

**Innovations in South African public
service procurement policy: 1999–2005**

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**INNOVATIONS IN SOUTH AFRICAN PUBLIC SERVICE PROCUREMENT
POLICY: 1999–2005**

by

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DISSERTATION DEDICATION

This dissertation is dedicated to Alta and my son Leehan for their support, patience and motivation that made the completion of this research possible. I also want to express my sincere gratitude to professor Pauw for his guidance and rewarding discussions that accompanied this project.

One today is worth two tomorrows; what I am to be, I am now becoming.

Benjamin Franklin

DECLARATION

Student number: 33402132

I declare that **Innovations in South African public service procurement policy: 1999–2005** is my own work and that all the resources that I have used or quoted have been indicated and acknowledged by means of complete references.

.....

SIGNATURE

(MRS E M VAN DER WALT)

.....

DATE

SUMMARY

This dissertation has shown that public procurement regulation takes place through regulatory documents that mainly underwent a name change and that the only changes are found in the reporting framework. The South African government identified public procurement as an active instrument to achieve social and economic goals. To provide substance to this realisation, public procurement was taken up in the Constitution of the Republic of South Africa 1996. The constitution prescribes a procurement system that is fair, equitable, transparent, competitive and cost-effective.

KEY TERMS

Fair, equitable, transparent, competitive, cost-effective, supply chain, supply chain management, demand management, acquisition management, logistic management, risk management and supply chain performance management.

GLOSSARY

The following acronyms are used in this dissertation:

ABEs	AFFIRMATIVE BUSINESS ENTERPRISES
AusAID	AUSTRALIAN AGENCY FOR INTERNATIONAL DEVELOPMENT
BAS	BASIC ACCOUNTING SYSTEM
B-BBEEA	BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT
BEE	BLACK ECONOMIC EMPOWERMENT
CIDB	CONSTRUCTION INDUSTRY DEVELOPMENT BOARD
CODESA	CONVENTION FOR A DEMOCRATIC SOUTH AFRICA
CPAR	JOINT COUNTRY PERFORMANCE ASSESSMENT REVIEW
GCC	GENERAL CONDITIONS OF CONTRACT
GDP	GROSS DOMESTIC PRODUCT
HDI	HISTORICAL DISADVANTAGED INDIVIDUALS
IFRSs	INTERNATIONAL FINANCIAL REPORTING STANDARDS
LOGIS	LOGISTICAL INFORMATION SYSTEM
PAJA	PROMOTION OF ADMINISTRATIVE JUSTICE ACT
PDI	PREVIOUSLY DISADVANTAGED INDIVIDUALS
PFMA	PUBLIC FINANCE MANAGEMENT ACT
PPP	PUBLIC PRIVATE PARTNERSHIP
PPPFA	PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT
PPR	PREFERENTIAL PROCUREMENT REGULATIONS
RDP	RECONSTRUCTION AND DEVELOPMENT PROGRAMME

SACOB	SOUTH AFRICAN CHAMBER OF BUSINESS
SCC	SPECIAL CONDITIONS OF CONTRACT
SCM	SUPPLY CHAIN MANAGEMENT
SMME	SMALL, MEDIUM AND MICRO ENTERPRISES
ST36	GENERAL CONDITIONS AND PROCEDURES
ST37	USER MANUAL: DIRECTIVES TO DEPARTMENTS IN RESPECT OF PROCUREMENT

Note about reference style

In cases where the source did not provide pagination for preliminary pages the reader is directed by words such as “introduction page” and “preface”.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

Modern governments are expected to deliver public services in such a way that all members of society can benefit from it and enjoy a quality life. The needs of societies are varied and for this reason, governments create different public institutions to focus on specific needs.

Public institutions require goods and services to both function and to fulfil their societal goals and objectives. Certain basic needs for public institutions are the same, for instance, they need stationery, cleaning materials, and so forth. The specific field of a service delivery department determines what other kind of goods and services are required. When the National Department of Public Works go shopping, the bulk of their goods and services purchases will come from the construction industry aisle, so to speak. The Department of Defence on the other hand, does not only purchase from the ammunition aisle, they also do bulk shopping for uniforms and consumable goods, such as food. Defence might also meet a purchaser from the Department of Health in the medical supplies section. Trepte (2004:11) provides an overall needs description when stating “(g)iven the range of its functions, government provides and uses all manner of goods and services from the mundane (office equipment and stationery) and necessary (roads, schools, hospitals, utility services and airports) to the complex and innovative (civil and military communications systems, satellites and fighter aircraft).”

