“Procurement in the South African public service: a reflection of the ethical and legislative framework”

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Procurement in the South African public service: a reflection of the ethical and legislative framework

Abstract

This paper presents the issue of ethical conduct in the procuring of public goods and services. Procurement in the public sector operates as a business function of an economic activity within a political system. Procurement is also a management function carried out by the public official. Although there is legislation to guide the ethical conduct, with reference to the procuring of goods and services required by the public sector, there is still the increase in corruption. The question thus arises what could be done to prevent corrupt activities.

Based on the research conducted, it may be reported that the function of procurement of public goods and services is susceptible to corruption due to large amounts of public funds that are involved. It is a complex environment where public procurement integrity, ethical standards, best value for money and the style of corruption jeopardize the ability of governments to achieve their developmental agendas. Ethics goes beyond the prevention of corruption, fraud and misconduct as modern societies expect public servants to serve the public interest and to serve in a rational and efficient manner.

Key words: fundamental principles, ethical conduct, procuring of goods and services.
JEL Classification: H10, H57, M48.

Introduction

Public sector procurement is a process whereby goods and services are acquired from external providers with the aim to meet the developmental needs of a government. In this process, procurement is used as a social and an economic tool to improve the livelihood of inhabitants. As in the South African scenario the government identify public procurement as a key activity to achieve secondary economic activities such as bridging the gap between the first and secondary economy created by the apartheid dispensation.

With the realization that corruption and related corrupt activities undermine the rights of citizens, endangering the stability and security of societies and undermining the values of democracy a number of legislative frameworks have been created to regulate public procurement. Despite the legislative frameworks established, corruption is on the increase and the issue of public procurement integrity comes to the fore. Administrators and bureaucrats cannot avoid making decisions and in this regard their discretionary powers require them to consider the ethical dimension of their decision-making. A number of practices may be beneficial in order to ensure sound procurement integrity, as external demands on public procurement are great and varied. It should be noted that demands such as transparency, integrity, accountability and exemplary behavior by administrators and bureaucrats are expected by the broader society.

The method of the study used for this paper is a qualitative analysis investigating the relevant legislation and policy documents developed by the South African National Treasury and the South African Public Service Commission. This paper aims to explore the issue of public procurement and the ethical considerations in the South African public service. In more detail this paper aims:

1. To review the literature reflecting public procurement and the legislative framework regulating public procurement in South Africa.
2. To examine public procurement integrity, corruption and ethical conduct.
3. To have a discussion on procurement and ethical considerations reflecting on the South African scenario.
4. To indicate the mechanisms to ensure good governance with reference to procurement, whistle blowing and the code of conduct.
5. To conclude the discussions with conclusions as an output of the study.

1. Review of the related literature

1.1. Contextualization of public sector procurement. Different authors attach different meanings to the term "procurement". It is referred to, amongst other things, as a business function with an economic activity, a business process in a political system, and a strategic profession. Sherman (1991) defines procurement as "a business function charged with and qualifying external sources, forming agreements, and administering them so that material and services that enhance the work of the organization are reliably delivered". As an economic activity, procurement refers to the economic relationship between a vendor and a purchaser and, to the extent that transactions occur in the context of a market

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order, that relationship is determined by the laws of the market (Trepte, 2004). According to Beste (2008), procurement is also a management function carried out proactively as a value-adding process by a specialized purchasing department or unit. De la Harpe (2009) prefers the definition of procurement provided by the African Development Bank, which sees procurement "as a process of acquiring goods, works and services resulting in the award of contracts under which payments are made in the implementation of projects, in accordance with the governing rules and procedures and guidelines of the financing agency or agencies".

