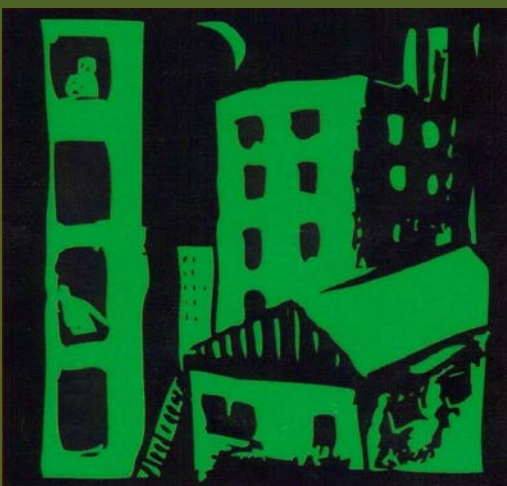


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The Use of E-procurement in South African Public Procurement Law: Challenges and Prospects

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1 INTRODUCTION

In order for government to function, it needs goods and services. It may acquire these goods and services by using its own resources, or by contracting with outside bodies. The latter method is generally referred to as public or government procurement.¹ Government procurement usually contributes a large deal to a country's economy and is therefore of great importance. In 2002, government procurement was estimated to amount to 21.77 per cent of the gross domestic product (GDP).² Section 217 of the Constitution sets the standard for government procurement in South Africa. Section 217(1) provides that organs of State in the national, provincial or local spheres of government or any other institutions identified in national legislation when contracting for goods or services must

¹ Bolton P *The law of government procurement in South Africa* (Durban: LexisNexis 2007) 1.

² Audet D "Government Procurement: a synthesis report" (2002) 2 *OECD Journal on Budgeting* 1 at 180.

do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Organs of State in terms of section 217(2) are not prevented from implementing procurement policies which provide for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, (previously) disadvantaged by unfair discrimination. Section 217(3) in turn provides that national legislation must prescribe a framework in terms of which section 217(2) must be implemented.

Electronic procurement, better known as e-procurement, has been employed in various countries for a number of years. It has been implemented in different ways, each with its distinct advantages.³ Generally, competitive bidding is the primary procedure used for the acquisition of goods and services by government due to its competitive nature which is believed to yield the best value for money. It would appear that the electronic version of competitive bidding is the electronic reverse auction procedure. The United Nations Commission for International Trade Law's (UNCITRAL) Model Law on Public Procurement of Goods, Construction and Services (UNCITRAL Model Law) makes reference to e-procurement in the form of electronic reverse auctions. The UNCITRAL Model Law defines electronic reverse auctions in Article 2 as "an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successfully lowered bids during a scheduled period of time and the automatic evaluation of bids". It therefore entails active involvement of bidders during the bidding and award process.

E-procurement has not been widely used in Africa in general. The World Bank has reported that the three main reasons for the slow adoption of e-procurement in Africa have been: firstly, that African governments have been slow in putting in place the necessary capacity required; secondly the lack of information technology infrastructure as well as lack of mass internet access; and lastly, antiquated administrative cultures which exist in African governments.⁴

This article will look at what e-procurement is, whether the current legislative framework in South Africa provides for it, its advantages and challenges, and current developments. Reference will be made to e-procurement as regulated by international instruments, specifically the UNCITRAL Model Law, as there is currently no African model with which to compare or measure South Africa's possible experience.

³ Soudry O "Promoting economy: electronic reverse auctions under the EC Directives on Public Procurement" (2004) 4(3) *Journal of Public Procurement* 340 at 345-348.

⁴ Thomas A, Abdoulaye K, Frannie L & Sithabile M "Trends in public procurement in Africa: opportunities and challenges of capacity building interventions" (2007).
<http://siteresources.worldbank.org/INFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/eGP-in-Africa.pdf> (accessed 2 April 2016).

