *implicated* person is wrongly entered into the Register pursuant to the Register Regulations, such persons may challenge the legal validity of the provisions of the Register Regulations which conflict with the Corruption Act, and in addition, would have a right to a remedy under PAJA. Where a challenge is successful, an effective remedy (from the contractor’s point of view) will be the setting aside of the decision taken.¹⁵⁰ Damages are also available in principle if a loss has occurred for which there is no other appropriate remedy,¹⁵¹ although these may be difficult to claim in practice because of the problems of proving loss.¹⁵²

¹⁴⁶ The Chairperson of the parliamentary committee deliberating the Corruption Bill also stated that ‘[t]he only thing a person can do in such circumstances is to appeal should s/he wish to appeal against the order of the Court’. See Parliamentary Justice and Constitutional Development Portfolio Committee—Prevention of Corruption Bill Discussion, 16 October 2003, available at www.pmg.org.za. See s 28(3)(b) Corruption Act.

¹⁴⁷ *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111 at 116; Hoexter et al op cit note 137 at 64–9.

¹⁴⁸ Hoexter et al op cit note 137 ch 7.

¹⁴⁹ Section 1(*ee*) of PAJA.

¹⁵⁰ Section 8 (1) (*c*) of PAJA; *Claude Neon Ltd v Germiston City Council* 1995 (3) SA 710 (W) at 720–21; *Logbro Properties CC v Bedderson* NO 2003 (2) SA 460 (SCA) at para 5.

¹⁵¹ J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 353–62; *Olitzki Property Holdings v State Tender Board* (2001) 3 SA 1247 (SCA).

¹⁵² Soren Schonberg *Legitimate Expectations in Administrative Law* (2000) 202; De Ville op cit note 151 at 359. However, an aggrieved supplier is not entitled to loss of profits, *Olitzki* supra note 151. Following the Constitutional Court judgment in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) it may also be very difficult for such supplier to claim out-of-pocket expenses where a mistaken, but bona fide endorsement was made.

ASSESSMENT

The endorsement provisions grew out of, and are intended to support, South Africa's anti-corruption policy. Although they are in many respects detailed and provide for many of the concerns arising from the use of procurement exclusions, some questions remain regarding the usefulness of the measures provided by the Corruption Act.

The major concern is whether the exclusions will actually be effective in combating public sector corruption. Exclusion is only one limited tool in the range of measures available in the fight against corruption, and corruption in public life is not limited to public procurement. In addition, corruption is such a complex issue that even within government contracts it requires the implementation of measures linked to clearly defined goals. If exclusions are considered an appropriate tool for corruption control, then the issue becomes how to make this tool effective.

Although the provisions are indicative of the government's lack of tolerance for corruption, it is not clear how effective they will be in practice. The provisions may be of limited effect¹⁵³ since they rely on the conviction of a corrupt supplier. Corruption notably thrives in secret, resulting in a dearth of convictions. Furthermore, even where a firm has been convicted of corruption, and has been endorsed on the Register, it may take on different corporate identities, and in practice remain able to participate in government contracts, as it is 'extremely difficult to prove that a new firm is the alter ego of one previously excluded' without lengthy and expensive investigations.¹⁵⁴ The effectiveness of the provisions may be hampered without clear rules on the nature of related persons that may be subject to exclusion, both under the Corruption Act that omits to deal with sister firms related to an endorsed firm and under the Register Regulations that deal with 'implicated' persons in a legally dubious manner.

More generally, it has been suggested that legislative intervention to prevent businesses from using bribes to obtain government contracts may not be sufficient. Thus, '[t]he effectiveness of . . . a legislative approach is undermined in a market economy where the drive for profit dominates. . . . Although some view the legal system as a cure for market imperfections, one of the reasons that law sometimes fails to compel ethical conduct in the operation of businesses may simply be that the potential for huge profits makes violation of the law seem worth the risk of punishment.'¹⁵⁵ If this is indeed the case, then the exclusion provisions, even if accompanied by rigid

¹⁵³ There have been no endorsements in the Register so far.

¹⁵⁴ Anechiarico & Jacobs *op cit* note 50 at 172.

¹⁵⁵ Barbara Crutchfield George & Kathleen Lacey 'A coalition of industrialised nations, developing nations, multilateral development banks and non-governmental organisations: A pivotal complement to current anti-corruption initiatives' (2000) 33 *Cornell International LJ* 547 at 557.

enforcement, may not succeed in eradicating procurement corruption without a complement of other initiatives.¹⁵⁶

Whilst the government must be commended for its uncompromising, multi-faceted approach to corruption control, it is clear that in linking procurement regulation and corruption control the government must ensure that there is maximum transparency, fairness and clarity in the way that the provisions are implemented and the least disruption to the procurement process.

¹⁵⁶ See Becker & Stigler op cit note 36; Harms op cit note 8; Frederick Staphenurst & Petter Langseth 'The role of the public administration in fighting corruption' (1997) 10 *International Journal of Public Sector Management* 311.