When procurement is used as a social tool, procurement preference allows tax money to be returned to domestic residents, create more jobs, and reduce imports (Miyagiwa, 2006) and Arrowsmith (1996) suggests that the protection of some industries is largely a political consideration, rather than a genuine way to address economic concerns. South Africa has a history of discriminatory and unfair practices, where certain groups were marginalized and prevented from accessing government contracts (Bolton, 2006). In an effort to address these imbalances, the *Preferential Procurement Policy Framework Act, 5 of 2000* (RSA, 2000c), was approved. Procurement preference is used as a tool in developing countries, and it is also a reality in developed countries. However, Arrowsmith (1996) criticizes the protection of industries, because it perpetuates "infant" industries where "the infant never outgrowths its infancy, and preference and subsidies tend to be extended through adolescence, adulthood and premature senility". The South African government has also identified public procurement as a key mechanism to achieve secondary economic objectives, such as bridging the gap between the first and second economy created by the apartheid system (Van Vuuren, 2006).

1.2. Legislative framework regulating public sector procurement in South Africa. As the supreme law, the *Constitution of the Republic of South Africa*, (RSA, 1996) also lays the foundation for public procurement. Section 2 stipulates that any "law or conduct inconsistent with it [the *Constitution*] is invalid", thereby placing a responsibility on the public sector to ensure that the laws approved and the execution of public sector activities adhere to the principles and requirements of the *Constitution*. The system whereby public procurement must take place is captured in section 217(1) of the *Constitution*, which states that procurement must take place "in accordance with a system which is fair, equitable, transparent, competitive and cost effective." Cost effectiveness is strategically placed as the last principle against which all other principles must be measured. Section 217(2) of the *Constitution* also allows for categories of preference in the allocation of contracts and the protection or advancement of persons (or categories of persons) disadvantaged by unfair discrimination.

As stipulated in section 217(3), the National Treasury has enacted the *Preferential Procurement Policy Framework Act*, 5 of 2000 (RSA, 2000c) in this regard. Chapter 10, section 195 of the *Constitution* (RSA, 1996) refers to the "Basic values and principles governing public administration". Sections 32 and 33 of the *Constitution* (RSA, 1996) deal with access to information and just administrative action. These two rights were enacted in the *Promotion of Access to Information Act*, 2 of 2000 (PAIA) (RSA, 2000a) and the *Promotion of Just Administrative Action Act*, 3 of 2000 (PAJA). The application of the PAIA and PAJA was highlighted in public procurement in the matter between Millennium Waste Management (Pty) Limited and The Chairperson of the Tender Board: Limpopo, where the judge found that because "the decision to award a tender constitutes administrative action, it follows that the provisions of the *Promotion of Administrative Justice Act*, 3 of 2000 (RSA, 2000b) applies. Of importance is that conditions used when making decisions should not be mechanically applied with no regard to a tenderer's constitutional rights" (Millennium Waste Management versus Chairperson Tender Board [2007] SCA 165 (RSA)).

The constitutional principles of public procurement are also reflected in the *Public Finance Management Act*, 1 of 1999 (PFMA) (RSA, 1999). In an effort to detect and prevent collusive practices, the *Competition Act*, 89 of 1998 (RSA 1998) was introduced to create an efficient, competitive economic environment, thereby balancing the interests of workers, owners and consumers, and focusing on development to benefit all South Africans. In terms of section 38(1)(a), which states that an accounting officer "must ensure that the institution has and maintains" systems for the various activities listed as part of the general responsibilities of accounting officers. Section 38(1)(a)(iii) prescribes "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective". The *Prevention and Combatting Corrupt Activities Act*, 12 of 2004 (RSA, 2004) was introduced. This Act emanated from the realization that corruption and related corrupt activities undermine the rights of citizens, endanger the stability and security of societies, undermine the institutions and values of democracy, and ethical values and morality, jeopardize sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organized crime.

