

GREEN IS THE NEW GOLD: GOING GREEN IN PUBLIC PROCUREMENT IN SOUTH AFRICA – THE USE OF ENVIRONMENTAL CONSIDERATIONS IN THE CRITERIA AND CONTRACT TERMS OF TENDER PROCEDURES

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ABSTRACT

Unsustainable consumption and production measures in human society have culminated in detrimental impacts on the environment and its resources, leading to increasing pressure being placed on both public and private sectors to adopt more environmentally sustainable practices. Public procurement law, a facet of administrative law, governs the interface between the public and private sectors in that it regulates rules of trade in procurement of products and services by the government from private sector businesses. Thus, in line with emerging global public procurement trends, this article posits that there is significant potential for influencing the environmental impact of consumption and production measures through Green Public Procurement (“GPP”), whereby public bodies may elect to prefer the procurement of environmentally sustainable products and services over their competitive alternatives. While there are multiple mechanisms within the stages of public procurement which may be utilised to achieve this objective, this article focuses on the potential for GPP to be employed using the preferential procurement system unique to South African public procurement law to incentivise businesses to follow more environmentally friendly models, with a use case focusing on the procurement of environmentally friendly products.

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1 Introduction

It is no secret that humans' daily levels of product consumption, and the accompanying waste that it generates, has had a significantly detrimental impact on the environment. In 2019, speakers at a meeting of the United Nations General Meeting on Climate and Sustainable Development already warned that only eleven years remain to prevent irreversible damage from climate change.¹

Although one would think that this should be enough to spark international reforms to effect environmentally friendly production and consumption measures, in many countries, and especially third-world countries where other socio-economic goals remain a priority, governments on a national and local level have been slow to act. The private sector also seems to lack the motivation and incentive to cut down on their environmentally hazardous practices, seeing that the preservation of the earth we inhabit is not yet regarded as a priority when it comes to manufacturing and other processes.

However, it is undoubtedly essential to the safety and survival of current and future generations that immediate and drastic changes are instituted to manage the attitudes of both corporates and states insofar as their environmental impact is concerned. A prime domain where such reformations can be effectively implemented is that of the interplay between public and private sectors, namely public procurement.

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¹ United Nations 2019.

Internationally, a trend towards Green Public Procurement (“GPP”) is emerging. GPP entails that public authorities engage in procurement procedures that prioritise procuring products and services which have a reduced environmental impact throughout their life cycle, when compared to competing products or services.²

The following analysis sets out to demonstrate how the South African constitutional and legislative framework allows for environmental considerations to be factored into the procurement process, particularly in regard to tender criteria and contract terms, by focusing on the procurement of eco-friendly product alternatives. It is furthermore argued that lifecycle costing analyses should be considered as part of the process. These considerations are viewed in light of the benefits of GPP and the barriers to achieving environmental redress.

2 Constitutional and legislative frameworks for GPP

Sustainable development is central to environmental governance.³ However, there appears to be no overarching law or policy dedicated to sustainable public procurement, nor to GPP.⁴ Notwithstanding, it is possible to interpret the existing constitutional and legislative framework, as well as the case law, to provide municipalities with the power to incorporate environmental considerations into their procurement processes. Local government, therefore, plays a crucial role in environmental protection, and hence GPP, in South Africa.⁵

The power of government to procure goods and services is enshrined in section 217 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Section 217(2)(a) provides the state with the general power to consider policy considerations in the procurement process. Subsection (2), therefore, allows for state institutions to implement a policy of preferential procurement. Procurement may thus be used as a policy tool, as evidenced by the enactment of the Preferential Procurement Policy Framework Act 5 of 2000 (“PPFFA”), which is aimed at providing preference to historically disadvantaged persons in the procurement system.

However, the Constitution, in section 24, also bestows upon South Africans the right to an environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of

² European Commission *Buying Green! A Handbook on Green Public Procurement* (2011) 2.

³ Humby 2013: 68.

⁴ International Institute for Sustainable Development *Implementing Sustainable Public Procurement in South Africa: Where to Start* (2014) vi.

⁵ Du Plessis 2015: 993.

present and future generations. Reasonable legislative and other measures must be adopted to give effect to these rights. Environmental preservation is therefore due to become an important policy factor in all legal sectors, also in state procurement processes.