2 LEGISLATIVE FRAMEWORK FOR PUBLIC PROCUREMENT IN SOUTH AFRICA

The legislation applicable to procurement in general includes the Preferential Procurement Policy Framework Act (PPPFA)⁵ and its Regulations⁶ which regulate preferential procurement by providing a framework in terms of which preferential procurement policies must be implemented. At national and provincial government levels, the Public Finance Management Act (PFMA)⁷ and its Regulations⁸ do not regulate public procurement directly, but rather public finance in general and therefore public sector procurement. At local government level, the Local Government: Municipal Finance Management Act (MFMA)⁹ with its Regulations¹⁰ and the Local Government: Municipal Systems Act,¹¹ manage public finance and thus public sector procurement. Since public procurement is of an administrative law nature, the Promotion of Administrative Justice Act (PAJA)¹² is applicable as well as the Promotion of Access to Information Act (PAIA)¹³ which regulates access to information held by both private and public bodies. Furthermore, for the purpose of preferential procurement in government contracts, the Broad-Based Black Economic Empowerment Act (BBBEEA)¹⁴ finds application, as well as the Prevention and Combating of Corrupt Activities Act¹⁵ in curbing corruption in public procurement. Lastly and especially in the case of electronic government services, the Electronic Communications and Transactions Act (ECTA)¹⁶ applies.

3 E-PROCUREMENT MODELS

South African legislation permits various forms of procurement. It regulates the use of oral quotations, written quotations and single-source procurement. These methods are fairly simple as they require a request for a proposal from three possible suppliers, after which the best offer is chosen. In an electronic form this means of procurement can simply be transferred into an electronic format, thereby reducing the carbon footprint of both government and private suppliers. However, when it comes to a competitive bidding process, a conversion to e-procurement is more complex and challenging. A

⁵ Act 5 of 2000.

⁶ GG 34350 of 08-06-2011.

⁷ Act 1 of 1999.

⁸ PFMA Public-Private Partnership Treasury Regulation 16 GN R1737 in GG 25773 of 28-11-2003; PFMA Supply Chain Management Treasury Regulation 16A GN R225 in GG 27388 of 15-03-2005.

⁹ Act 56 of 2003.

¹⁰ MFMA Municipal Supply Chain Management Regulations GN R868 in GG 27636 of 30-05-2005.

¹¹ Act 32 of 2000.

¹² Act 3 of 2000.

¹³ Act 2 of 2000.

¹⁴ Act 53 of 2003.

¹⁵ Act 12 of 2004.

¹⁶ Act 25 of 2002.

traditional means of bidding, called the English Auction,¹⁷ takes place when bidders congregate at a determined location and call out their bids so that each bidder is aware of the offer made by others. A bidder may bid several times as reserve prices are continuously increased until only one bidder remains and no other bidders increase their bids. The remaining bidder is then declared the winner who may claim the item at the price he last bid. Electronic reverse auctions operate in the same manner, except that the value of the bids are revealed electronically and the prices of bids decrease instead of increase. A mathematical formula is used to examine bids and award points for various aspects of the bids.

The UNCITRAL Model Law requires that the procuring entity electronically publish an invitation to tender. The invitation must reflect a detailed description of the subject matter of the procurement, the terms and conditions of the contract, and the criteria and procedure for examination of the bids including the mathematical formula to be used. The invitation must further inform bidders whether any component other than price, such as, quality or preference, will be evaluated.

4 ADVANTAGES AND DISADVANTAGES OF E-PROCUREMENT

4.1 Advantages

It has been noted that implementing e-procurement is potentially beneficial in ensuring a lower price for the goods procured and a more efficient public procurement process which results in reduced costs and time periods.¹⁸ It can further promote transparency in the requirement that bidders are actively involved in a “real-time” procurement process. They are therefore continuously informed of their competitors’ bids and what their prospects of success are. The latter may even contribute to reducing corruption within the process which at present (4 April 2016) is a great concern in South Africa. The use of e-procurement may also reduce administration costs and¹⁹ procurement staff, and improve communication through speedier access to information.²⁰ This means that tender documents and information will always be available and can be updated regularly and speedily. Government will further be able to identify who its regular suppliers are and inform the public thereof. This promotes transparency and value for money in contracting with reliable suppliers. However, competition must still be maintained in utilising the services and products of various suppliers. The main benefit

¹⁷ Other types of auctions noted by Soudry (2004) at 345 are the first-price sealed-bid auction, second-price sealed-bid auction and the Dutch auction. However, the English auction discussed in this article is according to Soudry the traditional means of bidding. It is also the electronic version of the normal competitive bidding in South Africa and is therefore the focus of this article.

