



**Report No. 25751-SA**

**SOUTH AFRICA**

**COUNTRY PROCUREMENT ASSESSMENT REPORT**

*Refining the Public Procurement System*

**Volume I**

**SUMMARY OF FINDINGS AND RECOMMENDATIONS**

**February 2003**

Africa Region  
*Operational Quality and Knowledge Services*  
The World Bank

**DATA SHEET**  
**Currency Unit = Rand (R)**

US\$ 1.00 = R9.00

(The exchange rate of R9.00 to the US dollar has been used for the purpose of analysis. The exchange rate on 10 October was R9.2850 = 1 US\$).

**Financial year**

National and Provincial Government: 1 April to 31 March  
Local Government: 1 July to 30 June

**Definition of an Organ of State**

Any department of state or administration in the national, provincial or local sphere of government, or any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution, or (ii) exercising a public power or performing a public function in terms of any legislation

**ACRONYMS AND ABBREVIATIONS**

APU	Accredited Procurement Unit
BEECom	Black Economic Empowerment Commission
CEO	Chief executive officer
CIDB	Construction Industry Development Board
CPAR	Country Procurement Assessment Review
CSP	Common Service Provider
DFID	Department of International Development
DTI	Department of Trade and Industry
EGP	Electronic Government Procurement
EU	European Union
GSSC	Gauteng Shared Service Center
GPA	Government Procurement Agreement
HDI	Historically Disadvantaged Individual
IDF	Institutional Development Fund
IPP	Industrial Participation Program
PDI	Previously Disadvantaged Individual
MFMB	Municipal Finance Management Bill
NQF	National Qualifications Framework
NSTB	National State Tender Board
PPP	Public-Private Partnership
PFMA	Public Finance Management Act
PPPFA	Preferential Procurement Policy Framework Act
RDP	Reconstruction and Development Program
SABS	South African Bureau of Standards
SACBP	South African Capacity Building Program
SARS	South African Revenue Service
SETA	Sector Education and Training Authority
SGB	Standards Generating Body
SITA	State Information Technology Agency
SMME	Small, Medium and Micro Enterprises
SOEs	State Owned Enterprises
UNCITRAL	United Nations Commission for the International Trade Law
UNISA	University of South Africa
USAID	United States Agency for International Development
VAT	Value Added Tax
WTO	World Trade Organization

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## **PREFACE**

This Country Procurement Assessment Review (CPAR) is a joint undertaking between the South African Government and the World Bank to study and analyze the existing public procurement system in South Africa and to recommend suitable actions to improve the economy, efficiency, predictability and transparency of the procurement process. It is intended to provide Government with the tools to make any necessary changes to improve the public procurement system and institutional framework.. It was carried out during September - December 2001 by a task team comprising officials from the National Treasury and the Departments of Trade and Industry, Public Enterprises and Public Works, the office of the Auditor General, the South African Revenue Services and the Gauteng Provincial Government, and World Bank officials and their local and international consultants. <sup>1</sup>

The CPAR team interviewed public officials and representatives of private sector organizations, major donors, business associations, training institutes and NGOs. It visited four provinces for interviews with provincial officials. The meetings focused on the legal framework, rules and procedures, prevalent procurement practices, issues and possible solutions for improving the public procurement system.

This report is divided into three volumes. Volume 1 presents a summary of the major findings and conclusions and related recommendations. Volume 2 discusses each of the major issues in more depth and is meant for those readers who would want additional details on these issues. Volume 3 contains the main documents referred to in the report.

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<sup>1</sup> The team of the World Bank was led by VS Krishnakumar, Lead Procurement Specialist. Other team members were Robert R. Hunja (Senior Procurement Specialist, World Bank), C Thomsen (international consultant), Strategic Procurement Systems (local consultant) represented by RB Watermeyer, DR Letchmiah, Alain Jacquet and T Munian. The government team was led by Coen Kruger, Deputy Director General (Specialist Functions) , National Treasury. Other team members were Jan Breytenbach (National Treasury); J Soobramanian (National Treasury); G Lourens (Office of the Auditor General); G Westcott (South African Revenue Services); A Brown (Department of Trade and Industries); M Buthelezi (Department of Trade and Industries); N Seperepere (Department of Public Enterprises); I Thumbiran (Department of Public Works); and A Moonsamy (Gauteng Provincial Government) Special thanks to John Schwartz (Consultant, World Bank) for his very useful suggestions and contributions.

## EXECUTIVE SUMMARY

### BACKGROUND

- 1. Importance of Public Procurement for South Africa.** South Africa has a large economy. Its GDP reached US\$ 125.9 billion in 2000. In this growing economic activity, total public procurement was estimated at US\$14 billion annually (1997 figures, about 13 percent of GDP at that time), with an additional US\$ 5 billion by State Owned Enterprises. The new Government, established after the 1994 elections, realized the importance of efficient public procurement for the national economy and embarked on a major review of the system in place. For this purpose, it created a Task Force in 1995, headed by the State Tender Board under the Ministry of Finance and the Department of Public Works, with technical and financial support from a World Bank IDF Grant of US\$ 487,000.
- 2. Redesign of the Public Procurement System.** In 1996, the Task Force produced a “10 Point Interim Strategy” for immediate action, including principles and policies for equitable and transparent public procurement and simplification of procedures. In its considerations, the Task Force recognized that South Africa faced the unique and formidable task of merging a dual economy consisting of the existing “main stream economy” led by a minority of 13 percent of a 40 million population, and an “emerging economy” of small and medium enterprises owned by hitherto disadvantaged groups. To provide a national environment for optimal economic development, the Government planned to mold the two economies into a sustainable unified growth pattern. The Task Force decided that public procurement should be part of this fundamental strategy by encouraging participation of disadvantaged groups in public contracts. The 1996 Constitution embraced the principles of the new strategy.
- 3. Publication of the “Green Paper”.** Subsequently, in 1997, the Task Force produced the “Green Paper on Public Sector Procurement Reform in South Africa”. This major policy paper was a draft for public discussion comprising comprehensive and practical proposals for (a) reform of the public procurement regime; (b) harmonization and simplification of procurement procedures and practices, and (c) increased participation of targeted groups in public contracts. To carry out the reform, the Green Paper recommended that (i) a “National Procurement Framework” be drafted, elaborating the Constitutional principles and prescribing the policies, procedures and control measures proposed in the Paper; and (ii) a “National Procurement Compliance Office” be created to oversee and control the Framework’s implementation. The National Procurement Compliance Office would replace the State Tender Board and the Provincial Tender Boards, which would relinquish their functions to the “Organs of State” (national, provincial and local departments or offices responsible for public procurement).
- 4. Implementation of the Recommendations.** For a variety of reasons, the recommendations of the Green Paper were not formulated into a final “White Paper” which would have formally prescribed Government procurement policy. As a consequence, the recommendations of the Green Paper were not formalized and implemented in a comprehensive and coherent manner. Consequently, several Acts containing procurement related matters were promulgated such as the Public Finance Management Act (PFMA, 1999), the Preferential Procurement Policy Framework Act (PPPFA, 2000), while the Municipal Finance Management Bill (MFMB) is currently before

parliament. Similarly, several acts regulating anti-corruption measures were issued. However, the State and Provincial Tender Boards continued to function but without the overarching national policy management and oversight framework that had been sought by the reform.

## FINDINGS OF THE CPAR

5. **Taking Stock.** A diverse team of professionals of the Government of South Africa and the World Bank carried out an assessment of where public sector procurement reform stood in 2001. It found that a number of achievements were reached. In the area of the *institutional and regulatory framework*, the Government took the decision in principle to repeal the Tender Boards, and the new Finance Acts encompass the essential principles of sound procurement. With respect to *procurement practices and procedures*, Tender Board conditions, procedures and directives to departments are well documented, and fraudulent practices are not tolerated and dealt with appropriately. Some revisions were made in procurement documents and guidelines in accordance with Green Paper recommendations. A *preferential procurement system* was established to permit emerging small and medium enterprises to compete favorably with established companies. Although exact data on the preference system's net-results are not yet available, there is evidence that in construction contracts, the "premium" for the State was less than one percent of contract value, which would suggest an acceptable cost in the pursuit of merging the dual economies. A new procurement practice, the Industrial Participation Program, was introduced, obliging successful foreign bidders of large goods and equipment contracts to invest in South African industries up to about 30 percent of the imported content.
6. **An Unfinished Agenda.** However, the team also found that a number of important recommendations of the Green Paper had not yet been implemented. While new Acts were passed, this happened without reforming the legal and institutional framework, leading to policy fragmentation and confusion on implementation, thus creating conflicts between new and old laws. Several weaknesses in procurement practices and documentation continue to persist, hampering procurement efficiency. The proficiency of procurement staff needs substantial capacity building. Clearly, the South African economy would benefit from an urgent completion of the unfinished agenda. Further refinement and simplification of the public procurement system would undoubtedly bring in substantial public savings.
7. **The Facts.** The team found that significant improvements could be made in the following areas:
  - **Procurement Practices, and procedures:**
    - Procurement planning is insufficient and not linked to the budgeting and appropriation process.
    - There are no uniform procedures for tender publication.
    - Except in bids for construction, prices are not read out at bid opening.
    - In some tender committees, private sector members outnumber government officials, which may give rise to conflict of interest.
    - Consultants are not selected and appointed in a systematic competitive manner.