More and more societies demand accountability and governance in the execution of their governments’ activities (Jonker 2002:242). When utilising public resources, public accountability becomes important in terms of the

allocation, utilisation of and the results that the spending has achieved (<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028466.pdf>).

Government's intention with public procurement was highlighted when procurement was taken up in South Africa's interim (Republic of South Africa 1983) and final Constitutions (hereafter called the Constitution) (Republic of South Africa 1996). This raises the question – why was procurement law elevated to receive Constitutional regulation? The answer to this question will be dealt with throughout this research.

This study focuses on regulatory innovations in the South African Government's procurement policy from 1999 to 2005. The selected period of research includes procurement policies relevant to the period before and after the Public Finance Management Act 1 of 1999 (hereafter called PFMA) and the introduction of a supply chain management system.

Aspects to be dealt with can best be summarised in the following table. The contents relating to the two eras form the basis for this dissertation and will be evaluated in chapter 5 and discussed in other chapters. It must be noted that some of the legislation indicated in the left hand column stayed in effect well into South Africa's new dispensation.

TABLE 1: PRE- AND POST-PFMA ERA

Pre-1993	Post-1993
Supreme law	
The Constitution of the Republic of South Africa 66 of 1983.	The Constitution of the Republic of South Africa 110 of 1993. The Constitution of the Republic of South Africa 1996.
Acts	
State Tender Board Act 86 of 1968.	Public Finance Management Act 1 of 1999.
Exchequer Act 66 of 1975.	Preferential Procurement Policy Framework Act 5 of 2000.
	Government Immovable Asset Management Act 19 of 2000.
	Broad Based Black Economic Empowerment Act 53 of 2003.
Regulations	
Regulations in terms of the State Tender Board Act, 1 July 1988.	Regulations in terms of the Public Finance Management Act 1 of 1999: Framework for supply chain management.
	Preferential Procurement Regulations, 2001. Pertaining to the Preferential Procurement Policy Framework Act.
Procurement prescripts	
General conditions and procedures (ST 36).	General Conditions of Contract.

User manual: directives to departments in respect of procurement (ST 37).	Supply chain management: a guide for accounting officers/authorities.
Constitutional procurement principles	
	Fair.
	Equitable.
	Transparent.
	Competitive.
	Cost-effective.

As can be seen from the above table, public procurement was dealt with under every heading relevant to the two periods, except for “Constitutional procurement principles”. The Constitution of the Republic of South Africa 110 of 1983 and the Exchequer Act only refer to “land” and “movable state property”. The 1983 Constitution and the Exchequer Act do not provide adequate information on all aspects of public procurement to warrant a comprehensive discussion. For this reason only basic information will be provided later in this chapter.

The Constitution of the Republic of South Africa 110 of 1983 does not provide procurement principles, for instance in a fair and transparent way. Section 30 of the Constitution does, however, state that the State President and Parliament can make laws pertaining to good government. One can therefore assume that “good government” refers to the manner in which all divisions of the public service must execute their functions. The acquisition, alienation, provision and maintenance of and control over land are referred to as auxiliary services relevant to own affairs of the various population groups (Republic of South Africa 1983). In 2007 the present South African government extended direction relevant to immovable property by means of a framework for the management and coordination of the use of immovable assets and issuing of guidelines and minimum standards in respect of

immovable asset management that is captured in the Government Immovable Asset Management Act 19 of 2007 (Republic of South Africa 2007).

The Exchequer Act 66 of 1975, chapter III under the heading: General financial control (31)(a), established the National Treasury's power in promoting efficiency and economy in the utilisation of state money and state property. Although no direction is provided in the manner of procurement, section R of paragraph III, confirms the National Treasury's responsibility in terms of the alienation and letting or disposal of movable state property (Republic of South Africa 1975).

1.2 Background to the study

The South African government identified public procurement as a tool to achieve, for example social and economic goals. The realisation of these goals could only take place through a public sector procurement reform process that commenced in 1995. In this regard, interim strategies such as the 10 Point Plan and the Green Paper on Public Procurement Reform in South Africa paved the way towards a Constitutional procurement system. The role of public procurement within the South African context will be discussed throughout this research document.

This section provides conceptual and historic background to the study. In the private sector, money is put into a business to make money out of the business. Within the public domain, the legislature provides public service institutions with capital to achieve non-monetary ends, such as societal goals (Pauw et al 2002:14). Because of non-monetary goals, the performance of accounting officers cannot be measured against monetary value but measured against compliance to policies and procedures in the attainment of societal goals (Hardiman & Mulrean 1991:19). The achievement of predetermined outputs and outcomes are however the real test when measuring performance. Public services are delivered with funds largely obtained from taxpayers. For this reason clear processes and

procedures must be in place for the procurement of goods and services or in order to ensure prudent financial spending.