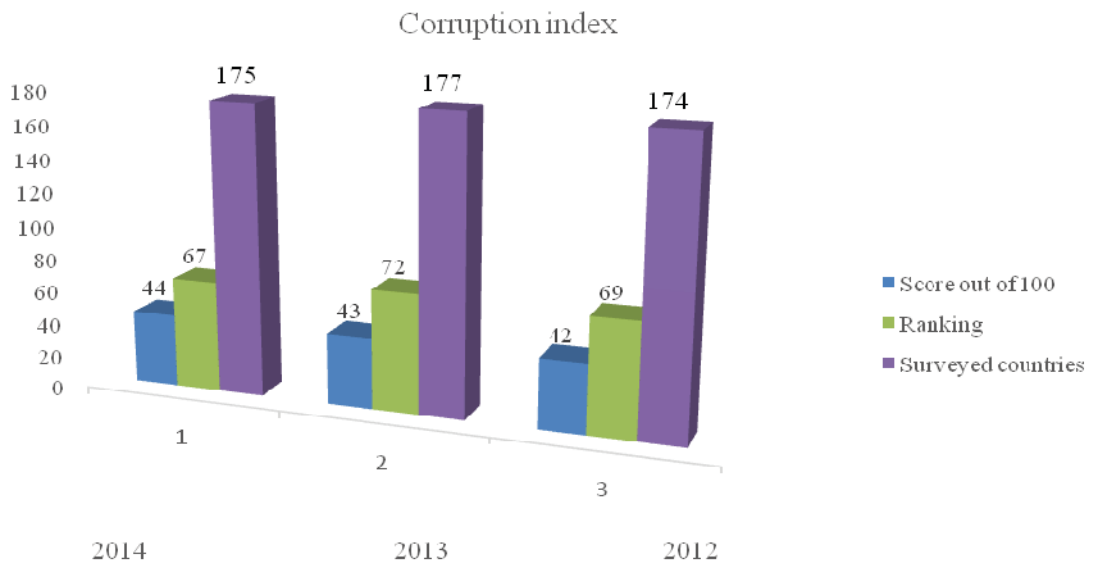
1.3. Public sector procurement integrity. Public sector procurement integrity should be seen as a cornerstone whereby the best value must be achieved. Dagbanja (2011, p. 133) defines best value as "the provision of economic, efficient and effective services, of a quality that is fit for purpose, which are valued by their customers, and are delivered at a price acceptable to the taxpayers who fund them". A number of practices may be beneficial in order to ensure sound procurement integrity and these practices may include the prequalification of tenderers in order for the purchasing entity to ascertain which tenderers have the required abilities and capabilities to execute the contract (Arrowsmith, 2011; Dagbanja, 2011; RSA: National Treasury, 2004). For example, in the two-stage tendering method, tenderers put their tender price in one envelope, and their suggested methodology or functionality in a second envelope. Functionality is evaluated first, before the price envelopes of the tenderers that are most likely to satisfy the needs of the procuring entity are opened. The aim of two-stage bidding is to prevent price from influencing the decision, with due consideration of cost effectiveness (Dagbanja, 2011; RSA: National Treasury, 2004).

1.4. Corruption and public sector procurement. It should be noted that the prevalence and style of corruption in public sector procurement vary considerably between countries, and they also impact on society on various levels. Corruption jeopardizes the ability of governments to achieve their agenda; affects spending on priority sectors such as education and health, and can have a damaging impact on growth (Dorotinsky and Pradhan, 2007; Paterson and Chaudhuri, 2007). Public procurement is particularly susceptible to corruption, as large amounts of public funds are involved in the procuring of goods and services, and the discretion of those public officials, politicians, and parliamentarians have over public procurement (Ware et al., 2007).

2. Procurement and ethical considerations: discussion

This study aims to discuss the issue of ethical considerations and public sector procurement. Despite the various forms of legislation introduced and public sector agencies created to combat corruption in South Africa, corruption continues to rise. The detection and reporting of corruption normally relies on sources such as the Auditor-general's reports, Internal Audit reports on where controls are bypassed or where governance problems occur, hotline reports, records of disciplinary hearings and grievance procedures, media reports and whistleblowing.

2.1. Cost of corruption per citizen in South Africa. The Minister of Finance reported on 14 October 2014 that the public sector wage bill for 2014-2015 was R439 billion and that approximately 1.3 million people were employed by the national and provincial governments. In that year, at least R30 billion was lost due to corruption in the procurement of goods and service and in the construction industry. This amounts to a staggering R23,076.92 (1,846.08 US$) average per public servant during the 2014-2015 financial year. According to Statistics South Africa (2013, p. 2), the South African population was estimated at 52 million in 2013. The cost of corruption per South African citizen was R566.25 over the same period (Maswanganyi, 2014). See Figure 1 reflecting the corruption index.