¹⁸ De la Harpe S “The use of electronic reverse auctions in public procurement in South Africa” (2012) 26(1) *Speculum Juris* 21 at 25-26.

¹⁹ See Jooste MV “A framework for the implementation of e-procurement” (2003) 14(2) *SA Journal of Industrial Engineering* 1 at 5 for an explanation on how procurement costs may be curbed by making use of e-procurement.

²⁰ Eadie R, Perera S, Heaney G & Carlisle J “Drivers and barriers to public sector e-procurement within Northern Ireland’s construction industry” (2007) 12 *ITcon* 103 at 109.

of introducing e-procurement recorded by the World Bank²¹ has been improvement in transparency and competition which are elements found in section 217 of the Constitution.

In order to maximise the benefits of e-procurement, it has been noted that in-depth training of all stakeholders will need to take place.²² Furthermore, suppliers will have to adopt an “electronic attitude” toward procurement in the sense that all enquiries, participation and complaints will have to be done electronically. All information relating to current tender processes will have to be transitioned or converted into an electronic format in order to maintain an electronic procurement system. More importantly, top management support will be of vital importance in establishing and maintaining an e-procurement system by not only ensuring that the necessary infrastructure is provided but also by providing the necessary support to staff undergoing the transition.

4.2 Disadvantages

With e-procurement being a relatively new form of procuring goods and services, it has a number of barriers. Due to the fact that bids are evaluated based on mathematical formulae, e-procurement may be possible only when procuring contracts of a relatively small value and where it is possible to evaluate aspects of bids by means of mathematical formulae. There is the inherent danger that secondary aspects, such as, quality and socio-economic considerations, may be given insufficient attention.²³ Products may therefore be procured at a lower quality for the sake of a better price. It is submitted that this may pose a number of challenges in a country such as South Africa. The use of a predetermined mathematical formula may be problematic: first due to political considerations as regards who (in terms of which State department and a person’s qualifications) will be responsible for creating the formula; and secondly, whether the same formula can be applied to all government contracts in all spheres of government. South Africa consists of nine provinces, each with its own specific capacities and needs. It is also well-known that South Africa still suffers from the consequences of discriminatory policies during the Apartheid era, and for which provision has been made in section 217(2) of the Constitution which states that categories of preference may be provided for in the allocation of government contracts. Based on this, the need to focus on preferential procurement and the development of small, medium and micro-enterprises (SMMEs) may be more important in some parts of

²¹ World Bank e-procurement reference guide

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/0,,contentMDK:23154434~pagePK:210058~piPK:210062~theSitePK:282823,00.html> (accessed 2 April 2016). More specifically, benefits from the use of e-procurement in the selection of consultants or rather professional services in South Africa, are increased transparency in the procurement process, a simplified selection process by providing online guidance throughout the process, “automated” compliance with procurement guidelines, and improved quality of institutional memory. See Leipold K, Klemow J, Holloway F, & Vaidya K “The World Bank e-procurement for the selection of consultants: challenges and lessons learned” (2004) 4(3) *Journal of Public Procurement* 319 at 327.

²² See Leipold, Klemow, Holloway & Vaidya (2004) at 330.

²³ De la Harpe S *Procurement law: a comparative analysis* (Unpublished PhD thesis, University of South Africa, 2009).

the country than in others. Therefore, this begs the question whether it will be possible to apply the same mathematical formula to all types of procurement in all spheres of government.

A further possible threat in an e-procurement process is that it may in fact increase collusion where there are only a small number of contractors who can provide the desired product or service. The possibility of an IT failure during the procurement process is a further reality which may lead to legal disputes regarding liability for a failed process or a tender incorrectly awarded. It has also been noted that technical expertise, knowledge and access to information technology may be limited in some companies, especially in the case of SMMEs. Furthermore, the lack of legal certainty underpinning e-procurement may be a further barrier to the successful implementation of e-procurement.²⁴ As noted by Jooste,²⁵ troublesome business relationships further influence the speed at which e-procurement has been adapted in South Africa by management failing to provide adequate infrastructure and support to staff and e-procurement staff, in turn, lacking a willingness to transition to an electronic environment.