As stated in the introduction, procurement was elevated in 1996 through section 217 of the 1996 Constitution and effect was given thereto under sections 76 and 38 of the Public Finance Management Act (Republic of South Africa 1999). Section 76 of the PFMA deals with Treasury regulations and instructions whereas section 38 reflects the responsibilities of accounting officers. In terms of said sections, accounting officers/authorities for a department must ensure that that department, trading entity or Constitutional institution "... has and maintains" an appropriate procurement and provisioning system. The PFMA plays a major role in the administration of government institutions. Through the implementation of the PMFA, heads of departments became responsible and accountable for their budgets and for the decisions that they make in the course of the management of their departments, also known as "devolution of responsibility" (AusAID and the South African Capacity Building Program 2000).

In adherence to section 38 of the PFMA, a procurement policy should describe the method or rules by which public sector institutions procure goods and services from the private sector. It means affording potential contractors sufficient access to the procurement process, widely advertising government contracts and allowing enough time to participate in the (procurement) process (Bolton 2007:48). However, government institutions do procure from each other, for instance paying for municipal services. The private sector, in turn, also procures from government, for example when government disposes of goods and immovable property.

It is appropriate at this stage to provide a brief overview of government initiatives post-1993 that played a key role in establishing a procurement system as it is now.

Government published a 10 Point Plan, as an interim strategy in 1995 (Doyle 2002:36). Although the 10 Point Plan has been superseded by

subsequent legislation, the principles have shaped the transformation of procurement practices since 1995.

The 10 Point Plan was replaced in April 1997 by the Green Paper on Public Sector Procurement Reform. The Green Paper was government's first step towards greater policy co-ordination across the different spheres or levels of government (Doyle 2002:219). The document was an initiative of the Ministry of Finance and the Ministry of Public Works. The Green Paper was created as a discussion document which contained various proposals aimed at achieving objectives of good governance. The Green Paper was viewed by government as a significant milestone in the transformation of public sector procurement in South Africa (Republic of South Africa 1997). It introduced new procurement management concepts such as an *affirmative procurement policy, life cycle costing, value for money and appropriate risk management strategies* (Doyle 2002:36).

After the introduction of the approach of financial management rather than financial control, new legislation was passed which included the PFMA. Madue summarises the role of the PFMA as: "... to modernise financial management in the South African Public Service in order to support the processes of public administration, which are focused on achieving sustainable development and high-level public services" (Madue 2007:306–318). Overall, the PFMA introduces a uniform system of public sector financial management, which improves on an erstwhile system in which accountability was undermined, amongst others, because different legislation applied to different entities, and expenditure control was too narrowly regulated. Compliance with the PFMA is in compliance to the International Financial Reporting Standards (IFRSs). However, Madue acknowledges that compliance to the PFMA remains a challenge in so far as over- and under-expenditure and the achievement of effective, efficient and economic financial management are concerned (Madue 2007:306–318).

In adherence to section 217(3) of the 1996 Constitution and in order to utilise public procurement as an active instrument of socio-economic policy,

the Preferential Procurement Policy Framework Act 5 of 2000 (Republic of South Africa 2000) (hereafter called the PPPFA), was promulgated in February 2002. The Preferential Procurement Regulations, 2001 (hereafter called the PPR) (Republic of South Africa 2001), gave substance to the contents of the PPPFA. The purpose of this act and regulations is to enhance the participation of historically disadvantaged individuals (hereafter called HDI) and to achieve certain Reconstruction and Development Programmes (hereafter referred to as RDP) (PPR 2001: Section 17) goals such as the promotion of small, medium and micro enterprises (hereafter called SMMEs) (PPR 2001: Section 1) through the public sector procurement system (Deputy Minister of Finance 2002). The PPPFA and subsequent Regulations will be discussed in more detail in chapter 4.

In November 2000 the Report on Opportunities for Reform of Government Procurement in South Africa, by Roger Webb, served before Cabinet. The Webb Report is one of two documents that gave direction towards the introduction of an integrated supply chain management system (Webb 2000).