- There is no systematic data collection on contract awards and completion. Payments to suppliers and consultants are often delayed.
  - The Auditor General found considerable flaws at the national and provincial level in the application of procurement procedures and delays in contract awards.
  - In the Housing Subsidy Scheme, which in FY01 was supported by a US\$330 million equivalent budget allocation, contracts are awarded on the basis of development proposals without being subject to competitive bidding.
- **Procurement documentation:**
- The NSTB documents on procedures and conditions of contract (“ST 36”) and its user manual (“ST 37”) are not considered user-friendly, but complex, sometimes ambiguous and causing unacceptable risks to contractors. There is a need for standard bidding and contract documents, simplified documents for small and medium enterprises, and user-friendly manuals of procurement procedures.
- **The Industrial Participation Program (IPP):**
- The IP obligation is restrictive and compulsive for a period of seven years. Although participation is not part of the bid-evaluation, non acceptance of the obligation invalidates the bid. The IP obligation comes with a cost which is normally included in the prices of goods and equipment offered by the bidders, as no service or obligation comes ‘free’. In other words, the government must be indirectly paying for such investment obligations. In addition, there is an immense monitoring cost being borne by the government.
  - The obligation imposes a restriction at the time of participation. And this restriction stifles competition, as it excludes participation by many genuine and qualified international suppliers with very competitive prices but who may not be willing to undertake IP obligations. This system can lead to monopoly of those suppliers who have committed themselves to such investments at the possible exclusion of others.
- **Procurement Proficiency of Government Staff:**
- Procurement officials have no formal training in procurement. Current training, which is mostly on the job, is inadequate. A skills and capacity needs assessment is needed followed by the preparation and implementation of comprehensive training program that needs to be sustained over time and accompanied by a system of accreditation and continued in-house instruction.
- **Preferential Procurement Mechanism**
- Preferential procurement policies are not well formulated in Organs of State due to lack of national targets. Qualification standards are insufficient or not adequately verified. Also, the cost and outcome of the preferential system are not adequately assessed to evaluate the merits of the system. The NSTB and provincial Tender Boards do not adequately evaluate who qualifies as a “disadvantaged enterprise”. Bidders are seldom required to provide detailed information to verify their claims. The system does not cater for capacity building of ‘disadvantaged enterprises’. There are no significant quantitative data on the cost and outcome of the preferential system.

## MAIN RECOMMENDATIONS FOR THE WAY FORWARD

**8. Eight Recommendations for the Near Term.** The incomplete implementation of the Green Paper has led to the flaws in the current public procurement system. The CPAR makes the following main recommendations to rectify this situation.

- i. **Follow up the Green Paper** with the preparation and adoption of a national procurement policy framework further defining and perfecting the Green Paper's recommendations for implementation.

**Current Development**

*A national uniform procurement policy is currently being put in place, which will be applicable to all organs of state. The Public Finance Management Act (PFMA) was enacted during 1999 and became applicable to all government departments since 1 April 2000.*

- ii. **Draft a National Legislative/Regulatory Framework** for public procurement to establish uniformity in tender procedures, policies and control measures. It would incorporate and complement the procurement legislation already in place in the PFMA and the draft MFMB, and also make adjustments in the PPPFA.

**Current Development**

*This process is already in motion. A framework for supply chain management has been drafted and will be promulgated in terms of section 76(4) (c) of the PFMA and section 106 (1) b of the MFMB (when it is finally promulgated). This will address the aspects of monitoring and compliance.*

- iii. **Create a National procurement Compliance Office** in the National Treasury, which would be responsible only for procurement policy formulation, laws and procedures, provision of standard bidding documents and contracts, oversight on implementation by all Organs of State, establishment of a procurement data capturing system and training of procurement staff. This would help eliminate the weaknesses revealed in procurement practices and procedures.

**Current Development**

*The National Treasury has already established a Supply Chain Management Office (SCMO).*

*This office has three chief directorates.*

- **Chief directorate: Supply Chain Policy** - responsible for supply chain policy development.
- **Chief directorate: Norms and standards** is responsible for the monitoring and surveillance of compliance.

- **Chief Directorate: Contract Management** - Facilitates the arrangement of certain transversally used term contracts. The intention is, however, not to centralize the procurement function.

*Where term contracts are arranged, heads of user departments are represented on the bid evaluation committees to take the procurement decisions jointly. The decision to procure under these transversal contracts thus arranged is also fully devolved to Accounting Officers. Where there is a general lack of capacity to deal with large contracts, the SCMO will also provide support to departments. The emphasis is placed on the monitoring of the outcome of contracts, including achievements of Government's procurement policy objectives.*

*The Supply Chain Management Office interacts with the Auditor Generals' Office on all Audit and compliance related issues.*

- iv. **Implement the decision to abolish the Tender Boards** and have their functions assumed by the responsible Organs of State at the national, provincial and local levels. It is known that there is some preference in the National Treasury for the creation of a Common Service Provider, which in addition to the above functions of the Compliance Office would also be responsible for central procurement. However, the functions of procurement policy and oversight should not be mixed with procurement implementation. National Departments can provide in the need for central procurement and procurement for those Organs of State that have no capacity to procure.

**Current Development**

*The process has already commenced. Refer to iii above.*

- v. **Under the National Public Housing Scheme, establish a competitive procedure** for the award of development contracts to obtain savings in the expenditure of fiscal revenues.

**Current Development**

*The Department of Housing has implemented competitive bidding procedures effective 1 April 2002. The implementation is based on the Department's Task Team's approved document entitled 'A new Procurement Regime in Respect of Projects classified as "Greenfields" Development'.*

- vi. **Abolish the Industrial Participation Program**, which conflicts with the basic principles of efficient, fair and transparent procurement. The same objectives of foreign investment can be reached by other measures (temporary tax advantages, industrial promotion activities) pursued in other industrial economies. The savings achieved from open competition without imposing restrictions could be channeled for domestic investment opportunities.

**Current Development**

*The intention has always been to phase-out the program once the objectives have been addressed. It is also important that the program should be reviewed periodically in order to assess its effectiveness and to make changes where necessary. The current thinking is to focus on IP Projects that seek to develop targeted industries and least developed geographic areas.*

*In this regard*

- *DTI is considering increasing the threshold for Industrial Participation Obligations from \$10m to \$15m, which will have an effect of reducing the overall application of this obligation on Government imports.*
- *DTI is mainly targeting specific sectors such as defence, shipbuilding, transport and aerospace industries*
- *DTI is considering phasing out the IPP obligation in the Information and Communication Technology sector. However, companies would have to fulfil their existing obligations*

- vii. **Revise the Preferential Procurement regulations** to provide for “graduation” of previously disadvantaged enterprises when they have reached a certain turn over rate to avoid that only an elite group continues to benefit from the system. **Make the system more economical and monitorable**, so that results can be measured to test its merits. **Establish national targets for preferential procurement policies** to enable Organs of State to respond better to the need for national empowerment objectives. **Require Accounting Offices to report quarterly on achieving these targets.**

**Current Development**

*In order to establish a monitorable system the National Treasury is currently exploring the possibilities of accessing technical assistance through the facilitation by the World Bank.*

- viii **Establish procedures for competitive selection and appointment of Consultants** using standard request for proposals and contract documents, with guidelines for criteria for evaluation.

**Current Development**

*As part of the framework as specified in ii two above, National Treasury is currently in the process of implementing a competitive system for appointing consultants.*

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# 1. INTRODUCTION

## Objective and Scope of the CPAR

1.1 The objective of this CPAR is to provide the analytical basis for dialogue on public procurement reform started by the South African Government with the assistance of the World Bank IDF<sup>2</sup> grant and to propose practical recommendations for short and longer-term actions. The implementation of critical measures to streamline the existing procurement systems and practices, including enhanced training and capacity building in the area of procurement and contract management, could bring in substantial savings to the government. Realizing greater value for money, with corresponding cost savings, is core to poverty alleviation since the monetary benefits can be directed towards the fulfillment of socio-economic goals.

## South-Africa's Procurement Reform Process

1.2 **Start of the Reform Process.** South Africa's first multi-racial elections were held in 1994. Immediately, as of 1995, the new Government initiated an internal review process to arrive at a consensus on needed public procurement reform and entrusted the Ministries of Finance and Public Works with its implementation. Government officials, business associations, emerging entrepreneurs and trade unions met in a Forum to make recommendations on desirable reforms. Subsequently, the new Constitution, adopted in 1996, laid the basis for transparent, equitable and efficient procurement. To remedy inequities under previous regimes, it also included provisions for allowing preferential treatment of emerging small and medium enterprises whose access to Government contracts had been difficult during the apartheid era. This was part of the objectives of the simultaneously agreed Reconstruction and Development Program.

1.3 **World Bank IDF Grant.** In early 1995, the Ministry of Public Works and the World Bank agreed on a IDF grant of US\$ 487,000 to assist the Government with the procurement reform, formulate a revised procurement policy and legislation, and prepare standard tender documents and operating guidelines and manuals. By mid-1996, a Task Team led by the head of the National State Tender Board (NSTB) and the Deputy Director of the Department of Public works (DPW) presented two main papers for Government consideration: (a) a ten-point interim strategy designed to immediately implement reform actions within the existing legislation and (b) a draft "Green Paper"<sup>3</sup> outlining proposed changes in the procurement legislation and institutional framework., which were subsequently approved by the Cabinet.

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<sup>2</sup> Institutional Development Fund

<sup>3</sup> A broad definition of a "Green Paper" is. A statement by the Government of propositions put before the whole nation for discussion.

With the completion of the Green Paper, the main objective of the IDF grant was achieved and the Grant was closed in 1997.

1.4 The Interim Strategies included (i) the simplification of procurement procedures, which the NSTB disseminated to Provincial Tender Boards and the private sector, and (ii) a system to allow preferences to encourage bid awards to targeted groups. DPW successfully launched such a system for contracts at or below Rand 2 million (US\$450,000 equivalent at that time). Provincial Tender Boards applied similar rules.

1.5 The Green Paper, which after discussion at the national and provincial level, was published by the Ministry of finance in 1997, elaborated preliminary policy and principle statements, based upon the procurement principles stated in the 1996 Constitution. These principles prescribe that (i) public procurement must be through a system that is fair, competitive, transparent and cost effective; (ii) preferential procurement policies should be applied in the award of contracts to small and medium enterprises; (iii) procurement, including procedures for socio-economic support, should adhere to sound financial management, as the Green Paper states: “good value for money cannot and will not be negated”; (iv) corruption will not be tolerated and (v) bidders must be in good standing with their fiscal obligations.

1.6 The objective of the Green Paper was to translate the principles of the Constitution into “the best possible procurement policy”. The Green Paper was meant to be a draft policy paper, which would ultimately be finalized in a final “White Paper”<sup>4</sup> to permit the adoption and implementation of a complete procurement reform by the State. However, for a variety of institutional reasons, the White Paper has not yet been produced (only the DPW, which was then the main engine of the procurement reforms, prepared a White Paper on Reconstruction Growth and Development in the Construction Industry). This has led to the current situation of some confusion in the application and interpretation of the initial reforms and laws that were promulgated.

1.7 The Green Paper proposes the following fundamental reforms:

- Creation of a national body for policy, oversight, developing regulations and standard documents, and providing training. The NSTB and provincial tender boards would be phased out. Ministerial and provincial departments would be responsible for procurement of items of general government use. State Owned Enterprises (SOEs) would be required to follow national procurement procedures and not be allowed to compete with the private sector unfairly.
- Formalization of preferential procurement procedures elaborated in the Interim Strategy to encourage small and medium enterprises hitherto excluded from participation in public procurement.