Source: http://mg.co.za/article/2014-12-02-fsdf – accessed on 1 April 2015.

Fig. 1. Corruption index

According to the 2014 Corruption index (http://mg.co.za/article/2014-12-02-fsdf), South Africa scored 44 out of 100 and is ranked 67 of the 174 surveyed countries and territories. Countries are scored on a scale from 0–100, with 0 representing most corrupt and 100 very clean. Since 2012, South Africa has consistently scored below 50. In 2012 and 2013, the country scored 43 and 42 respectively, with rankings of 69 out of 174, and 72 out of 177. The index is the most widely used indicator of corruption worldwide. According to Corruption Watch (http://mg.co.za/article/2014-12-02-fsdf) these figures therefore highlight the gradual erosion of trust in South Africa's public sector. Effective functioning of public procurement is often hamstrung by a lack of integrity in the procurement process, a lack of effective competition between suppliers and collusion among suppliers. Integrity is defined by the OECD (2009) as "the use of funds, resources, assets and authority, according to the intended official purposes, to be used in line with public interest". Amundsen (2009) adds that it involves "having a sense of honesty and truthfulness in regard to the motivations for one's actions", and that corruption is the antonym of integrity.

2.2. Ethical standards and integrity. The question then arises what could be done to prevent corrupt activities. It can be assumed that ethical standards and integrity are not in line with the standards required by the *Constitution*, Chapter 10, which stipulates that a "high standard of professional ethics must be promoted and maintained" (RSA, 1996). This particular value and principle provide a firm foundation to execute public duty in a professional and ethical manner. Ethics goes beyond the prevention of fraud, corruption and misconduct. Ferreira (2008) distinguishes between ethics and ethical behavior. Ethics concerns itself with what is good or right in human interaction and revolves around three central concepts: "self", "good" and "other". Ethical behavior results when one does not merely consider what is good for oneself, but also considers what is good for others. Modern societies expect public servants to serve the public interest, and to serve in a rational and efficient way (Amundsen, 2009). Ethical conduct should aim to promote an ethical culture in discharging public duty. Williams and Quinot (2007) believe that resistance to corruption as a concept is steeped in morality and ethics, and is a sensitive subject to address because of elements of moral misappropriation, shame and wrongdoing. Bureaucratic corruption that involves government officials is a moral dilemma that is not necessarily based on need, but also on greed. Dye (2007, p. 304) argues that corruption does not make economic distinctions as it infects all forms of government and believes that countries cannot "sustain the social, political, or, economic costs that corruption entails".

2.3. Fundamental principles. Fox (2010) states that there are fundamental principles that direct human effectiveness, principles such as fairness, integrity, honesty, human dignity, service, quality, excellence, potential and growth. Ferreira (2008) reflects that integrity is never a given, but is always a quest that must be renewed and reshaped over time and it requires considerable individual self-awareness and self-command. Fairness as a fundamental principle relates to getting what a person deserves: due process and just allocation (Pauw and Wolvaardt, 2009). Granville and Dine (2013) suggest that there is an emotional dimension to fairness and that it is pointless to get caught up in platitudes-such as "from each according to his ability, to each according to his needs". Fairness in public sector procurement is an obligation of the public sector where administrative reasonableness can be tested against procedural fairness. Administrators and bureaucrats cannot avoid making decisions, and their discretionary powers require them to consider the ethical dimension of their decision-making (Amundsen, 2009). In this case the judgment in *Laingville Fisheries (Pty) Ltd v The Minister of Environmental Affairs and Tourism* (C) states:

Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factor relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

External demands on public procurement are great and varied. These demands include transparency, integrity, accountability and exemplary behavior, where government is expected to set an example of ethical standards, efficiency and effectiveness in its operations, as expected by the broader society (Telgen, Harland and Knight, 2007). With limited financial resources, ethical dilemmas often arise in deciding about who the beneficiaries of public goods, works or services are to be. The OECD (2007) states that although transparency and accountability have been recognized as key conditions for promoting integrity and preventing corruption, they must be balanced with administrative efficiency.