5 E-PROCUREMENT IN SOUTH AFRICA

The legislation which regulates public procurement in South Africa does not make specific reference to e-procurement. However, the ECTA states in its long title that it is intended to provide for electronic transactions, to provide electronic access to electronic communications and transactions by SMMEs, to provide for human resource development in electronic transactions, and, most importantly, to encourage the use of e-government services in sections 27 and 28 of the Act. It is a goal of the Act to promote the use of e-government services and electronic transactions between private and public bodies. Moreover, the ECTA attributes a wide definition to “e-government services” in section 1 as “any public service provided by electronic means by any public body in the Republic”. The process of e-procurement can therefore fall squarely within this definition so as to enjoy the regulation and protection of the ECTA.

The public procurement process generally entails the advertisement of a tender, receipt of expressions of interest or tender offers, evaluation of tenders, award of the tender, and management of the contract. The ECTA in section 5(3)(e) provides that the Minister of Communications may in developing a national e-strategy, “conduct research into and keep abreast of developments relevant to electronic communications and transactions in the Republic and internationally”. This section therefore empowers the Minister to research the possibility of implementing e-procurement in South Africa as a starting point. Section 6(a) of the ECTA further provides that the e-strategy must indicate programmes to provide internet access to disadvantaged communities. Together with this and in line with the disadvantage highlighted above, section 9 of the ECTA places an obligation on the Minister to investigate the programmes and

²⁴ Eadie, Perera, Heaney & Carlisle (2007) at 110.

²⁵ Jooste (2003) 11 – 12.

infrastructure which allow SMMEs access to internet connectivity in order to utilise electronic transactions. Pursuant to this, the Minister may establish electronic and communication centres for SMMEs,²⁶ facilitate the development of website portals to enable SMMEs to transact electronically and provide the necessary assistance in managing their electronic transactions. The Act therefore enjoins the Minister to provide access to e-procurement for SMMEs.

The ECTA provides in section 24(a) that an “expression of intent or other statement”, which it is submitted, may constitute an expression of interest or tender offer, has legal force and effect if sent in a data message.²⁷ Important to note is that section 20 of the ECTA provides for automated transactions and the management thereof. Obvious as it may seem, it is important that the Act does in fact allow for transactions to take place electronically and states that “an agreement may be formed where an electronic agent performs an action required by law for agreement formation”.²⁸ The Act therefore appears to permit the electronic conclusion of contracts, and therefore electronic tenders. Similarly, section 22(2) provides that “[a]n agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror”, thereby providing for the time at which the tender becomes valid and binding, which may be important in the event of the tender being contested in a court of law. From this it is apparent that the ECTA contains provisions which allow for the entire public procurement process to take place electronically – from the stage of advertisement of a tender, to the receipt of an expression of interest or tender offer, to the evaluation and award of a tender. It would therefore appear that there is in fact room for the legal regulation of e-procurement in South African legislation. However, although this may be the case, in order to avoid legal uncertainty and therefore possible loopholes for dispute, as well as to provide a more nuanced piece of legislation which provides for the specific needs of an e-procurement system, it is imperative that specific legislation be enacted for the regulation of e-procurement in South Africa.

As previously indicated, section 217 of the Constitution requires that government when contracting for goods and services should do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Fairness in this context refers to equal access to the process and procedurally fair evaluation of bids. By advertising contracts electronically on a website available or accessible to all potential bidders, the e-procurement process will ensure equal access to contract opportunities. The evaluation of bids by means of a mathematical formula excludes human interference, thereby ensuring that bidders are evaluated procedurally fairly and contributing to reducing corruption.

²⁶ Section 9(a).

²⁷ “Data message” is defined in section 1 of the Act as “data generated, sent, received or stored by electronic means and includes- a) voice, where the voice is used in an automated transaction, and b) a stored record”.

²⁸ Section 20(b).