1.8 These proposals and the steps that government has taken in furtherance of the procurement reform agenda will be further discussed in the next chapters of the CPAR.

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<sup>4</sup> The term “White Paper” is commonly applied to official documents presented by the Cabinet stating and explaining the government’s policy on certain issues

## Importance of Public Procurement in the National Economy

1.9 The Green Paper starts out with the premise that an annual expenditure of US\$ 14billion<sup>5</sup> equivalent in public procurement by Organs of State (in 1997 about 13% of GDP), requires strict fiduciary control for good governance. With a population of about 42.8 million in 2000 and a GDP of US\$125.9 billion, South-Africa is indeed an important economy. Services and industry constitute the main components of GDP (65.9 and 30.9 percent, respectively. ) Gross domestic investment stands at 15 percent of GDP. Total imports in 2000 amounted to about US\$ 31 billion, of which about US\$ 15 billion in capital goods.

1.10 The top 9 Import Commodities in 2000<sup>6</sup>, representing about 30% of the total imports, were:

Description	Value – Equiv. US\$
Petroleum Oils, Crude	\$ 3.5 billion
Original Equipment Components	\$ 2.0 billion
Transmission apparatus, etc.	\$ 0.8 billion
Vehicles	\$ 0.5 billion
Aluminum oxide	\$ 0.45 billion
Other apparatus for line systems (Electrical)	\$ 0.4 billion
Medicaments, other	\$ 0.4 billion
Gold, other unwrought forms	\$ 0.35 billion
Parts and accessories for Data Processing Machines	\$ 0.35 billion
Original Equipment, Transport Vehicles	\$ 0.15 billion

1.11 Of the total consolidated government procurement estimated at US\$14 billion equivalent, Central Government procurement accounts for US\$ 5.5 billion (39%), Provincial Government for US\$6.4 billion (46%) and Local Authorities for US\$ 0,9 billion (15%). Goods and services accounts for approximately US\$ 11 billion (79%) and capital assets an estimated US\$ 3 billion (21%). In addition to the procurement by Organs of State, procurement by state owned enterprises (SOEs) is currently estimated to be between US\$ 4.4 and US\$ 6.7 billion per annum. A modest improvement of a few percentage points in public procurement by the Government and SOEs could help save hundreds of millions of dollars to South Africa's public exchequer.

1.12 **Bank operations in South Africa** have thus far been limited. Apart from the above mentioned IDF, the Bank supervises one project (IBRD LN for Industrial Competitiveness and Job Creation, approved in FY97, with a net commitment of US\$24.5 million)<sup>7</sup>, GEF Grants of US\$12.4 million for Cape Peninsula and US\$8.0 million for Maloti-Drakensburg

<sup>5</sup> Based on the estimates of the Green Paper in 1997 (R 56 billion @ R3,5=1US\$). Current data not available. With the growth in the GDP, the government procurement might have increased by about 10% since 1997.

<sup>6</sup> Source: SARS. The importation of 95% of the products indicated here (100% for crude oil and other petroleum products) is undertaken by private importers (including privately owned oil companies).

<sup>7</sup> Please also refer to Recommendations under Chapter 4

Nature Conservation Project, and several IDF Grants in a variety of activities (Capacity building for the Dept. of Welfare – closed -, Capacity building for Education, Establishment of the Institute of Public Finance & Auditing – completed - African Connection Telecom, and Strengthening Statistical Capacity). These limited operations have followed the Bank procurement guidelines mostly with prior procurement reviews by the Bank.

**1.13 Other Donor Initiatives in South Africa.** DFID provides technical assistance. The European Commission is the only donor with major funding: the European Program for Reconstruction and Development in South Africa, with grants amounting to EU 140 million per annum for about 60-70 projects, and annual disbursements of EU 120 million. Public Private Partnership Unit (within the National Treasury) is partly funded by USAID. South Africa regulations allow grants to be executed in accordance with donor procurement regulations.

## 2. PUBLIC PROCUREMENT REGIME

### Legal, Regulatory and Institutional Framework for Public Procurement Policy

2.1 The Green Paper on Public Sector Procurement Reform adopted by the Cabinet in 1997, called for the drafting of a “*National Procurement Framework*” to establish uniformity in procurement procedures, policies and control measures, as well as policies with respect to the advancement and protection of disadvantaged persons consistent with the constitutional provisions of good governance. It argued for the abolishment of the State and Provincial Tender Boards and their reconstitution as Procurement Offices in the Ministerial and Provincial Departments, and the establishment of a National Procurement Compliance Office responsible for policy, oversight, standard documentation and procedures, and handling of complaints.

2.2 Normally, the Green Paper would have been followed by a Government White Paper which would have established the recommendations of the Green Paper as uniform national procurement policy. However, the postponement in formulating the recommendations of the Green Paper into a White Paper<sup>8</sup> has led to the fragmentation of public procurement policy and management. It has resulted in the emergence of independent procurement cultures and different interpretations of the broad procurement principles of the Constitution and the policy recommendations of the Green Paper. There is little or no policy co-ordination and integration of efforts among the different spheres of government or between government and state owned enterprises (SOEs).

2.3 **Procurement Policy Fragmentation.** The fragmentation in procurement policy and management is the result of the continuation of the existing institutional procurement organizational arrangements and the issuance of several new laws, which ideally should have been part of a well coordinated and comprehensive reform. Traditionally, a central tender board governed procurement at the national and provincial level, while “Ordinances” regulated procurement by local authorities. The 1994 Interim Constitution led to the establishment of Provincial Tender Boards. But the 1996 Constitution requires Organs of State (all Government Departments or other organs at the national, provincial and local levels), or any other institution identified in national legislation, to procure. This is part of the Government’s policy to devolve more managerial responsibility to the Organs of State (at the national and provincial levels). Experience has also proven that, in the absence of an overarching national procurement policy framework, coordination and uniformity in the application of procurement policies is difficult, if not impossible with between ten autonomous Tender Boards (NSTB and nine provincial Tender Boards).

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<sup>8</sup> The main reason for not transforming the Green Paper into a White Paper is: there was a difference of opinion as to who should lead the initiative – Ministry of Finance or Dept of Public Works. There was no champion to lead the initiative

2.4 The main legislative instrument aimed at regulating procurement is the Public Finance Management Act (PFMA - Act 1 of 1999) which establishes a National Treasury (instead of the previous Ministry of Finance) and with respect to procurement states that the National Treasury must ensure transparency and expenditure control. Accountability for procurement is placed on accounting officers (heads of departments) in National and Provincial Departments, and in SOEs on accounting authorities (chief executive officers or controlling boards.) The PFMA also charges the National Treasury with responsibility to issue regulations and instructions applicable to all institutions which would determine a framework for an “appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective”. (The Municipal Finance Management Bill (MFMB) is currently before parliament to place accountability for procurement on municipal managers.) Meanwhile, following up on the recommendations of the Green Paper, the Cabinet has taken the decision to repeal all tender board acts to remove the conflict between old and new legislation, but this decision has not yet been implemented. The procurement aspects of the new laws contain the fundamentals of transparency, equitable treatment, efficiency and value for money, and state that procurement in all spheres of government should take place in accordance with international best practice, but otherwise do not regulate procurement in greater detail<sup>9</sup>.

2.5 **Conflict between the Tender Boards and New Laws.** The current national and provincial Tender Boards Acts<sup>10</sup> conflict with the newly promulgated procurement laws, in particular the PFMA. As a result, the responsibilities of the accounting officers (heads of departments) are split between the responsibilities reserved for the Tender Boards under the existing Tender Board Acts and the new laws, and they can, therefore, not be held accountable for managing procurement risks or service delivery. Although the PMFA provides for establishing regulations for an appropriate procurement and provisioning system, no regulations have yet been issued to establish norms and standards. One of the provinces, which has repealed its Tender Board Act, has replaced it with an act that holds on to the historic approach to procurement, using different terminology and without addressing the fundamental conflict between the old and new laws. Some of the other provinces are contemplating a similar arrangement to effectively retain tender boards.

2.6 **Creation of a National Procurement Compliance Office.** The Green Paper recommends the creation of a National Procurement Compliance Office to establish the needed national order in procurement legislation and management. The Office would have a policy and oversight function and would not be involved in procurement implementation, which would be delegated to the procurement offices of the Organs of State at the national, provincial and local levels, under the directives of the centrally issued and monitored procurement legislation, procedures and guidelines.

2.7 **Alternative of a Common Service Provider.** The National Treasury has indicated a preference for the establishment of a Common Service Provider (CSP), which would in addition to policy making and oversight also provide for central tendering needs and the needs

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<sup>9</sup> The Construction Industry Development Board Act (Act No 38 of 2000) also has procurement related provisions. The Board is *inter alia* mandated to “promote the standardization of the procurement process with regard to the construction industry” and to establish a national register of contractors.

<sup>10</sup> In particular the State Tender Board Act, No. 86 of 1968

of Organs of State who do not want to procure or have insufficient capacity to do so. The case for “central tendering” for common user items is also made in the Green Paper, as this has in the past proved to be cost effective and resulted in savings for the Government. On the other hand, there is no reason why the national Organs of State cannot implement central tendering separately in their areas of responsibility and competence, so that the role of the national procurement oversight function would not be compromised by also being involved in procurement implementation. Furthermore, placing responsibility for procurement of certain items within a CSP would seem to dilute the primary accountability (including for procurement) that the PFMA places on the accounting officers and heads of departments.