The National Environmental Management Act 107 of 1998 ("NEMA") was introduced to give effect to section 24 of the Constitution, offering a comprehensive set of national environmental principles applicable "throughout the Republic to the actions of all organs of state that may significantly affect the environment".⁶ Although NEMA makes no specific reference to procurement measures which may be implemented, procurement-related environmental principles would be subject to its provisions because procurement procedures involve actions of organs of state that may significantly affect the environment. Furthermore, procurement is an essential sector within which to regulate the environmental impact of businesses.

The KwaZulu-Natal High Court, furthermore, declared that municipal entities have the power to enact bylaws promoting the protection and preservation of the environment in terms of the Constitution and NEMA, thereby emphasising the position of municipalities as being best placed to deal with issues involving the environment at the local level.⁷ Further, the court pointed out that according to section 48 of the National Environmental Management: Biodiversity Act 10 of 2004, municipalities "play a key role in managing natural resources, and are required to take Biodiversity into account in terms of the Constitution and NEMA".⁸

It has been argued that, while the PPPFA explicitly provides for preference based on social policies, the Act may be interpreted, in line with section 24 of the Constitution, to also include environmental preservation as a policy factor that may be used in preferential procurement.⁹ Section 2(1)(d) of the PPPFA does not constitute a *numerus clausus*: By using the words "the specific goals of a preferential procurement policy *may* include" [contracting with certain categories of persons], the legislature has left the provision open to be read as granting public entities the power to also consider environmental policy factors in preferential procurement. Municipalities are thus empowered, and may even be obliged, within the existing legal framework to take the necessary steps to implement environmental considerations into the procurement process. NEMA's principles, furthermore, provide a thorough list of factors to be considered by procuring entities in the administration of GPP as a mechanism to further the goal of sustainable

⁶ S 2(1).

⁷ *Le Sueur v Ethekewini Municipality* 2013 ZAKZPHC 6 para 20.

⁸ Para 38.

⁹ Bolton 2008: 39.

development.¹⁰ Of particular interest with respect to the procurement of environmentally sustainable products are sections 4(a)(ii) and 4(a)(iv), which require, respectively, that “pollution and degradation of the environment are avoided or ... [where necessary] minimised and remedied” and “that waste is avoided, or ... minimised and reused or recycled where possible and otherwise disposed of in a responsible manner”.

The Municipal Finance Management Act 56 of 2003 (“MFMA”), furthermore, regulates the financial governance of institutions within the local sphere of government and mandates each municipal entity to implement a supply chain policy which gives effect to the provisions of the MFMA in a manner that is financially sustainable.¹¹ Considering lifecycle costing, which denotes the cost of an asset over its lifetime as opposed to only the initial cost of its procurement, eco-friendly product alternatives would prove not only to be more environmentally sustainable, but also more financially sustainable for state entities in the long run. This aspect is subsequently discussed in more detail.

3 The necessity of lifecycle costing

Sustainable financial management necessarily implies incorporating environmental considerations into the procurement process, with a preference for products that are more environmentally friendly considering the maintenance costs of the product. The myth that eco-friendly product alternatives tend to be more expensive has been adequately debunked internationally by numerous authorities and procuring entities with reference to the concept of lifecycle costing.¹²

The lifecycle costing of a product includes a costing analysis of not only the acquisition of a product, but also the financial costs incumbent upon its ownership, including installation, usage, maintenance, upgrading, and disposal.¹³ This goes to the heart of financially sustainable procurement in that, while a product's initial price on acquisition may be cheaper than an eco-friendly alternative, its maintenance costs often turn out to be far more expensive, without even considering the unquantifiable value of the ultimate detriment to the environment.

In considering lifecycle costing, a case study on the comparison between the cost of LED light bulbs, used for installation in streetlamps in the City of Tshwane, and the less energy efficient HPS bulbs, exemplifies the higher affordability of an eco-friendly product

¹⁰ S 2(4)(a).

¹¹ S 111 and S 2.

¹² Bolton 2008: 37.