The second document, a Joint Country Performance Assessment Review (hereafter called the CPAR) was conducted in collaboration with the World Bank during 2001/2002 (The Country Procurement Assessment Review 2002). The primary objectives of a CPAR are to:

- provide a comprehensive analysis of the country's public sector procurement system, including the existing legal framework, organisational responsibilities and control and oversight capabilities, present procedures and practices, and how well these work in practice;
- undertake a general assessment of the institutional, organisational and other risks associated with the procurement process, including identification of procurement practices unacceptable for use in Bank-financed projects;
- develop a prioritised action plan to bring about institutional improvements, and

- assess the competitiveness and performance of local private industry with regard to participation.
(<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20105527~menuPK:84283~pagePK:84269~piPK:60001558~theSitePK:84266~isCURL:Y,00.html>).

The findings and recommendations of both reports will be discussed in chapter 3.

1.3 Motivation for this study

While being a public official for 14 years, the researcher was frustrated by a lengthy procurement and provision system. Every request for goods and or services had to take place according to the book. The researcher believed that procurement, as a support function, should facilitate and not frustrate organs of State in their functioning and the discharging of their obligations.

The researcher felt that government procurement by way of the State Tender Board Act was viewed as an end in itself and not a means to an end. This view resonates with the opinions of other authors. Knipe, for example, is of the opinion that “(h)istorically far too much emphasis has been placed on compliance and process accountability and far too little on managerial and social accountability” (Knipe 2002:266).

The procurement system in terms of the State Tender Board Act 86 of 1968 was, according to the National Treasury, for some time already obsolete and therefore supply chain management was introduced as the system that has the potential to replace the outdated practices and conform to international best practices (Republic of South Africa. 2000a:2).

The value of this study lies in the analysis and comparison between procurement in terms of the State Tender Board Act and procurement in terms of the PFMA. The objective is to determine whether changing from

process-orientated practices to a best practice approach may provide the basis for society to benefit as a whole. The analysis and comparison will be made in chapter 5.

This research has additional academic value because there is not any documented research that focuses on a parallel analysis of the two South African systems. Furthermore, although the South African procurement system has been analysed in detail by authors such as Bolton (see chapter 3) and the compilers of government sponsored research reports (see 3.2.4), not much attention has been paid to the regulations themselves.

1.4 Research question

Procurement in terms of the State Tender Board is often referred to as outdated, centralised and process driven and having cumbersome procurement processes. In September 2003, government adopted the new integrated SCM function that will be part of financial management and will conform to international best practises.

The aim of this research is to determine the progress, if any, made by introducing new regulations and policies in the South African public supply chain. Therefore, the research question is: To what extent do the regulations and policies in the new democratic dispensation embody progress in public procurement in South Africa? The term “progress” implies a comparison and measurement in terms of one or more criteria.

1.5 Objectives of the study

The objective of the study is to answer the research question. The answer to the question will allow the researcher to also determine whether any meaningful innovation took place in public procurement with the introduction of the PFMA. The researcher will further then be able to determine whether

government strategies such as the 10 Point Plan are captured in the new SCM policy.

In order to achieve the main objective of the study, the following sub-objectives had to be met:

- Identify the regulatory basis of the two systems;
- Analyse the most pertinent regulations and prescripts of the two dispensations in detail;
- Compare the two sets of regulations and prescripts;
- Devise a measuring instrument to enable an evaluation, and
- Apply the instrument.

1.6 Method of the study

The objective and approach to the study is closely linked with each other. To reach the objective of the study the researcher first had to set out conceptual and statutory aspects pertaining to the field of study in chapter 2 and 3. The pre- and post-PFMA procurement systems are the units of analysis whereas the ST36, ST37, Guide to accounting officers/authorities and GCC are the units of observation. The units of observation represent the units of analysis. Under the previous procurement system the ST36 reflected the State Tender Board's General Conditions and Procedures for government procurement. The State Tender Board's user manual that provided directives to departments in respect of procurement is known as the ST37. At the time of this dissertation the State Tender Board Act 86 of 1968 was not yet repealed. The act and related documentation uses the terms "tender" and "tenderers", as do the PPPFA and its regulations, while other documentation relevant to the post-PFMA stage uses the terms "bid" and "bidder". For the sake of consistency with the legislation, the researcher avoids "bid" and "bidder" as far as possible. Information gathered from the units of observation provided the facts for coming to conclusions.

Investigating innovations took place by means of a desk study and interpretation of policy documents within frameworks developed for this study.

An easy readable matrix with the same structure as table 1 earlier in this chapter was created. Contextual information from the various documents were summarised under the relevant headings and therefore placed against each other. By dissecting these regulatory guidelines for procurement, the researcher will be able to determine whether a “new” SCM policy was indeed created or if the context of the previous procurement regulations were merely re-written and if it was really new, if it was an improvement.