### **Recommendations to Complete the Reforms Launched by the Green Paper**

2.8 The current weaknesses in the public procurement policy framework mainly results from an interruption in the momentum of the procurement reforms started with the adoption by the Government of the Interim Strategies and the Green Paper. To continue this momentum, the following recommendations are made intended to streamline and to strengthen the legal and regulatory framework:

- (a) **Issue a National Procurement Policy Framework to govern issues that would have been dealt with in a White Paper on Procurement:** Such a national policy framework would build on the recommendations of the Green Paper and unify fragmented procurement legislation issued since then. It would formulate and consolidate procurement policy in all spheres of government and for state owned enterprises. It would improve the predictability in procurement transactions and remove the uncertainty that has prevailed because of lack of follow-up since the release of the Green Paper.
- (b) **Draft a National Regulatory Procurement Framework:** A national regulatory framework as foreseen in the PFMA should be created to establish uniformity in tender procedures, policies (including preferential policies with respect to contract awards to disadvantaged persons – see Chapter 4) and control measures in all Organs of State (meaning all administrations at the national, provincial and local levels). The resulting framework would include mechanisms for implementing new and reformed policies by Accounting Officers responsible for Procurement Offices and Centers. Any piece of national procurement legislation and all provincial acts dealing with procurement should be reviewed in the light of the requirements of the PFMA and the MFMB (when this Bill will be enacted), and if found to be in conflict, they should be repealed.
- (c) **Establish a National Procurement Compliance Office in the National Treasury.** This Office should not have any purchasing and contracting function and it should not be a layer in the procurement process of the executing agencies. Its responsibilities should include: formulating the public procurement law, policies, the public procurement rules and procedures, and standard bidding and contract documents for mandatory application by all

levels of government in South Africa, and keeping them up-to-date with the international practices:

- (i) formulating the public procurement law, policies, the public procurement rules and procedures, and standard bidding and contract documents for mandatory application by all levels of government in South Africa, and keeping them up-to-date with the international practices;
- (ii) maintaining a data base on procurement complaints, a list of known and proven arbitrators, and data on the resolution of complaints, and disseminating information;
- (iii) overseeing compliance with the public procurement rules and procedures to ensure that public entities and bidders observe the laws and regulations in place, and observe the highest standards of ethics during the procurement and execution of contracts and are held accountable;
- (iv) ensuring, as part of its role to monitor compliance, that there are arrangements in place for independent ex-post audits of the procurement process for a random sample of contracts at all levels of government, and lessons learned to further improve the public procurement system are disseminated;
- (v) coordinating efforts to raise awareness, at all levels, of the need for efficient and clean procurement; and
- (vi) preparing an annual report on public procurement for wider dissemination (to Parliament and local legislatures, the Auditor General and public).

### **3. PROCUREMENT PRACTICES, PROCEDURES AND CAPACITY**

#### **Principles**

3.1 **Good Procurement contributes to Good Governance.** The Green Paper highlights good procurement as an essential component of the Constitution’s objectives of good governance. In this regard it emphasizes the need for (i) effective and efficient procurement practices and systems, of world class level, accompanied by standardized procedures and documentation to enhance competitiveness; (ii) continuing improvement in “value for money” based on whole life cost and quality; and (iii) carrying out comprehensive audits to maintain accountability. It underlines the importance of “change management” and training of procurement officers in the Organs of State to meet the required high standards of professional ethics, competence, and accountability. The tendering process must be managed efficiently, while preserving genuine competition and avoiding discrimination. The Government has embraced these principles in the evolving years since publication of the Green Paper, but – as it has stated with the Green Paper – these positive actions need to be further refined.

#### **Procurement Practices and Procedures**

3.2 The current procurement arrangements generally follow the provisions of the law as stated in the various tender board Acts.. There have been a few successful legal actions against tender boards. Investigations by the auditor general into procurements by tender boards, have found examples of poor procurement practices, mal-administration and deviations from procedures. A significant number of complaints and allegations received by the public protector relate to a lack of understanding of the procurement procedures and unresponsiveness of officials.

3.3 The effectiveness of procurement arrangements varies from department to department. For example, not all national departments are capable of spending their annual capital budgets, while the capacity of provincial and local government to spend money on infrastructure is generally low due to outdated institutional arrangements and poor planning, design and project management practices.

#### **Strengths**

3.4 Some of the strengths of the current system are:

- (a) Tender Board conditions, procedures and directives to departments are well documented;

- (b) Tender Boards place restrictions ranging from a few years to an indefinite period on names of principals / firms for the award of contracts who have in the past not acted in accordance with conditions, obtained preferences in a fraudulent manner or have acted unethically.

## Weaknesses

3.5 The weaknesses<sup>11</sup> identified in the current procurement and contract management systems are:

- (a) **Insufficient procurement planning.** Procurement planning linked to the budgeting process is not applied as a matter of principle, which leads to the need for recurring contracts, or the extension of existing ones, or the need for emergency procurements with the usual cost increases;
- (b) **Insufficient procurement data.** There is no system to capture comprehensive data on procurements and this inhibits publication of critical statistics on national procurement, including some of the basic information on number of contracts executed by the same supplier, reasons for the termination of contracts, and time and cost overruns;
- (c) **No uniform procedures for tender publications.** Tenders at national and provincial levels are advertised in the weekly State Tender Bulletin which is obtainable from the offices of the State Tender Board or the government website. It is also posted to subscribers at a nominal fee. Some provinces do not advertise in the State Tender Bulletin and only advertise in major newspapers. Local authorities usually place advertisements in major newspapers;
- (d) **Delays in payments to suppliers<sup>12</sup>.** Contractors for supplies and works are often not paid within 30 days of submitting an invoice, which has increased the Government's cost of business. On the other hand, this practice has disadvantaged consultants, who are reluctant to charge interest on overdue accounts because of fear for not obtaining new assignments. Generally, payment at the national level is somewhat more acceptable, at the provincial level it is mixed and at the local level it is poor;
- (e) **Conflict of interest and political influence through some of the tender committees.** Currently, private sector members in 8 of the 9 provincial tender boards constitute a majority. This practice, in addition to such members not being accountable to the government, gives rise to a situation of conflict of interest in awarding of contracts. The practice of councilors (politicians)

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<sup>11</sup> Most of the findings are based on reviews done at the State and four Provincial Tender Boards and information obtained from the audit reports from the Office of the Auditor General

<sup>12</sup> The South African Association of Consulting Engineers, who represent approximately 400 engineering firms, indicate that as of June 2001, approximately 6% of their members potential fee income, or 26% of all outstanding fees, was outstanding for longer than 90 days from all levels of government.

participating in the decision making process of contract awards, at the local government level, gives rise to undue influence in the awarding of contracts;

- (f) **Poor practice of tender opening.** Except in the case of building and construction contracts, prices quoted by the bidders are not read out during public opening of tenders/bids. This is being practiced at the Central, Provincial and Local government levels;
- (g) **Poor estimates of requirements** in centrally managed supplies contracts;<sup>13</sup>
- (h) **Various uncompetitive systems for the selection and appointment of consultants.**
  - Consultants providing services in the building and construction sectors are appointed from panels (a database of pre-qualified consultants) on a pre-set tariff basis. Appointments are made in the sequence in which they were registered on the database or at the discretion of officials.
  - Some contracts are awarded on the basis of comparison of price only, without any weightage for the quality of the proposals.
  - At the local government level, consultants are often appointed at the discretion of “councilors” (politicians)<sup>14</sup>. Mostly, they are appointed on the basis of a fee system advocated by the Association of Consulting Engineers from a prequalified database of consultants. Normally, contracts are awarded on a rotational basis to the pre-selected consultants who generally belong to the same constituency or municipality.
- (i) **Implementation Weaknesses.** The Audit<sup>15</sup> of procurement in the national and provincial spheres of government found examples of the following poor practices by organs of state:
  - Failing to benchmark prices against other contract prices in order to establish value for money and realise savings to the state;
  - Changing of specifications after the award of tenders;
  - Poor planning in works contracts and excessive cost overruns;

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<sup>13</sup> Also refer to Para 2.7 in the context of Common Service Provider, which should not be considered for implementation.

<sup>14</sup> Based on a recent benchmark survey conducted by the Dept. of Public Works in conjunction with the construction industry

<sup>15</sup> Most of the observations are based on the recent preliminary findings of an investigation conducted by the Auditor General.

- Irregular practices (including conflicts of interest) by some provincial tender boards, resulting in financial gain and other irregularities by tender board members;
  - Failure by certain provincial tender boards to timeously call for tenders in respect of recurring commodities prior to the expiry of existing contracts resulting in the extension of existing contracts to overcome interruptions in supply;
  - Excessive delays in the awarding of contracts resulting in escalation of costs;
  - Lack of verification of quality, quantity and costs due to the non-availability of procurement documents (poor record keeping);
  - Subdividing of contracts in order to reduce the value of individual contracts to remain within delegated financial limits;
  - Entering into lease agreements for properties which have not been utilised; and
  - The capacity of provincial and local government to spend the allocated funds on infrastructure is generally low due to outdated institutional arrangements, poor planning, design and project management practices.
- (j) **Procurement using the National Public Housing Fund.** A significant amount<sup>16</sup> of public monies is spent on the provision of housing to the poor through the project linked housing subsidy scheme. The granting of rights in this scheme to the private sector to provide housing is, however, currently not treated as falling within the ambit of procurement. Contracts are awarded based on development proposals and not on open tendering system.

### **Procurement Documentation**

3.6 **Current Documents.** The State Tender Board's general conditions and procedures (called "ST 36") and its user manual ("directives to departments in respect of procurement – ST37") contain the procurement policies, regulations and delegations at the national and provincial level. Some Organs of State use the standard forms of contract in respect of engineering and construction works that are prepared by the industry, with or without extensive modifications.

### **3.7 Deficiencies in the current documentation.**

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<sup>16</sup> In FY01, a budget allocation of US\$ 330 million equivalent representing about 25% of the capital budgets for national departments.

- (a) Conditions of tenders and contracts, specifications and payment terms are often mixed, making them complex and ambiguous and posing unacceptable risks to contractors<sup>17</sup>.
- (b) There are no standardized bidding documents (complete with guidance notes) available. Each Department uses its preferred conditions of contract, as long as it is acceptable to the relevant Tender Board, drafts its own specifications, and formats their documents as they wish. This situation has led to a largely fragmented proliferation of documentation

### **Industrial Participation Program (IPP) Obligations in Government Procurement**

3.8 The Department of Trade and Industries (DTI) has devised an Industrial Participation Program which uses public procurement as a vehicle to mandate that suppliers of large contracts participate in the industrial development of South Africa. *This system is not included in the Green Paper and was developed after its publication.* The system applies only to public procurement and not to the private sector, whose import contracts are at least twice as large as those of the public sector.

3.9 In essence, the system requires that all suppliers awarded with government and parastatal contracts (goods and equipment) with an imported content equal or greater than US\$10 million equivalent should participate in the South African economy with up to 30 percent of the value of the imported content of the contract. This participation can take the form of investments, joint ventures or subcontracting and must remain in place for seven years. It also applies to multiple contracts on the same supplier aggregating to US\$ 10 million, over a two-year period. Although participation is not part of the bid-evaluation, it is a precondition for contract award, and not accepting the condition of IP obligation invalidates the bid. Currently IP obligations total US\$ 12,8 billion (major obligations arising from defence and aviation contracts).