¹³ T Khaka *City of Tshwane: Sustainable Procurement Strategy* (2017) 16.

alternative. The figures display that the initial investment on HPS bulbs stood at around R1214.00, compared to LED's R3481.00 for the same energy output – the initial cost of LED bulbs being just below three times that of HPS bulbs.¹⁴ However, the future energy costs of HPS bulbs, of R6824.00, cost more than treble that of the LED bulbs of R2063.00. This comparison, without even considering costs associated with disposal, already displays the misleading nature of a costing analysis based solely on initial product investment.

Unfortunately, South Africa's particular socio-political circumstances, the lack of capacity, skills, and knowledge,¹⁵ as well as depleted state funds, present challenges to environment-conscious procurement, resulting in a tendency to prioritise short-term needs over more sustainably viable, longer-term focused purchase policies. Furthermore, the PPPFA and its regulations may serve as an additional hinderance to incorporating lifecycle costing, considering that it simply refers to the "price" offered by suppliers, without mentioning lifecycle costs.¹⁶

4 Incorporating environmental considerations into the procurement process

It is possible to incorporate environmental considerations into most, if not all, stages of the procurement system.¹⁷ However, this discussion will only focus on two of those stages, which may be most effective in discharging the goal of incorporating environmental policy objectives into the procurement system, namely the criteria in adjudicative (award) and contract (post-award) stages. In accordance with principles of fairness and transparency, any criteria used to assess the bids, as well as any contractual terms the winning bid will be subject to, must be stipulated in the invitation to bid.¹⁸

4.1 Criteria

Environmental considerations may be built into the functionality, preference, and pre-qualification criteria.

¹⁴ T Khaka *City of Tshwane* (2017) 20.

¹⁵ Bolton 2016: 24.

¹⁶ Bolton 2016: 23.

¹⁷ Bolton 2008: 41.

¹⁸ *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (SOC) Ltd* 2016 3 SA 1 (SCA).

4 1 1 *Functionality criteria*

"Functionality" was previously defined in regulation 1 of the Preferential Procurement Regulations 2017, ("the 2017 Regulations") as "the ability of a tenderer to provide goods or services in accordance with specifications as set out in tender documents". Regulation 5 of the 2017 Regulations then obliged the organ of state to specify evaluation criteria in the tender documents, and that such criteria must be objective. In contrast, the new Preferential Procurement Regulations 2022 ("the 2022 Regulations") are silent on functionality criteria. However, both the PPPFA and the 2022 Regulations use the term "acceptable tender" to refer to those tenders that qualify for adjudication. The PPPFA defines "acceptable tender" in section 1 as "any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". Thus, while the terminology of "functionality criteria" has been removed from the regulations, the notion remains within the broad definition of "acceptable tender". That is, the PPPFA and its regulations contemplate that criteria will be stipulated in the tender document that will determine which tenders meet the functionality requirements of the tender.

However, the PPPFA and its regulations (both in the 2017 and 2022 form) fail to indicate what such functionality criteria should specifically entail. It is thus conceivable that criteria as to the quality and contents of the products tendered for may be used to assess functionality. In the end, criteria used in each case will depend on the nature of the product being procured by the public entity.

Functionality criteria may apply to the material components of the product itself, as well as to its disposability and/or reusability. A bidder, therefore, may be scored on the percentage recycled material used in the product, as well as the recyclability of the product (the higher the percentage, the higher the score). Using such specifications will be particularly relevant in the context of procuring plastic and paper products, for example. Energy efficiency is another criterion to assess a product against, such as in the case of lightbulbs.¹⁹

4 1 2 *Preference criteria*

If the argument regarding the interpretation of section 2(1)(d) of the PPPFA, mentioned in part 2 above, is accepted, using environmental adjudicative criteria at the price or preference stage is also an option available to organs of state. It is important to note that incorporating a consideration of environmental compliance into the preferential points

¹⁹ Khaka 2017: 29.

system does not have to mean disregarding the use of a social procurement policy based on previously disadvantaged persons – it may be balanced alongside it under the broad concept of "Sustainable Public Procurement" ("SPP"), which takes into account economic, environmental, and social considerations in the procurement process.²⁰

Points may be granted to bidders based on the product, or the environmental compliance standards of the bidding entity itself. Environmental compliance of the bidding entity would probably be more relevant in the context of procurement for services or works. But insofar as the product is concerned, a public entity could easily incorporate preference points into the scoring system based on eco-labels attached to a product, or its environmental certification.²¹ Eco-labels stipulate the environmental performance of a product.²²

Allocating preference points based on environmental certification would be binary. In other words, a product either does, or does not have the eco-label; it is either certified, or not certified. It could not be determined on a scale, as is the case for a bidder's Broad Based Economic Empowerment ("B-BBEE") status. The bidder, therefore, would score either zero or one hundred percent on the environmental preference point.