In order to determine whether an improvement occurred, the researcher worked out a set of criteria in terms of which the evaluative comparison was made.

1.7 Demarcation of the study

This study begins with the introduction of the PFMA in 1999 and includes the promulgation of the Regulations in respect of the Framework for Supply Chain Management, December 2003. The content of applicable legislation and regulations will be broadly discussed in chapter 4.

Legislation pertaining mostly to national departments is used. Only one of the three levels of government was selected to have a more focussed approach. The most important demarcation of the study is perhaps to limit it to the analysis of the appropriate legislation. In other words, the researcher does not study the application or results of the legislation and producers, but only the texts themselves.

1.8 Terminology

Comprehensive theoretical clarification within the South African context, pertinent to the research, is provided in chapter 2. Terminology and abbreviations utilised throughout the study are briefly clarified below.

1.8.1 Accounting officer

Accounting officers are heads of departments and take full responsibility and accountability for all expenditures incurred by their departments. (Bolton 2007:34).

1.8.2 Effective

Effectiveness, according to Lyson and Gillingham, “is a measure of the appropriateness of the goals the organisation is pursuing and of the degree to which those goals are achieved” (Lyson & Gillingham 2003:2).

1.8.3 Efficient

Being efficient implies achievement of an objective at the lowest possible cost (Vogt et al 2002:21).

1.8.4 Equitable

Equitable refers to the equalling of disparate groups in South Africa. Instead of treating all groups exactly the same, groups who face different levels of resources and development should receive different treatment (Bolton 2007:50).

1.8.5 Fair

Fairness implies: free from discrimination, just and appropriate in the circumstances; impartial, in conformity with rules or standards, treating people equally, unbiased, uncorrupted, and unprejudiced (Bolton 2007:46).

1.8.6 Institution

“(A) government institution is a body established by a government and used to achieve the particular objectives of the government concerned by applying administration” (Du Toit & Van der Waldt 2008:42).

1.8.7 Public accountability

Public accountability is an obligation to expose, to explain and to justify actions (Schwella et al 2001:16).

1.8.8 Public policy

According to Doyle, public policy “... is a declaration of a course of action that is taken by government to achieve societal aims and objectives” (Doyle 2001:165).

1.8.9 Preferential procurement

South Africa’s 1996 Constitution makes provision for empowerment in state procurement for people who were previously disadvantaged by unfair discrimination (Hugo 2004:55).

1.8.10 Procurement

In the South African context "... procurement refers to instances where the government acquires goods or services and when it sells or lets assets" (Bolton 2007:3).

1.8.11 Supply chain

In a government context, supply chain can be said to be a network of organisations that are involved in the different processes and activities dealing with products and services to be delivered to the ultimate customer (Lyson & Gillingham 2003:71).

1.8.12 Supply chain management

It is the planning, design, and control of all information and material flowing from the origin of the goods and services to the end-user to ensure that customer needs and wants, present and future, will be met in an effective and efficient manner (Kruger, De Wit & Ramdass. 2006:7).

1.8.13 Value for money

From a procurement perspective, Lyson and Gillingham considers value for money "as taking into account the optimum combination of whole life cost and quality necessary to meet the customer's requirement" (Lyson & Gillingham 2003:418).

1.8.14 Regulations

Regulations are subordinate legislation issued in terms of existing parliamentary laws (Van der Waldt 2002:87).

1.9 Overview of chapters

Chapter 1 (general introduction) provides a general introduction to the dissertation, the background and motivation for the study as well as the research question. This chapter also provides the objectives and approach to the study, clarifies the demarcation of the period of study and provides the method of research. Specific key concepts used in the text are also listed and briefly explained and an overview of chapters provided.

Chapter 2 (conceptualisation of procurement and supply chain management) defines and provides a conceptual overview of the concepts relevant to procurement and supply chain management in the public sector. Supply chain management in the private sector will be touched on in an effort to determine the concept's role in the public sector. Chapter 2 sets the foundations for later chapters. Theory relevant to the main focus of the study is thus placed into context.

Chapter 3 (literature survey) is devoted to the analysis of articles and literature by other authors relevant to both public procurement and related fields of study. The chapter also provides a summary of the findings and recommendations of The Webb Report and the CPAR. Both these documents were crucial in paving the way towards public procurement reform.

In chapter 4 (regulation of public procurement in South Africa) the regulation and procedures of public procurement in terms of the State Tender Board Act and the 1996 Constitution of the Republic of South Africa are discussed.