### **Key Issues arising from the IP Program**

3.10 The IP obligation obviously comes with a cost which is normally included in the prices of goods and equipment offered by the bidders, as no service or obligation comes 'free'. In other words, the government must be indirectly paying for such investment obligations. In addition to the cost included by the bidders in their bids, there is an immense monitoring cost being borne by the government.

3.11 The obligation imposes a restriction at the time of participation. And this restriction stifles competition, as it excludes participation by many genuine and qualified international suppliers with very competitive prices but who may not be willing to undertake IP obligations. This system has a tendency to cause distortions in free trade and leads to uneconomic decisions by public entities just to obtain contracts. In addition, it can lead to

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<sup>17</sup> The Interministerial Task Team for Construction Industry Development found the ST36 document not to be 'user friendly' and considered that some of the conditions of contract unreasonable, particularly those relating to the settlement of disputes.

monopoly of those suppliers who have committed themselves to such investments at the possible exclusion of others.

3.12 Currently, there is no clear mechanism for the measurement of value for money. It is simply assumed that the ‘competition’ takes care of this aspect, but it ignores the restriction imposed on competition and its consequent negative implications.

### **Public-Private Partnership**

3.13 The existing procurement legislation and regulations are geared to conventional procurement activities where the government department is procuring assets and services (as inputs) that allow it to deliver services to the public. In a PPP, the department is procuring an arrangement under which someone else provides services on its behalf. The department’s focus shifts from managing the inputs to managing the outcomes. The simplest form of a PPP is a service contract, and the complex ones are concessions and build-operate-transfer (BOT) schemes. Currently, the PPP Treasury Regulations apply to 33 national government and 85 provincial government departments.

3.14 As national and provincial departments lack the required skills and expertise in this area, the PPP Unit<sup>18</sup> within the National Treasury provides technical assistance to the departments throughout the PPP cycle, including (i) training and capacity building of departments to structure, implement and monitor PPPs, (ii) advising departments on the procurement of PPP consultants, advisers, service providers and concessionaires, and (iii) advising and training on post-award contract monitoring.

### **3.15 PPP’s Progress and Achievements since July 2000.**

- Detailed PPP Guideline Manual issued in January 2001. The manual contains: (i) Treasury Regulations, (ii) Project Life-Cycle, (iii) Transaction Advisors Guidelines, (iv) Feasibility Study Guidelines, (v) Request for Proposals Guidelines, (vi) Tender Procedures, etc.
- Six PPP Foundation courses (2 days each) have trained about 400 government officials. PPP Quarterly Newsletters which highlights status of various projects, training programs etc. are circulated to various government departments, public entities, donors and various others.
- Three contracts awarded by December 2001: (i) Nkosi Albert Luthuli Hospital (15 year concession), (ii) Northern Cape Fleet (5 year contract), and (iii) Northern Province Reserve Eco-Tourism Projects (30 year concessions).
- 39 PPP projects are in pipeline at various stages.

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<sup>18</sup> The PPP Unit was established in July 2000, and a detailed procedures manual was issued in January 2001

### 3.16 **Best Practices being implemented.**

- Support to SMME participation in PPPs. SMMEs seldom have resources to hire bid advisers, or to participate successfully in the bid process. PPP unit to collaborate with DTI to secure an appropriate grant facility. Plan to design appropriate incentives, and long term business support systems.
- Standardization of PPP contract provisions. In order to reduce transaction costs, firm up on SA government standards, and build market confidence, PPP Unit is in the process of selecting a suitable legal firm to draft the standardization document .

### **Recommendations to Improve Procurement Practices and Procedures**

3.17 The following actions, which to a large extent have been elaborated in the Green Paper, are recommended for short-term action.

- (a) **Mandate the submission of procurement plans linked to budget proposals.** Inclusion of spending proposals in the budget by the National Treasury should be subject to the submission of such procurement plans. Procurement plans should be revised on a regular basis and expenditure should be monitored accordingly.
- (b) **Implement a uniform tender publication policy, improve tender opening procedures and record keeping.**
- (c) **Exclude private sector members and politicians from tender and evaluation committees.**<sup>19</sup> Evaluation and selection committee members should be obliged to declare any conflict of interest and exclude themselves from bid evaluation and approval process.
- (d) **Promote the use of intelligent electronic data bases and encourage competitive selection process.** The practice of using intelligent data bases to award relatively low value tariff based appointments to pre-qualified service providers and to prepare a short list of pre-qualified firms/consultants for non-tariff based contracts should be encouraged and promoted. On the other hand, clearer guidelines for the hiring of more complex, high-value services should be developed.
- (e) **Make the Housing Subsidy Scheme compliant with the Constitution and the PFMA.** The current Housing Subsidy Scheme should be restructured so that tenders can be called for the right to develop land made available for subsidized housing.
- (f) **Establish a common framework for the regulation of Public-Private Partnerships.** The current framework for PPPs applicable to national and provincial Organs of State should be extended to all Organs of State. Such a

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<sup>19</sup> Except as observers to ensure transparency

framework should also include measurable goals and analytical tools to ensure that value for money is continuously being achieved in PPP contracts. Training and dissemination of knowledge on PPP project management skills should be extended to all Organs of State.

- (g) **Standardize and rationalize procurement documentation:** Prepare standard bidding packages (including instructions to bidders, general and special conditions of contract etc.), guidelines and checklists for each generic procurement category and sub-category of contracts for use by all Organs of State. Simplify documents used by SMMEs.
- (h) **Registration of suppliers and service providers.** Foreign suppliers of imported goods should not be made to register in SA (except for certain types of goods such as pharmaceuticals, etc.), and contractors and consultants should not be required to register as a pre-requisite for tendering.<sup>20</sup>
- (i) **Report on procurement activities.** Procurement activity sector codes should be developed and utilized to advertise tender opportunities and to report on procurement outcomes. In accordance with the provisions of the PFMA and the MFMB, Organs of State should prepare management information to their respective Treasuries using standard reports on expenditure in particular procurement activities and also in accordance with preset performance indicators. The National Procurement Compliance Office should co-ordinate and make these data available so that comparisons between Organs of State can be readily made, thereby facilitating the universal adoption of successes as well as corrections of poor results.
- (j) **Abolish IPP Obligations in government procurement.** Procurement should not be used as a vehicle to force bidders in public contracts to participate in domestic industrial investment. There are other monitorable economic measures that can attract foreign investment much more efficiently (such as temporary tax advantages, facilitating location, industrial promotion activities) as has been proven in several European countries. The savings achieved from open competition without imposing obligations/restrictions could be channeled for domestic investment opportunities.
- (k) **Establish procedures for competitive selection and appointment of Consultants** using standard request for proposals and contract documents, with guidelines for criteria for evaluation. This could be done in collaboration with the PPP Unit.

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<sup>20</sup> Whereas the Construction Industry development Board Act mandates the establishment of national register of contractors, it only states that unregistered contractors “may not undertake, carry out or complete any constructions works...for public sector contracts”. The inference is that registration will not be a condition for bidding but will be a condition for contract award. The register called for in this Act (and the rules applicable to it) are still under preparation

### **Professional Capacity for Public Procurement**

3.18 It is estimated that there are about 15,000 persons involved in public procurement. There are currently no formal qualifications for procurement officials. The absence of accredited training programmes and lack of professional institutions further exacerbates the problem. Most procurement officials have acquired their procurement skills on-the-job or through in-house training courses. As a result, many of the senior procurement officials have at best only public administration experience or derive their procurement experience from construction projects. The procurement profession within the public sector is also not held in high esteem and its profile compares poorly with other public service positions in South Africa.

3.19 Current Training Initiatives are totally inadequate. Training of the staff of tender boards is conducted on an ad hoc basis. The focus of such training is on the process and rarely extends to contract management, procurement strategies etc. The SA Management Development Institute only offers a course on provisioning administration.

### **Recommendations**

3.20 The following recommendations are made for improving procurement capacity.

- (a) Undertake a skills and capacity needs assessment of procurement professionals.
- (b) Develop standards and qualifications for procurement officials in accordance with the requirements of the National Qualifications Framework established by the South African Qualifications Act.
- (c) Develop and promote accredited training programs, courses and training materials, leading to certification as procurement accredited staff in various capacities and levels and with varying authority.
- (d) Provide systematic and continuous on-the-job training for all procurement officials alongside the specialized training of procurement experts.
- (e) Publish a series of guidance notes that address topics such as those associated with the procurement processes, performance specifications, procurement documents, targeted procurement procedures and integrity management.

### **Anticorruption Measures and Practices**

3.21 The Constitution provides for rights such as just administration and access to information, and requires high standards of ethics within the public administration. Acts passed in recent years relating to transparency and anticorruption measures make corruption a criminal offence, and protect employees against making disclosures against their employers in both the public and private sectors. The recent pieces of legislation that are aimed at or have an impact on curbing corruption are:

- (a) Public Protector Act (Act 23 of 1994)
- (b) Corruption Act (Act 94 of 1994)
- (c) Protected Disclosure Act (Act 26 of 2000)
- (d) Promotion of Administrative Justice Act (Act 3 of 2000)
- (e) Promotion of Access to Information Act (Act 2 of 2000)

3.22 The Public Service Commission has published a Code of Conduct for civil servants containing examples of unacceptable actions and essential practices, and some Tender Boards have similar Codes governing the behavior of Board members. However, the State Tender Board's code of conduct does not deal with anti-corruption issues, except that potential conflict of interest must be declared. The Green Paper proposes the registration of suppliers, contractors and service providers to regulate participation in public sector procurement and promote good business practices, and to censure those who are at variance with the law.

3.23 A significant number of complaints and allegations made occurred not because of corruption but because of lack of understanding of the procurement procedures, poor procurement practices by officials or frustration about losing a bid. Arising from legal actions against the NSTB and provincial Tender Boards, the courts found that these Boards had in some instances exceeded their powers. Findings by the Auditor General reveal inadequate actions by Organs of State to assure "value for money", changing of specifications after award of tenders, and poor planning in works. Some cases showed inadequate evaluation by provincial Tender Boards for financial gain by Tender Board Members. However, there is no indication that corruption is a severe problem<sup>21</sup> and the Office of the Auditor General is well equipped to pursue corruptive and fraudulent practices.