Alternatively, to achieve a scalable preference score, the procuring entity could incorporate the percentage recyclable components used in the product as well as its recyclability into the preference points, rather than into the functionality assessment stage.

It is arguably as important to incorporate environmental considerations into the procurement process as is ensuring wealth redistribution. Hence, it would be ideal to weight the preference score for environmental impact equally to bidders' B-BBEE status.

4.1.3 *Pre-qualification criteria*

Regulation 4 of the 2017 Regulations provided requirements which the procuring entity could consider prior to the functionality stage as a means to determine whether a bidder meets certain strict criteria before

²⁰ Bolton 2008: 47. The concern that Broad-Based Black Economic Empowerment (B-BBEE) acts as a hinderance to the implementation of SPP seems to be "limited to intellectual or theoretical exercises more than it is founded on empirical research"; however, where sustainable procurement does entail paying more initially, negotiation strategies for public procurers are available to lower the purchase costs of sustainable goods and services. See: International Institute for Sustainable Development, 2014: 11.

²¹ 47.

²² Khaka 2017: 15.

their bid will even be evaluated. This is probably the best stage at which environmental criteria can be used as a tool to incentivise the production and supply of eco-friendly product alternatives.

The 2022 Regulations have removed the rules on pre-qualification criteria and is now silent on whether a tender may include such pre-qualification stage. It is noteworthy that the Constitutional Court judgment which found the 2017 Regulations unlawful, and which led to the 2022 Regulations, explicitly stated that the 2017 Regulations "do what is envisaged in section 217(2) of the Constitution".²³ The problem with the 2017 Regulations that resulting in the finding of invalidity was that the Minister prescribed the preferential policy that organs of state must follow, while the PPPFA gave such power to the organ of state. It was pointedly not an issue of the substantive content of the regulations, which, in the court's own words, were aligned with the Constitution. It follows that the silence of the 2022 Regulations on pre-qualification does not imply that pre-qualification is no longer possible, but only that the decision regarding pre-qualification rests with the procuring organ of state rather than the Minister.

This reading of the 2022 Regulations in light of the *Afribusiness* case, means that a procuring authority can specifically require products which are, for example, predominantly made from recycled material, are reusable, or products which have obtained particular environmental certifications or have particular eco-labels, or electrical products which have a minimum standard of energy efficiency as a matter of pre-qualification.

In addition to the procurement process, the terms of the contract concluded with the successful bidder can also ensure compliance with environmental standards.

4 2 Contractual terms

The use of contract clauses to ensure compliance with environmental standards of procured products has a dual purpose: firstly, to ensure that the product itself actually meets the standards which the bidder claims it does, and secondly, to set additional environmental conditions.²⁴

"Green washing" is a term used for describing a practice where companies assert that their product meets certain environmentally compliant standards or has eco-friendly qualities in order to gain public traction, when the product in fact does not meet those standards.²⁵ False

²³ *Minister of Finance v Afribusiness* NPC 2022 (4) SA 362 (CC) para 116.

²⁴ Palmujoki, Parikka-Alhola & Ekroos 2010: 254.

²⁵ Loewe 2020.

declarations as to product functionality in general are harmful, but it is even more where products are procured based on their environmental impact: not only are state resources inefficiently spent, but there may be negative implications insofar as the product's effect on the environment is concerned. It is thus important that the procuring entity may have a right of recourse against the winning bidder if their product in fact does not meet the required environmental criteria by ensuring sufficient contractual protections.²⁶

In addition to environmental criteria used to evaluate tenders, environmental clauses may be incorporated into the contract which all contractors should be able to comply with (in other words, those clauses should not incorporate criteria according to which various bidders are assessed and which only some of them could meet – all successful bidders should be able to perform these obligations).²⁷ For example, contract clauses could regulate the manner in which goods are supplied, the method of transport (to ensure lower fuel consumption), or the supplier could be required to make use of recyclable packaging (to ensure that less material wastage ends up on landfills).²⁸

5 Benefits of GPP

There are a multitude of advantageous outcomes that incorporating environmental policy considerations into the procurement system could achieve, of which only a few need to be stated here to convey the impact that such an undertaking could have on society at large.