Equality in the South African public procurement context refers to substantive equality. This means that contractors are evaluated against the backdrop of section 9 of the Constitution. In order to give effect to this section and the equality element in section 217 of the Constitution, contractors' socio-economic circumstances are considered when evaluating their bids. Contractors may therefore be treated differently in view of South Africa's past discriminatory practices.²⁹ In order to give full effect to this principle, a formula will need to be devised in terms of which it will be possible to evaluate tenders for equity purposes, especially when e-procurement is eventually used in the case of large-value tenders.

Throughout the tender process, bidders will be aware of the competing bids and the contents thereof. However, the identity of bidders should not be revealed in order to maintain the integrity of the process and prevent collusion. All information necessary to participate in the process, the evaluation criteria and information regarding the outcome of the process and the reasons therefore must be made available to all bidders. The principle of transparency will therefore be complied with. The UNCITRAL Model Law provides in Article 54(1)(j) that a minimum number of bidders should be indicated in the invitation to tender so as to ensure effective competition. This provision therefore ensures that the competition principle will be complied with as mandated by section 217 of the Constitution.

E-procurement will go a long way to reducing administrative costs, and significantly decrease the quantity of paper involved in a procurement process. It is designed to be faster than a paper-based tender process, thereby aiming to achieve best value for money. E-procurement will therefore promote cost-effectiveness in compliance with section 217 of the Constitution.

6 CURRENT DEVELOPMENTS

In an attempt to curb the scourge of corruption in public procurement, National Treasury has established an e-tender publication portal and central supplier database on which all tenders in all spheres of government will be published.³⁰ All tender documents and information pertaining to the advertised tenders will be made available on the central portal. The entire initiative and the administration of the portal will be managed by the Office of the Chief Procurement Officer. The intention is to reduce legislative fragmentation, improve transparency and accountability with regard to the award of government tenders, and in the process curb corruption and reduce costs.

The benefits of the e-tender portal have been noted as: a central point of entry to view, search and identify government tender opportunities; the improvement of competition in the tender process by making it easier to identify and access tender information and documents; and an increase in transparency with regard to tender awards published on the portal. It is considered to be a first step to digitise interaction between South African business and government and possibly foreign contract

²⁹ Bolton (2007) at 49 -51.

³⁰ See www.etenders.gov.za.

opportunities; is meant to reduce and eventually eliminate duplication of costs and administrative logistics; it will provide a free service to State departments, businesses and the public in accessing tender information and opportunities.³¹

6 CONCLUSION

Regulating e-procurement by means of legislation will go a long way in not only ensuring legal certainty, but also ensuring that transparency and competition are promoted. E-procurement will further ensure that a cost-effective process is followed and that best value for money is therefore achieved. It is important that the legislation enacted to regulate e-procurement gives effect to section 217 of the Constitution. On a cursory analysis, the UNCITRAL Model Law regulations on e-procurement comply with an e-procurement system which is fair, transparent, competitive and cost-effective. South Africa will thus benefit from a system similar to that in the UNCITRAL Model Law. The implementation by National Treasury of an e-tender portal is to be commended and is a positive step towards digitising and eventually internationalising South Africa's commercial capabilities. The element of equity, being unique to South Africa, can be given effect to by providing greater access to SMMEs as mandated by the ECTA. The relevant training in information technology, institutional support within corporate bodies, and innovative methods to convert equity aspects in bids to mathematical formulae will ensure that the element is complied with. It is submitted that the use of e-procurement holds many benefits for the South African economy. It will assist in increasing South Africa's contribution to environmental considerations and sustainable development. Furthermore, an inevitable decrease in human intervention in the e-procurement process will curb corruption and ensure that bidders are treated fairly. Although barriers to successful implementation of e-procurement exist, South Africa can benefit from the advantages offered by an e-procurement system. However, until a viable solution is provided for the challenge posed by a non-discriminatory mathematical formula, e-procurement should be utilised only for smaller-value government contracts.

³¹ See

http://www.gov.za/sites/www.gov.za/files/speech_docs/Annexure1%20eTender%20%282%29.pdf (accessed 2 April 2016).