### Recommendations

3.24 The following recommendations are made to strengthen the environment for anti-corruption measures:

- (a) **Review the implications on procurement of the various Acts promulgated to promote transparency.** The full implications of the Promotion of Justice Act and the Access to Information Act and its impact on all aspects of procurement should be examined and thereafter, government by means of the National Treasury could convey the resulting information to Organs of State and the public.
- (b) **Develop integrity management plans.** Under the terms of the PFMA and the MFMB (when enacted), the National Treasury should issue a code of conduct governing the actions of all those involved in the procurement processes and guidelines to Organs of State to assist them in the development and implementation of integrity management strategies and plans. Guidelines on the application of sanctions should also be issued.

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<sup>21</sup> This is based on interviews with some of the supplier/contracting business communities.

- (c) **Undertake an anticorruption awareness campaign.** A series of booklets and other media on the anticorruption measures that are currently in place should be published by the National Treasury and made available to all participants in the procurement process.



## 4. PREFERENTIAL PROCUREMENT SYSTEMS

### The Case for Preferential Treatment in Contract Awards

4.1 **Preferential Procurement Policy.** The Constitution of the Republic of South Africa establishes that Organs of State may implement a preferential procurement policy in the allocation of contracts in order to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination. The new Government, in 1995, reasoned that in order to broaden economic participation in the existing “mainstream economy”, specific promotional measures were needed, and considered that public procurement could achieve this by facilitating emerging enterprises to compete for government financed contracts.

4.2 **Legislative Requirements.** The Constitution requires national legislation to prescribe a framework to implement this policy. The Green Paper recommended that the National Procurement Compliance Office be responsible for formulating and reviewing the results of the procedures for preferential procurement. In the interim, the Preferential Procurement Policy Framework Act (PPPFA - Act 5 of 2000) was passed in February 2000. The PPPFA requires Organs of State to determine their preferential procurement policy and to implement it within the framework established under the Act. The Preferential Procurement Regulations issued under the Act provides definitions, e.g., of “historically disadvantaged persons” and sets certain prescriptions on how to implement the framework provided for in the Act.

4.3 The PPPFA establishes the procedural requirements for implementing preferential procurement policies, establishes a basis for determining disadvantage by unfair discrimination (race, gender and disability), and provides examples of a range of specific goals, which have been set in the government’s “White Paper on Reconstruction and Development”. It establishes the obligation that goals must be measurable, quantifiable and monitored for compliance. The entrepreneur has to substantiate that any failure to achieve the contract participation goal was beyond his control. If he cannot do so, he must pay penalties as provided for in the contract.

4.4 **Preferential Procurement Procedure.** Tendering is done by a system combining “price” and certain “criteria meeting the target groups”. The PPPFA does not exclude from consideration those bidders who do not have preferred characteristics or choose not to embrace specific goals associated with a particular contract, but if they do not meet the target criteria, they are penalized in the bid evaluation. Conversely, if they meet the criteria, they get “adjudication points”. The preferential system is applied in the:

- (a) Procurement of goods, works and consulting services;

- (b) Public-Private Partnership Programs;
- (c) Industrial Participation Obligations in Government Procurement.

**4.5 Criteria for “disadvantaged enterprises”.** The criteria determine a bidder as “being disadvantaged” (owned at least by two thirds by persons falling into the target group) or as “offering to achieve specific goals in a contract” (direct participation, e.g. by engaging targeted groups as joint venture partners). Certification is required to establish the bona fides of the target group. The Green Paper recommends that such certification can best be achieved by registration of all entrepreneurs by the proposed National Procurement Compliance Office. A weighting method is used to establish the lowest evaluated bidder by applying a formula of 90 points for price and 10 points for the “target criteria” (for contracts below US\$55,555 equivalent a weighting formula of 80/20 is used). In summary, the preferential system provides a means by which bidders can compete on a balance between price and socio-economic development goals.

### **Assessment of the Preferential Procurement Systems**

**4.6 Justification of Procurement Preferences for Target Groups.** The preferential procurement system for target groups is a reflection of South Africa’s special economic and historic circumstances. In fact, South Africa is faced with a dual economy: one, which used to be the “main stream” economy, led by a relatively small minority of European origin (13 percent of a 40 million population), and another “emerging economy” of African descent. With the preferential system, the Government sought to empower the African entrepreneurs to insert their participation into the country’s existing economic growth. As the Green Paper states, “as long as businesses continue to develop along racial lines and to operate parallel to each other, South Africa cannot develop to its full potential and will not compete internationally as a nation.” The objective is to merge the dual economies into a more productive and more competitive economy over time.

**4.7 Compatibility with International Procurement Principles.** International procurement principles underscore equal access to bids and equal treatment in bid-evaluation and contract award. These principles would seem to conflict with applying preferences in national procurement to target groups for domestic socio-economic purposes. However, the preferential system in South Africa may be defended in the same manner as, for example, the World Bank defines domestic preferences for procurement of works and goods in international bids, which give an advantage to domestic manufacturers or contractors of developing nations over competitors from industrial nations, or in the case of South Africa’s dual economy, competition of “established enterprises” with “emerging historically disadvantaged enterprises”. Nonetheless, progress with achieving the goal of merging the two economies should be measurable in order to continuously assess whether the policy is meeting the desired goals and, more importantly, that it is not causing undesirable distortions in overall competitiveness and other undesirable consequences.

**4.8 Measurement of the Preferential System.** The Green Paper lists several principles for the system to be successful:

- (a) it should not result in failure in delivery or deterioration of quality;
- (b) participation in the system should not continue beyond the point it is no longer justifiable; and
- (c) only those businesses should be considered that are able to complete a given contract successfully and on time.
- (d) in addition, the system should (i) result in increased efficiency and delivery, and a growing number of businesses owned by the target groups, and (ii) ensure that emerging businesses contribute to a larger tax base.

4.9 It is recognized that the Government may have to bear a cost (“premium”) associated with the preferential system, but in the spirit of the Green Paper’s proposals, this may be seen as a subsidy towards moving from the dual to the single economy and the alternative larger cost associated with the inefficiency of maintaining a dual economy.

### **Key Issues from the Current Implementation of the Preference System**

4.10 The CPAR reveals a number of drawbacks in the implementation of the preferential system:

- (a) The majority of Organs of State do not have well formulated means of applying the preferential procurement policies because the Government has not yet set any targets for a national program of preferential procurement.
- (b) The NSTB and provincial Tender Boards do not have adequate measures in place to adequately evaluate who qualifies as a “disadvantaged enterprise”, to prevent such enterprises from tendering on behalf of “established enterprises” or to avoid that disadvantaged enterprises cede their contracts to established enterprises. Bidders are required to merely certify that they are eligible for the preference claim and are seldom required to provide detailed information to verify their claims. The system does not cater for capacity building of ‘disadvantaged enterprises’, as mere paper certification qualifies them to obtain a preferential treatment.
- (c) Split responsibilities of accounting officers handling the procurement and those handling contract management cause nobody to measure achievement of the goals of the preferential policy.
- (d) There is no uniform approach to preferential procurement in Public-Private Partnerships (PPPs). The National Treasury applies different weighting criteria for such partnerships as a result of which Organs of State may have to award the contract to a less favorable financial bid.
- (e) The absence of quantitative data on the cost and outcome of the preferential system since it was proposed in the Interim Strategy and further elaborated in the Green Paper and subsequently enacted into law by the PPPFA is a cause

for concern.<sup>22</sup> Only DPW systematically collected statistics and found as positive results that the additional “cost” to the State of contracts let on the basis of the 90/10 weighting formula was about 1 percent of contract value. It also found that the flow of monies to targeted enterprises was significantly greater and more cost effective where contracts were let on the basis of “direct participation” rather than “direct preferences”.

- (f) On the other hand, it was found that performance of “non-disadvantaged enterprises” was much better than “disadvantaged enterprises” due to better capacity. “Breaking down” of contracts substantially increases the administrative burden of Organs of State and has reduced their capacity to spend their capital budgets. The increased “minimum participation requirements” to qualify for contracts subject to preferences leads to cost increases for enterprises, making such contracts less attractive. Since no systematic assessment is done in other Organs of State, the flaws in the system may be considerably larger and more widespread.
- (g) Although the PPPFA provides for a system that would be applied by means of granting a preference within evaluation criteria, there was evidence that some organs of state were applying schemes such as “set asides” and local/regional preferences.

## Recommendations

4.11 The following recommendations are made with respect to the preferential procurement system.

- (a) **Revise the PPPFA regulations.** As intended by the Green Paper, the system should provide for “graduation” of previously disadvantaged enterprises to established enterprises, when they have reached a certain turn over rate. The regulations to the PPPFA should be reviewed to render the preferential system more economical and monitorable. A national database should be created for disadvantaged enterprises based on a range of standard definitions. Best practices and standards should be issued to implement preferential procurement policies in accordance with the PPPFA.
- (b) **Establish national targets for preferential procurement policies.** Government should consider establishing quantitative short and medium term targets in each sector of the economy to inform Organs of State as to how they should respond to national empowerment imperatives when implementing the preferential procurement policy. Accounting officers and accounting authorities should review their targeting strategies to assess that these strategies do not compromise the cost effectiveness or quality of the procurement.

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<sup>22</sup> In discussions with businessmen in the “disadvantaged” category, it was said that the preferential system led to “enrichment of a select group of businesses” in this category

- (c) **Report on policy outcomes.** Accounting officers and accounting authorities should be required to report, on a quarterly basis, progress in achieving their share of the national targets , including the difference in price between the lowest acceptable financial offers received and the awarded contracts. Government, based on this data should at regular intervals reassess the preferential procurement policy and the implementation framework and make necessary modifications. The system should not be a permanent structure. Consideration should be given to establishing a medium to long term “sunset” policy which would guide government on how phase out of the preference schemes would be applied once their basic objectives have been met.
  
- (d) **Training Needs of potential HDI suppliers should be vigorously pursued.** In this regard, the World Bank Support for Black Business and Supplier Development Program (BBSDP), as a modified design of the Industrial Competitiveness and Job Creation Project, should be implemented as expeditiously as possible (see Box next page).

### World Bank Support to South African Private Sector, and HDI Firms

The World Bank has been in dialogue with the Department of Trade and Industry (DTI), in order to provide support to the South African private sector for the past seven years. From 1995-2000, the dialogue centered around issues of competitiveness, and how the existing manufacturing sector would fare in the face of import competition, after decades of protection through trade sanctions. There were fears of large job losses resulting from trade liberalization, and the Bank approved a US\$48 million project in 1998 to assist with improving manufacturing sector competitiveness. (Subsequently, a \$24 million component for providing pre-shipment finance to exporters was cancelled, and the remaining \$24 million supported two matching grants to the private sector).