Public entities that choose to procure energy-efficient electronics, including bulbs, computers and any heating appliances, can contribute to cutting carbon dioxide emissions by a significant percentage, while the use of water-efficient ablution facilities, such as taps and toilets, could lead to millions of tons of water being saved.²⁹

The re-use of products or the use of recyclable or reusable, rather than single-use, products, or, most preferably, the use of bio-degradable products, will minimise landfill capacity to an appreciable extent.

GPP can incentivise manufacturers, suppliers, and every possible entity throughout the distribution chain, to start producing, purchasing, and selling products that are environmentally friendly in response to a public trend of preferring environmentally sustainable products. This would

²⁶ Bolton 2008: 50.

²⁷ 50.

²⁸ Palmujoki, Parikka-Alhola & Ekroos 2010: 254.

²⁹ Bolton 2008: 36.

increase the supply of eco-friendly product alternatives and would ensure their availability to the private sector as well.³⁰

The possible cost benefits of GPP are also noteworthy: conducting lifecycle cost analyses goes to the core of not only environmental but also economic sustainability. On a more fundamental level, using recycled products, or reusing products as an alternative to buying new products, will reduce government spending.³¹

6 Barriers to achieving GPP

By prioritising the achievement of financial sustainability in the short term, the manner in which the regulatory framework in the MFMA and related procurement instruments govern timing, budgeting, and spending requirements which procurement entities must abide by presents a challenge to incorporating lifecycle costing analyses in the procurement process. This is because the acquisition price alone is considered in awarding tenders to bidders, rather than factoring maintenance, operational, and upgrade costs into the equation. Sustainable procurement, and hence GPP, requires lifecycle analyses in procurement processes. Not doing so, ironically, also presents a barrier to long-term financial sustainability.³²

Another material factor inhibiting the implementation of a GPP system in South Africa particularly is a lack of knowledge and information pertaining to the importance of environmental preservation and how public procurement may be used as a tool to achieve this policy objective. Where a significant proportion of the population is misinformed or simply lacks the necessary insight, it is difficult to see how state entities, especially at a local level, will be motivated to incorporate environmental considerations into the procurement system.³³

Knowledge inspires interest; hence, it is imperative that educational programmes are undertaken by state departments to increase awareness and access to information regarding the negative impacts that human activities have on the environment, and, importantly, what can be done about it.³⁴

³⁰ 36.

³¹ 37.

³² Khaka 2017: 16.

³³ Mutenda 2018: 2.

³⁴ Mutenda 2018: 6.

7 Conclusion

Across the globe, governments provide for GPP procedures that incorporate environmental policy considerations into their procurement processes. These incentivise businesses and corporate entities to adjust their business models to accommodate the manufacture of eco-friendly product alternatives to be supplied in an eco-friendly way, instead of merely imposing sanctions on those who transgress environmental prohibitions.

In South Africa, organs of state are empowered to initiate GPP within the existing legal framework, and, arguably, government entities are constitutionally obliged to procure in a manner which is least harmful to the environment. Local municipalities are best suited to determine applicable GPP supply chain management policies, as environmental needs will differ depending on the product to be procured and the area within which the procuring entity operates.

However, to efficiently incorporate GPP considerations into the criteria which may be used to assess bidders will most likely necessitate an amendment to the Regulations, as well as the MFMA, so that lifecycle costing analyses are to be conducted to promote long-term financial and environmental sustainability in the procurement process.

The implementation of GPP is integral to achieving environmental preservation, and it can be an effective mechanism in curbing carbon fuel emissions, reducing landfill capacity, and cutting down on public spending. It can also be instrumental in attaining large-scale, permanent changes in the way humans produce, consume, and dispose of goods.

Finally, environmental education is the most powerful tool to be used in addressing the socio-political particularities of South Africa which militate against achieving GPP.

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