Examples are also provided of legal actions against departments and the State Tender Board.

In chapter 5 a critical analysis and comparison between the outdated procurement and provisioning practices and the new integrated supply chain management function are done. Characteristics of both the “old” and “new” practices are classified based on written information. The classification is encapsulated in an easy readable matrix. Information from the matrix is used to test what progress, if any, had been made in terms of the Constitutional and PFMA procurement requirements.

Chapter 6 provides a summary of the findings of the study, with an analysis of stumbling blocks that have already been identified and the possible consequences thereof. From the analysis a conclusion was reached based on written information.

1.10 Conclusion

Benjamin Disraeli said: “Change is inevitable in a progressive country. Change is constant” (Goodman 2005:127). After the first democratic elections in South Africa in 1994, large-scale political reforms were introduced to eradicate poverty and underdevelopment. Public Procurement is fundamental to government’s strategy to mould the economy into a sustainable unit (Van Vuuren 2006).

The introductory chapter provided a background and motivation for the study, identification of the units of analysis as well as reasoning for procurement progression from the introduction of the PFMA to the promulgation of the regulations in respect of the framework for supply chain management.

CHAPTER 2

CONCEPTUALISATION OF PROCUREMENT AND SUPPLY CHAIN MANAGEMENT

2.1 Introduction

According to Rugge, Public Administration was traditionally conceptualised as “... its virtuous sister to some, its dull servant to others” (Rugge 2003:177). Behan agrees with Rugge when stating that procurement and purchasing have been seen in some departments as a low level, low profile, low powered activity (Behan 1994:16).

The perception that procurement is “subservient” to line functions severely restricts the contribution thereof to organisations. In this chapter procurement will be discussed as a concept, the methods of procurement in terms of the Constitution of 1996 will be provided, the role of procurement in aspects relating to modern society will be discussed and the role of procurement as an instrument to achieve certain goals will be discussed briefly.

2.2 Ideas on procurement

Sherman defines procurement as “... a business function charged with and qualifying external sources, forming agreements, and administering them so that material and services that enhance the work of the organisation are reliably delivered” (Sherman 1991:9). Trepte complements Sherman’s definition by stating “[p]rocurement (purchasing) is primarily an economic activity. It concerns the economic relationship between vendor and purchaser and, to the extent that transactions occur in the context of a market order, that relationship will be determined by the laws of the market” (Trepte 2004:5).

Pauw is of the opinion that there is a great deal of terminological confusion in scholarly literature and official documentation about the words: “procurement”, “acquisition”, “supply chain”, “purchasing” and “sourcing” (University of South Africa 2005:48; see also Bolton 2007:1, 3 & 67). For example, the American government have been using “acquisition management” rather than procurement since 1984. According to Sherman “[a]cquisitions are likely to require many procurement actions. The procurement process is intertwined with and integral to acquisitions but in government usage, [it] generally refers to the planning, execution, and administration of individual contract actions” (Sherman 1991:21).

Lyson and Gillingham differentiate between “purchasing and procurement.” They consider “[p]rocurement [to be] a wider term than purchasing which implies acquisition of goods or services in return for a monetary or equivalent payment. Procurement, however, is the process of obtaining goods or services in any way including borrowing, leasing and even force or pillage.” They consider procurement to be a more “accurate term” resulting in it being used “... in job titles such as ‘procurement manager’, ‘procurement agents’ and ‘head of procurement’” (Lyson & Gillingham 2003:5).

In South Africa, direction is derived from the 1996 Constitution since the manner in which any organ of state may contract for goods and services are described under the heading “procurement”. The Constitutional mandates of departments allow procurement to take place in various forms such as buying, hiring, letting, granting of any right and disposal of government property.

Behan argues that sourcing and supplier analysis are part of government’s commitment to obtain the best suppliers on behalf of tax payers. He defines sourcing to be “... the identification and (where necessary) development of possible sources of supply”. Supplier appraisal, according to him is “... the systematic investigation of these identified resources”. He identifies trade journals, trade directories, supplier catalogues, visits from supplier’s representatives, trade exhibitions, discussions with other purchasers and

advertising by the buying department to be examples of sourcing methods (Behan 1994:31–34).

In summary: public procurement always has to do with a transaction between the state and an outside party. The apparent tension between the use of the term by Sherman as quoted above and the South African 1996 Constitution, where section 217 is entitled *Procurement*, can be resolved by pointing to this fact. Sherman uses “procurement” to refer to individual instances of such contracts, while the South African 1996 Constitution is referring to these contracts in general. Procurement is not the only form of acquisition because organs of state can also acquire goods internally. Buying or purchasing is not the only form of procurement.