During a mid-term review of the Project in early 2001, it was found that over 95 percent of beneficiaries were non-HDI firms, and this was consistent with the historical pattern of asset ownership in the South African manufacturing sector. An additional design-feature of the project was that the applicant firm had to spend the approved grant money up-front from its internal resources, and claim the grant upon submitting documentation for reimbursement several months later. Most HDI firms did not have strong enough cash flow to be able to access the matching grant under these conditions, and stayed away.

Following the mid-term review, the Bank and the DTI agreed to work together to examine how the project could be modified so that part of the uncommitted funds could be channelled in support of emerging HDI businesses, specifically to improve their competitiveness. The model was to link HDI firms with established firms and thereby the mainstream economy. The effort would have to focus **on upgrading the HDI firm** to the point where it could deliver a good or service to another private sector firm itself, rather than just serve as an address to win a contract, that would be implemented by someone else.

In September 2001, the DTI approved a Concept Paper for Black Business and Supplier Development Program (BBSDP). During the preparation of the Concept Paper, DTI had interviewed many representatives of the formal private sector and eight separate chambers of commerce, to assess their readiness for directing part of their procurement to black-owned firms on a competitive basis. In every instance, the established **private sector had concerns about who would finance the training needs of potential HDI suppliers**, that would enable them to fulfil the contract reliably and to the standards required by the private sector. The BBSDP is a pilot program which seeks to finance and deliver relevant training to emerging HDI firms, that may then be accredited and enter a database from which established private sector firms will short-list potential suppliers.

The program is now being implemented by The Enterprise Organization within DTI, and has started with about US\$2 million from the Industrial Competitiveness Project. The plan is to implement and strengthen **business linkages in the supply chain**, whereby the emerging HDI firm seeks to participate in the economic mainstream by supplying a good or service to an established firm that has in place an "affirmative procurement" program, to be run on a competitive basis among registered HDI firms.

For historical reasons, DTI does not have an outreach network among emerging HDI firms, its incentive programs typically apply to the manufacturing sector which is non-HDI, and in addition, require the applicant to have a VAT registration number. Therefore the DTI is using a series of network facilitators as partner organizations in order to implement the BBSDP. The network facilitators have a history of working with HDI firms and understand what "upgrading" is needed for them to win contracts from the mainstream private sector.

The Bank's view is **that a market approach such as the linkages model is a promising way to help HDI firms integrate into the economy**. The BBSDP is very new, there have been about twenty applications to the program so far from HDI enterprises, and their training is underway. A number of private sector firms willing to engage in affirmative procurement on a competitive basis, have been identified as part of the BBSDP process, and are waiting to engage their first round of suppliers under this program.

## 5. ELECTRONIC COMMERCE IN PUBLIC PROCUREMENT

5.1 A Green paper on e-Commerce was published in 2000, taking into account the UNCITRAL model law on e-commerce and discussions were held with the WTO in its formulation. A draft document on e-Government Policy has been prepared. The Government has also established a State Information Technology Agency. This agency is the designated procurement agency for state information technology.

5.2 However, the procurement processes and practices of most Organs of State are not yet geared for e-procurement. In particular, SMMEs have little access to information technology. There is also inadequate capacity in the public communications network to cope with a growth in demand for electronic access to a range of services, including e-commerce. Furthermore, there isn't a clear policy framework to guide organs of state on how to implement those e-procurement measures that they may be capable of implementing.

### Recommendation

5.3 **Consider development of a policy framework for the implementation of e-procurement.** Under such a policy, some steps that may not need legislative action can be implemented. This may include for example, mandatory electronic announcement of bids and bid awards (for contracts above a set threshold) and availing of bid documents through electronic means.

5.4 **Embark upon a pilot project for electronic government procurement.** Government should consider the possibility of implementing a pilot project to gain experience in the field of electronic government procurement. The primary objective of such a pilot project should be to test how electronic government procurement could be used to support the transparent and streamlined procedures demanded by international best practice. The pilot project should simultaneously inform government of the compatibility of existing systems, procedures and practices with the options offered by new technology, and establish the way forward to a national, integrated electronic government procurement system from which an effective and efficient strategy can be formulated.



## 6. COMMERCIAL PRACTICES

### Private Sector Procurement

6.1 South Africa has a well-developed private sector in large industry in the primary, manufacturing and service industry as well as in SMMEs. SMMEs account for more than half of the people formally employed in the private sector and contribute about 42% of the country's GDP. There are an estimated three million micro-enterprises in the country.

6.2 Competitive business practices are regulated by the Competition Act 89 of 1998, which aims to outlaw restrictive practices between businesses, or between businesses, their supplier(s) and customers, which hinder competition, including price-fixing, collusive tendering, restricting output and investment and market sharing. The abuse of a dominant position, which, according to the Act, is defined as a market share of 35% or more, is also forbidden.

6.3 The Black Economic Empowerment policy and the socio-economic objectives of public procurement policies have been successful in creating the basis for many new SMMEs, especially in the construction industry. There is some evidence that business practices of newly established businesses do not always comply with their agreements with subcontractors and customers.

6.4 Reinforcement of the efforts to introduce and sustain good business practices will be crucial if this segment of private industry is to become sustainable and contribute to economic growth. In the medium term, it will be important that these companies continue to develop professional capacity to enter into procured jobs as a subcontractor either as a single company or in a network of subcontractors. The trend is that successful enterprises of this size must be able to handle subcontracting and networking professionally to remain profitable.

6.5 The volume of private sector procurement cannot be estimated on the basis of the available data. The main importers of raw materials and finished products are the large corporations in the primary and manufacturing sectors, such as mining, oil and chemicals, car manufacturers or pharmaceuticals. The use of INCOTERMS and payment through documentary credits is common practice. Commodities are purchased both through brokers and by competition linking prices to the international market.

6.6 Procurement practices are company specific and include all practices from simple direct purchase/contracting, invitation of quotations, open tender to major international bidding processes. New methods such as New Engineering Contracts and Partnering are also practiced. Open tender is more common for goods than for works and services and the bigger the purchase the more likely that an open or an international procedure is applied.

6.7 Procurement plans, short lists and detailed bidding documents are all fairly common practice in the larger corporations. Some large corporations have corporate ethics in place that guide personnel in purchase and procurement. Criteria for selection of the winning bidder vary with the specific task procured, but do comprise price, quality, compliance, and delivery period. Large corporations use modern computerized methods for procurement monitoring.

6.8 Availability of skilled professionals is the largest obstacle to continued improvement of efficiency in purchasing and procurement. Not enough people in South Africa can handle Supply Chain Management Systems.

6.9 The Institute of Purchasing and Supply is the professional organization for procurement officers and this organization does provide training and certification of procurement officers. Other training institutions are the University of Durban that comprise a purchasing faculty and UNISA that has a degree in Logistics and an advanced specialization in Purchasing.

### **Recommendations**

6.10 Launch public or private efforts to professionalize SMMEs as subcontractors to contribute to the general competitiveness and sustainability of SMMEs.

6.11 Intensify the efforts of enhancing the capacity to train procurement officers by both public institutions and private organizations.

## **7. CUSTOMS AND TRADE PRACTICES**

### **Regulations, Practices and Quality Control**

7.1 Trade and customs regulations and practices are in general up to international standards in South Africa. A Free Trade Agreement has been made with both the EU and the USA to reduce and eliminate tariff barriers over the next 10-12 years.

7.2 Licensing and customs procedures (including procedures and regulation for export, import and transit) are generally transparent and efficient. The Customs and Excise Act No. 91 of 1964 is the major legal customs document. The latest major revisions can be found in the Taxation Amendment Laws Bill, 2000. Procedures and regulations are not yet collected in a single administrative document, but this is being prepared. There is room for improvement in efficiency according to both South African Revenue Service (SARS) and private enterprises, and this could be achieved by better training. SARS is also in the process of developing an accreditation scheme for shipping and handling agents and importing and exporting companies.

7.3 Imported goods must comply with the standards of the South African Bureau of Standards (SABS). The standards of the SABS are in line with internationally acceptable standards. SABS itself is accredited and audited by a European agency.

7.4 Complaints over customs procedures and appeals of customs decisions can be filed with the Commissioner of SARS, the Department of Trade and Industry, the Courts and the Public Prosecutor. The customs act provides for claiming back overpaid customs, also for transactions dating back years.

7.5 Foreign firms are generally not required to use a national agent, except for specific sectors such as the pharmaceutical sector. It is, however, common practice to use a customs clearing agent. Such agents must be registered and their licenses renewed on a yearly basis.

7.6 No pre-shipment inspection takes place. The strategy is to do post-shipment inspection in South Africa and further develop the capacity to do this efficiently. This is in accordance with WTO recommendations.

7.7 Goods are inspected upon arrival and the inspection procedures conform with established international practice. A targeting system to determine the thoroughness of the individual inspection (considering the producer/supplier, the importer and the port of departure) is being developed. The present practice is targeting based on customs officers' experience. The post-shipment inspections are not reported (by shipping agents and importing companies) to unduly increase the procurement time. There is a procedure in place where cash

deposits can be made, so goods can be released if it is expected that valuation of the goods takes time.

7.8 Over- and/or under-invoicing are not common practices, although it does occur, as is in many countries. SARS is counteracting these through spot checks and other control procedures. A Risk Profiling System is being developed to enhance the efficiency of the control to improve targeting of examination and reduce the administrative burden of importers. This includes the creation of a valuation audit (among other things to establish an anti-dumping procedure) where a desk audit is done through submission of invoices to customs as well as the Federal Reserve Bank. Closer cooperation with the Federal Reserve Bank is regarded as the way to enhance value efficiency.

7.9 Goods are generally described correctly on invoices, although a smaller percentage get the product code wrong. There are no indications that import documents are falsely labeled on purpose or that other trade malpractices take place to a significant extent.

7.10 Barter agreements are not used. If goods are exchanged for goods this has to be based on a monetary foundation, which will be investigated and value dated by customs.

7.11 Counter-trade is not generally used, although this may to some extent be considered the nature of the Industrial Participation Program (IPP).

7.12 Customs tariffs are clear and transparent and the product code is in accordance with the international standard. They are published by Jacobsen's Publishers on a regular basis and changes in tariffs are also dispersed from here.