2.4. Attainment of ethical conduct. William and Quinot (2007) identify accounting and audit requirements as administrative processes or measures that can address corruption. Dye (2007) argues that audit staff tends to demand strict compliance with procedures, while missing the objective of compliance. In South Africa, the heads of public institutions are given the power to restrict suppliers from doing business with the public sector if such suppliers obtain preference fraudulently (RSA: National

Treasury, 2003). Functionaries can play an active role in the attainment of ethical standards in public sector procurement. They should promote and maintain the highest standards of probity and integrity in all their dealings. For this reason, special attention should be given to the screening of prospective employees in the appointment process and the creation of codes of conduct (UNODC, 2013) and the enforcement of the *Code of Conduct for the Public Service* as introduced in 1997. Screening assists in identifying possible conflict of interest, and whether an applicant has the essential skills to perform the required function effectively and has the insight to detect corrupt activities.

2.5. Mechanisms to ensure good governance with reference to procurement. The *Constitution of the Republic of South Africa* (RSA,1996) is the supreme law in creating good governance in the public service. State institutions supporting a constitutional democracy are identified in section 181(1) of the *Constitution*. In the public sector procurement environment, the Public Protector and Auditor-general play an important role. The Public Protector is appointed by the President, but is subject only to the *Constitution*, thereby allowing the Public Protector to function without fear, favor or prejudice. The number of complaints received by the office of the Public Protector (33 533 in 2012/13 http://www.npa.gov.za/ReadContent470.aspx – Accessed on February 16, 2015) is an indication of society's trust in the Office as an institution to strengthen constitutional democracy in South Africa (Van der Walt, 2014). Whereas the Public Protector investigates complaints from the public, the Auditor-General is responsible for producing annual reports on the accounts and financial statements of all organs of state in the national, provincial or local spheres of government and other public entities. These audits include the assessment of procurement processes, contract management and verification of the controls in place to ensure fair, equitable, transparent, competitive, and cost-effective Supply Chain Management systems.

2.6. Whistleblowing. As a source of the detection and elimination of corrupt relationships whistleblowing fulfills an important role too. It is a mechanism whereby a person, either internal or external to an organization, draws attention to wrongdoing within an organization. Such reporting is mostly facilitated by hotlines. Whistleblowing is also defined as not being about informing in the negative, anonymous sense, but rather about raising a concern about malpractice within an organization. Whistleblowing is not necessarily applicable only in public institutions, but also in the private sector, reporting information of corrupt relationships between public and private sector employees. To be effective, the informants must be protected against intimidation, harassment, dismissal or, in some instances, violence. In South Africa, protection takes place through the *Protected Disclosure Act, 6 of 2000* (RSA, 2000d).

2.7. Code of conduct. In South Africa, the *Code of conduct for supply chain management practitioners* reflects the required conduct expected from functionaries in respect of conflict of interest, accountability, openness and confidentiality. Not only does this Code provide the responsibilities of Bid evaluation and Bid adjudication teams, but it also places an obligation on institutions to ensure the clearance of members on the level of "confidential" (RSA: National Treasury, 2003). Verification of an official's financial standing, interest and past practices assist accounting officers in selecting committee members who are above reproach. Legislation allows for precautionary suspension of employees that serves as a safety measure used by affected departments to allow for unhindered investigation pending the institution of disciplinary procedures. In terms of South Africa's *Disciplinary Code and Procedures* (Resolution 1 of 2003), public institutions have 60 days within which a hearing should be held. According to the Department of Public Service and Administration for the period 2009/2010, the combined amount remuneration paid to employees placed on precautionary suspension was more than R45 million (South Africa. Public Service Commission, 2013).