2.2.1 Methods of government procurement

For the sake of clarification, the methods of procurement that were referred to in section 2.2 will briefly be discussed.

2.2.1.1 Buying (purchasing)

Buying in the public sector takes place either by means of quotation or open tender. (Where the need for specific goods or a specific service exists, it is advertised in the Government Gazette for all interested parties to submit their offer). The method of buying the required goods or service depends on the monetary value of the requirement, as determined by National Treasury. But in circumstances such as emergency cases or sole suppliers, the means of procurement can be waived.

2.2.1.2 Hiring and letting

Although leasing is not included in the National Treasury’s definition of procurement, the researcher will provide practical examples in order to differentiate between hiring, letting and leasing. The department of Public

Works for instance hires vehicles for official use from a car rental agency. The Department acts in terms of its mandate to lease accommodation from the private sector, and to let public property to the private sector.

2.2.1.3 Granting of any rights

The granting of rights takes place when government for example, grants servitude over state land for a farmer to get to a main road and granting rights to the private sector to build and manage toll roads. Granting of rights also takes place when taxi drivers are given permission in the form of a permit to use a specific route in a municipal area, or when private companies advertise on bridges on train coaches or on municipal busses.

2.2.1.4 Grants

Van Niekerk defines grants as, “[g]overnment provid[ing] a financial or in-kind contribution to a private organisation or individual as encouragement to provide a service so that the government does not have to provide it. Welfare schemes serve as an example of grants to service providers which government, on its own, cannot achieve” (Van Niekerk 2002:264). It is a moot point whether this is procurement *strictu sensu* (in the strict sense – this is not legal Latin *strictu sensu*, but rather a Latin term in general use).

2.2.1.5 Disposal

Disposal is the final process when an institution needs to do away with unserviceable, redundant or obsolete movable assets. According to the National Treasury, disposal is not only the process of selling, but depending on the nature and condition of the asset an organisation may choose to transfer or destroy assets (Republic of South Africa. Guide for Accounting Officers 2004:7.1.2). The disposal of movable property and letting of immovable property must be at market-related value and to the best advantage of the stage.

Section 5 and 6 of the PPR makes provision for the sale and letting of assets. Noticeably the legislators' neglected to include the aforementioned in the PPPFA. According to Deltas and Evenett "governments can discriminate among bidders by using three policy instruments: price preferences, cost preferences, and direct exclusion of firms from bidding in the first place" (Deltas & Evenett 2006:303). Given these options, the legislator's neglect to include the sale and letting of assets in the PPPFA is again accentuated.

Although Public Private Partnerships (hereafter called PPP) (Republic of South Africa 1999: Treasury Regulation 16) are not part of the "official" definition of public procurement, the inclusion thereof in Treasury Regulations 1999 warrants mentioning under the heading "method of procurement".

2.2.1.6 Public private partnership

South African law defines a PPP as a contract between a public sector institution and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project. Public private partnerships are regulated by means of section 16 of the Treasury Regulations.

(<http://www.ppp.gov.za/Pages/default.aspx>)

2.3 Context of procurement

Not only are sound procurement practices a requirement for optimising scarce resources, but public procurement also holds significant secondary objectives for the South African community. For instance, the use of modern technology is of key importance in the attainment of value for money and procurement as a tool can also deal with contemporary dilemmas.

2.3.1 Public procurement and the economy

Trepte considers public procurement in an economic context "... to mean the act of a public body purchasing or acquiring goods, works and services from the market place. It therefore involves the question of the economic activities and of its relationship with other economic entities operating in the market" (Trepte 2004:9). According to Bolton, South Africa's public sector procurement was estimated to be 14% of the gross domestic product (GDP) in 2007 (Bolton 2007:3).

"Due to the legacy of the apartheid years, South Africa had at the time of writing a "main stream" or first economy that was led by a minority of 13% of the population and an emerging (second) economy of small, medium and micro enterprises owned by historically disadvantaged groups, comprising of the balance of 87% of the population. Government identified public procurement as a key mechanism to bridge the gap between the first and second economy (Van Vuuren 2006:2). "When, where, what and from whom government procures products and services gains crucial importance for the profitability, survival and development of specific economic sectors" (Doyle 2001:217).

Government procurement practices in this highly competitive world market need to match those of the best and most demanding private sector procurement organisations. But where does this view of procurement take us when we know that government departments do not exist to make a profit? (Behan 1994:3) The answer can be found in the three-Es, efficiency, effectiveness and economy. "Economy implies frugality in the use of public money, efficiency on the other hand to sound financial management and effectiveness entails performance and outcomes in the context of government policies and programmes" (Drewry, Greve & Tanquerel 2005:63).

