

Joined at the hip – An Overview of the Competition Aspects of Public Procurement (A South African Perspective)

Songezo Mabece

For many who might be tempted to think that the terrains of competition law and public procurement are two exclusive of each other, their inherent public interest and benefit features together with their historical context to South Africa make these two areas of the law in part inseparable. In the South African context, it is important to consider the constitutional history of the nation to get a better sense of competition law and public procurement law, respectively.

The Constitution¹ took effect from February 1997 and in express terms makes provision for public procurement through section 217; where 217(1) reads: *‘When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’*. And because many of the fundamental rights located in the Bill of Rights (chapter 2 of the Constitution) are provided for through public procurement, public procurement’s importance to the constitutional project ranks high. As a result, and in the same year, the 1997 Green Paper on Public Procurement (Green Paper) was released through the Government Gazette².

The Green Paper was developed to represent a *‘significant milestone in the transformation of public sector procurement in South Africa. The appropriate orientation of public sector procurement would enable the State to use its purchasing power to attain specified socioeconomic objectives’*³. Within the South African context, public sector procurement was thought to make a critical contribution to the transformation and democratisation

¹ Constitution of Republic of South Africa, 1996.

² Government Gazette Notice 691 of 1997.

³ Ibid, at pages 5 and 6.

of South African society. And because the socio-economic objectives are enshrined as fundamental rights in the Constitution, public procurement essentially became the state's vehicle to deliver on this promise.

Among the features that must define a proper procurement, the aspect of 'competition' is given premium treatment. In South Africa, competition law and policy are regulated by the Competition Commission together with the Competition Tribunal. The relevant legislative instrument is the Competition Act⁴. This instrument came into force in early 1999.

Of note; the Constitution, the Green Paper and the Competition Act (together with many other instruments that were designed to address the socio-economic question) were all settled in first democratic administration (1994–1999) under President Nelson Mandela. What this illustrates is that the post-apartheid reform was an all-inclusive socio-economic reform and transformation project consistent with the policy objectives contained in the Reconstruction Development Programme (RDP)⁵ and Growth Employment and Redistribution (GEAR)⁶. Moreover, the administration was aware of the state machinery's power that was at its disposal to drive this socio-economic reform, as encapsulated with these words:

As the largest buyer in the country, government has a responsibility to ensure that its procurement policy supports its overall economic objectives and serves as an instrument for attaining those objectives⁷.

The Green Paper informs the legislative instruments that prevail in the conduct of public procurement in South Africa. Among these are the Public Finance Management Act⁸, the Municipal Finance Management Act⁹, the Preferential Procurement Policy Framework Act¹⁰ and the Broad-Based Black Economic Empowerment Act¹¹. These pieces, in whole or in part, address the issues of transformation and of economic redress for the purposes of transformation in the economy and, by necessary

⁴ 89 of 1998.

⁵ The RDP is an integrated, coherent socio-economic policy framework. It seeks to mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future. This became government policy in 1995 following the ANC victory at the 1994 general elections.

⁶ A 1996 macroeconomic strategy for South Africa to complement and build on the RDP policy of 1995.

⁷ Green Paper, at page 5.

⁸ 1 of 1999.

⁹ 56 of 2003.

¹⁰ 5 of 2000.

¹¹ 53 of 2003.

extension, at a social level where a great deal of responsibility is placed on the shoulders of the contracting authority to ensure transformation takes place with public funds. Also contemplated in this transformation objective is the Competition Act whose purpose is to promote and maintain competition in the country in order to, among other things,

- i. promote employment and advance the social and economic welfare of the South Africans¹²
- ii. ensure that small and medium-sized enterprises have equitable opportunity to participate in the economy¹³
- iii. promote the greater spread ownership, in particular, to increase the ownership stakes of historically disadvantaged persons¹⁴.

These objectives point to the public interest and benefit aspects that were cited earlier. Just as public procurement is a vehicle to drive the transformation objectives, so too is competition law and policy. And when the state procures, it must contemplate the fundamental tenets thereof, among them fairness through competition. Tenders, or bids, can be compromised through bid-rigging. Bid-rigging, on the other hand is given special dispensation in the Competition Act in section 4(b)(iii) that proscribes-

‘Section 4(1) An agreement between, or concerted practice by, firms, or a decision by an association of firm, is prohibited if it is between parties in a horizontal relationship and if –

(b) it involves any of the following restrictive horizontal practices:

(iii) collusive tendering’

There are other competition issues that must be contemplated in the conduct of public procurement. These include:

1. bid suppression
2. loser’s fee
3. market allocation (see section 4(1)(b)(ii) – ‘... involves... dividing markets by allocating customers, suppliers, territories, or specific types of goods or services’)

¹² Section 2(c).

¹³ Section 2(e).

¹⁴ Section 2(f).

4. cross directorship and cross shareholding
5. collusive conduct by spouses or family members
6. economic interest groupings and joint ventures
7. excessive pricing
8. exclusionary bid specifications
9. exclusionary contracting models such as transversal contracts.

These are, in fact, contained and discussed in greater detail in 'A Guide on Promoting Competition in Public Procurement'¹⁵ – a clear acceptance and understanding that competition law and public procurement are joined at the hip.

¹⁵ <https://www.compcom.co.za/wp-content/uploads/2022/03/A-Guide-on-Promoting-Competition-in-Public-Procurement-15March2022.pdf>, released on 15 March 2022.

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