7.13 VAT is currently 14% and is regulated by the VAT act 89 of 1991 – updated 1998. The issue was raised that in some instances the importer in the recipient country must pay VAT in connection with export from South Africa and then claim it back from the South African Government. It has not been possible to investigate further into this practice, but if this is so, this practice might be considered an obstacle for further development of South African export.

7.14 There is a shortage of trained customs personnel. There is a need for enhanced training capacity and training program. The General Customs Officer has appointed a Human Resource Management Officer in charge of developing and implementing new training schemes and the process is under way.

## **Recommendations**

7.15 The following recommendations are made:

- (a) Complete the process of developing the Single Administrative Document for Customs.
- (b) Complete the on-going development of the risk profiling system for custom clearance as well as the accreditation scheme for agents and companies.

- (c) Reduce the total number of tariff bands to 6 categories in accordance with South Africa's WTO commitments from the currently (2001) close to 50 existing bands.
- (d) Investigate the issue of VAT and exports from South Africa to determine whether this practice is an obstacle to the development of South African exports.
- (e) Improve training of custom personnel. Every possible attention should be given to implement the training schemes under development. There is willingness in the private sector to collaborate with the training schemes. This possibility should be explored.



## 8. GENERAL RISK ASSESSMENT

### Risk Analysis

8.1 To achieve the objectives of equitable, economic, efficient, and transparent public procurement, the risks to be managed by the Government could be summarized as follows:

<b>Risk to be managed</b>	<b>What can happen</b>	<b>How it can happen</b>
Loss of economy and inefficiency in procurement	<p>Tenders are not awarded to the lowest responsive bidder.</p> <p>The tenders received / awarded do not represent best value for money.</p> <p>Time taken to solicit and award tenders is excessive.</p>	<p>Lack of competition (see below) and capacity to understand market</p> <p>Poor contracting strategies / procurement documents which place excessive and unnecessary risks on bidders / overlook quality in selection of consultants.</p> <p>Lack of procedures / excessive controls / shortage of experienced or trained staff / data management systems</p> <p>Weak procurement planning.</p> <p>Uncompetitive procedures for selection and employment of consultants</p>
The exclusion of certain eligible bidders from competing for bids	<p>Firms, which fall outside those that are targeted in terms of a preferential procurement policy, are excluded from tendering.</p> <p>Firms, which fail to have achieved a certain staffing structure are excluded from tendering.</p> <p>The actual quantities procured under centralized contracts are considerably lower than those estimated for entering into contracts. This practice makes the contract unattractive for a significant number of bidders.</p>	<p>Organs of State choose to use set asides to attain socio-economic objectives or restrict competition by linking onerous mandatory industrial participation requirements or socio-economic goals to the award of contracts</p> <p>Firms are not pre-qualified to bid due to their racial / gender composition or are scored poorly in the adjudication of tenders</p> <p>Centralizing contracts for common items, which in the medium and long term is not cost effective.</p> <p>Industrial Participation Obligations</p>
Unfair and inequitable	Organs of State have double standards in dealing with suppliers and	Preferential treatment beyond that provided for in the law is practiced.

<b>Risk to be managed</b>	<b>What can happen</b>	<b>How it can happen</b>
treatment of suppliers and contractors	contractors	Price matching is used to secure the participation of enterprises targeted in terms of a preferential procurement policy.
Lack of integrity, fairness and public confidence.	Those involved in procurement <b>do not</b> discharge their duties and obligations timely and with integrity / behave equitably, honestly and transparently / comply with all applicable legislation, regulations and by-laws	A lack of codes of conduct Poor enforcement of laws. Poor ethics of those participating in procurement.
Lack of transparency in procurement procedures.	Bidders do not understand why they failed to secure a contract or where they are positioned with respect to a bid	Reasons for administrative actions are not furnished. Tender prices and preferences are not made public or poor public opening procedures
Failure to achieve socio-economic objectives through procurement	Socio-economic objectives are not achieved despite mechanisms being in place to do so.	Lack of compliance monitoring / enforcement Poor preferencing practices which are not contractually enforceable.

8.2 An analysis of the existing strengths and the weaknesses associated with various aspects of the procurement system indicated that the likelihood of failure to achieve the above stated objectives on a 5 point scale (U=unlikely; L=low risk; M=medium risk; H=high risk and P=probably) is as follows:

<b>Risk to be managed</b>	<b>Indicative risk of objectives not being fully realized in most Organs of State in a specific category of organ of state</b>			
	<b>National</b>	<b>Provincial</b>	<b>Local</b>	<b>SOE</b>
Loss of economy and inefficiency in procurement	M	M-H	M-H	L-M
The exclusion of certain eligible bidders from competing for bids	M	M-H	M-H	L-M
Unfair and inequitable treatment of suppliers and contractors	L	M-H	M-H	L-M
Lack of integrity, fairness and public confidence	L	M-H	M-H	M
Lack of transparency	M	H	M	M-H
Failure to achieve (and measure) socio-economic objectives through procurement	M-H	M-H	M-H	M-H

### **Risk Treatments**

8.3 The general risk profile for the South African procurement system can be categorized as low to medium for entities at the national level and medium to high for entities at the provincial and local levels. Effective implementation of various recommendations of this report comprise the required risk treatments to reduce all risks relating to the Bank and Government's objectives not being achieved to within acceptable levels (i.e. low risk). The following chapter on recommended action plan gives short term remedies for risk treatments. [In the interim, any Bank financed project would need to implement certain specific risk mitigation measures]

## 9. RECOMMENDED ACTION PLAN

There are eight key recommendations for the near term. The incomplete implementation of the Green Paper has led to the flaws in the current public procurement system. The CPAR makes the following main recommendations to rectify this situation.

- i. **Follow up the Green Paper** with the preparation and adoption of a national procurement policy framework further defining and perfecting the Green Paper's recommendations for implementation.

**Current Development**

*A national uniform procurement policy is currently being put in place, which will be applicable to all organs of state. The Public Finance Management Act (PFMA) was enacted during 1999 and became applicable to all government departments since 1 April 2000.*

- ii. **Draft a National Legislative/Regulatory Framework** for public procurement to establish uniformity in tender procedures, policies and control measures. It would incorporate and complement the procurement legislation already in place in the PFMA and the draft MFMB, and also make adjustments in the PPPFA.

**Current Development**

*This process is already in motion. A framework for supply chain management has been drafted and will be promulgated in terms of section 76(4) (c) of the PFMA and section 106 (1) b of the MFMB (when it is finally promulgated). This will address the aspects of monitoring and compliance.*

- iii. **Create a National procurement Compliance Office** in the National Treasury, which would be responsible only for procurement policy formulation, laws and procedures, provision of standard bidding documents and contracts, oversight on implementation by all Organs of State, establishment of a procurement data capturing system and training of procurement staff. This would help eliminate the weaknesses revealed in procurement practices and procedures.

**Current Development**

*The National Treasury has already established a Supply Chain Management Office (SCMO).*

*This office has three chief directorates.*

- **Chief directorate: Supply Chain Policy** - responsible for supply chain policy development.
- **Chief directorate: Norms and standards** is responsible for the monitoring and surveillance of compliance.
  
- **Chief Directorate: Contract Management** - Facilitates the arrangement of certain transversally used term contracts. The intention is, however, not to

*centralize the procurement function.*

*Where term contracts are arranged, heads of user departments are represented on the bid evaluation committees to take the procurement decisions jointly. The decision to procure under these transversal contracts thus arranged is also fully devolved to Accounting Officers. Where there is a general lack of capacity to deal with large contracts, the SCMO will also provide support to departments. The emphasis is placed on the monitoring of the outcome of contracts, including achievements of Government's procurement policy objectives.*

*The Supply Chain Management Office interacts with the Auditor Generals' Office on all Audit and compliance related issues.*

- iv. **Implement the decision to abolish the Tender Boards** and have their functions assumed by the responsible Organs of State at the national, provincial and local levels. It is known that there is some preference in the National Treasury for the creation of a Common Service Provider, which in addition to the above functions of the Compliance Office would also be responsible for central procurement. However, the functions of procurement policy and oversight should not be mixed with procurement implementation. National Departments can provide in the need for central procurement and procurement for those Organs of State that have no capacity to procure.

**Current Development**

*The process has already commenced. Refer to iii above.*

- v. **Under the National Public Housing Scheme, establish a competitive procedure** for the award of development contracts to obtain savings in the expenditure of fiscal revenues.

**Current Development**

*The Department of Housing has implemented competitive bidding procedures effective 1 April 2002. The implementation is based on the Department's Task Team's approved document entitled 'A new Procurement Regime in Respect of Projects classified as "Greenfields" Development'.*

- vi. **Abolish the Industrial Participation Program**, which conflicts with the basic principles of efficient, fair and transparent procurement. The same objectives of foreign investment can be reached by other measures (temporary tax advantages, industrial promotion activities) pursued in other industrial economies. The savings achieved from open competition without imposing restrictions could be channeled for domestic investment opportunities.

**Current Development**

*The intention has always been to phase-out the program once the objectives have*

*been addressed. It is also important that the program should be reviewed periodically in order to assess its effectiveness and to make changes where necessary. The current thinking is to focus on IP Projects that seek to develop targeted industries and least developed geographic areas.*

*In this regard:*

- DTI is considering increasing the threshold for Industrial Participation Obligations from \$10m to \$15m, which will have an effect of reducing the overall application of this obligation on Government imports.*
- DTI is mainly targeting specific sectors such as defence, shipbuilding, transport and aerospace industries.*
- DTI is considering phasing out the IPP obligation in the Information and Communication Technology sector. However, companies would have to fulfil their existing obligations.*

- vii. **Revise the Preferential Procurement regulations** to provide for “graduation” of previously disadvantaged enterprises when they have reached a certain turn over rate to avoid that only an elite group continues to benefit from the system. **Make the system more economical and monitorable**, so that results can be measured to test its merits. **Establish national targets for preferential procurement** policies to enable Organs of State to respond better to the need for national empowerment objectives. **Require Accounting Offices to report quarterly on achieving these targets.**

**Current Development**

*In order to establish a monitorable system the National Treasury is currently exploring the possibilities of accessing technical assistance through the facilitation by the World Bank.*

- viii. **Establish procedures for competitive selection and appointment of Consultants** using standard request for proposals and contract documents, with guidelines for criteria for evaluation.

**Current Development**

*As part of the framework as specified in ii two above, National Treasury is currently in the process of implementing a competitive system for appointing consultants*