2.8. Banks as a loophole in the prevention of corruption. In a paper entitled "Closing banks for the corrupt", De Simone and Fagan (2014) identify banks as a loophole that prevent the detection of corruption. Ill-gotten gains easily find their way back into society via banks that legitimize income. Grand corruption can be stopped when the corrupt does not have a safe haven for money gained through corrupt activities. Politically-Exposed Persons (PEPs) are defined as including "high ranking officials from government, heads of state, senior politicians, the military and state owned companies" (Ahlers, 2013). Banks can identify PEPs, scrutinize their funds, closely monitor their transactions and report suspected irregularities (De Simone and Fagan, 2014). The monitoring of PEPs is a daunting task if money is paid into the accounts of relatives, friends, the family trusts of the corrupt, or when actual money does not change hands but movable or non-movable assets are obtained for both the corrupt and those who can benefit from their position. Professional registered companies such as financial brokers, tax consultants, registered auditors should be compelled to work towards their clients' best financial interests, but also to recognize that those hurt most by corruption are also the most vulnerable, the people who depend, ironically, on PEPs for a better life. Ahlers's (2013) research suggests that PEPs are not adequately moni-

tored in South Africa, and the risk that the presence of corrupt political exposed persons poses for society is not addressed adequately.

3. Summary and concluding remarks

This paper offers an understanding of the issues in the public sector procurement process and of underlying factors relating to procurement and ethical considerations. Corruption remains a strong challenge to good governance as it has economic, political and social consequences for a nation. Corruption has an impact on the stability and limited resources. Despite efforts such as training and legislative frameworks, corruption and its cost to society continue to increase.

Based on the analysis of the various documents, the following conclusions may be articulated as an output of this study:

- As is the case with most modern governments, a variety of mediums are available for participation by society in detecting and preventing corruption. Society should be informed on various levels, starting at school level, on the benefits of participation, but government should also earn trust by actively investigating and prosecuting transgressors.
- Corruption remains a strong challenge to good governance as it has economic, political and social consequences for a nation. Corruption has an impact on stability, and limited resources are often spent on commissions investigating corruption. Despite efforts such as training and strategic partnerships, corruption and its cost to society continue to increase. Is corruption increasing because more officials are being appointed to serve the public, or is corruption a symptom of the malaise of South African society?
- The exposure of corruption sometimes has unintended consequences, resulting in a "catch 22" situation. If a government reveals corruption, the revelation itself can be politically destabilizing, and has negative consequences at the polls and on investment confidence. In a corrupt relationship there are always two parties, the corrupt and the corruptor, who share a mutually beneficial relationship (usually a financial benefit). Society as the intended receiver of goods and services is the victim of this relationship, when tax payers' money is used to fund corrupt relationships, and then to prevent and detect corruption. A partnership between government and society would be the most cost-effective and sustainable tool to eradicate corruption.
- Performance results need to improve across government, hence there is a need for a variety of training forms to address performance issues at the individual level and at an institutional level. In response to the South African government's commitment to improving performance results, 199 281 officials were trained from 2009 to 2014 on various matters relating to the public sector. Despite this achievement, the training has not yet yielded the anticipated positive results in preventing public procurement corruption and thus ethical conduct, as is evident from the latest Corruption Index (RSA: School of Government, 2014).
- Education and training should be used to sensitize and create a sense of ethical conduct in the work place. Political appointees need to be vetted by committees of the legislature, and the Declaration of Assets should be applicable to all levels of managers and not only to senior officials. There should also be a rotation system where committee members are announced during the different stages of tendering that is scoping, evaluation and awarding as it might assist in closing opportunities for unethical conduct in the process.

Finally, the successful application and practice of ethical conduct in a public organization requires strong leadership, as ethics should not be managed merely as a compliance exercise. It requires the will and ability of public leaders and managers to set a vision which is based on generally accepted values. Ethical conduct in public sector procurement could be subjected to detailed scientific investigation in order to gain a clear understanding of the value of ethical conduct in combating corrupt activities.

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