2.3.2 Public procurement as a policy tool

Public procurement is used by the South African government as a tool to achieve socio-economic objectives. In 2005, 60% of Telkom's R4,9 billion capital expenditure was spent on BEE companies and R873 million was spent on procurement from SMEs (Wadula 2006:12–15). From these figures it is evident that public sector procurement has a significant role to play in achieving socio economic objectives, thereby eradicating poverty and unemployment.

The South African 1996 Constitution, specifically section 217, broaches the issue of preferential procurement. The PPPFA is the result of section 217. It aims to (amongst others):

- advance the development of SMMEs and HDIs;
- promote women and physically handicapped people;
- create new jobs;
- promote local enterprises in specific provinces, in a particular region, in a specific local authority, or in rural areas, and
- support the local product.

The PPPFA dictates how the government will go about awarding contracts for goods and services. Public procurement as a policy tool will be described in more detail in chapter 4.

2.3.3 Public procurement as a political policy tool

The role of public procurement in achieving political goals is not only recognised by government, but also acknowledged by the judiciary system. In *Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and Another*, it was stated:

“In our country, government procurement is one of the key mechanisms for ensuring that those previously locked out of economic opportunity by the policies of apartheid, are given an opportunity to participate” (Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and another 2006 JDR 0217 (SCA)).

In the United Kingdom public procurement was used in the past, to achieve overtly political ends by boycotting companies with commercial interests in South Africa (Sparke 1996:43). There is also a growing appreciation of the linkages between specific national objectives and public procurement practices. “As well as having a direct bearing on development-sensitive state programmes, the implementation of government procurement policies reveals much about the governance-related priorities and challenges facing a society” (Evenett & Hoekman 2005:20). In the execution of their political mandate governments must acknowledge the importance of public trust.

Phillips and others are of the opinion that “[e]ffective procurement practices provide governments with a means of bringing about social, environmental and economic reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud” (Phillips, Caldwell & Callender 2007:140). O’Neill, on a more fundamental level, is of the opinion that poor resources management causes erosion of public confidence and deterioration of (an) investment climate. According to her the “... institutions and office-holders on whom transparency requirements have been imposed, are now seen as less trustworthy and less trusted.” O’Neill submits that this situation might be because of a lack of trustworthy performance and lower levels of trust in the institutions and office-holders of which transparency has been required.” She postulates that “[t]hose who have already become suspicious remain suspicious, and a great deal of evidence of change will be needed before they change their minds” (O’Neill 2006:75–76).

2.3.4 Public procurement and technology

Technological developments have added a new dimension to procurement. Asset management, for instance, is simplified by making use of bar coding and bar code readers when issuing movable assets and stocktaking. Manual verification of movable assets can be expensive when considering the manpower and hours utilised for the task. Information technology on the other hand, has the following benefits: faster data entry, greater accuracy, reduced labour and costs and faster access to information which results in better decision-making. However, the advantages also come at a cost; not only cost associated with for instance infrastructure and training, but also with complementary reform such as telecommunications regulations and privatisation (Evenett & Hoekman 2005:20).

2.3.5 The role of government procurement within the socio-economic environment

According to Mabaso, "... there are (within South Africa) more than 10 000 leading buyers (that procure) from government, parastatals and the private sector". "By making tenders worth billions of rand easily and freely available to SME's opportunities are created for these businesses to gain experience and to create a business track record with the government which financiers consider favourably" (Mabaso 2006:16–17).

The practice of governments to favour domestic suppliers over foreign suppliers is placed in perspective by Miyagiwa as being a method of returning tax money to domestic residents which in turn will create more jobs locally as is the case with the Buy-American Act of 1933 (Miyagiwa 2006:347).

As the largest buyer in the country, the South African government has the responsibility to use its purchasing power to mould the economy into a sustainable unit (Republic of South Africa 1997:1). Mattoo, provides global examples with "significant government presence" to be, "defence-related

procurement, state-owned airlines, engines, turbines, transportation equipment, communications, pipelines, air transport services, communications equipment, and a number of utility-related sectors” (Mattoo 2006:281–282).

2.4 Clients of procurement

Not only does the type but also the level of services delivered by government play a vital role in social development. Levine identifies government’s role in the lives of people to be “... from cradle to grave”. Government issues birth certificates, provides public schooling in some way or another, regulates for instance health care, medicine and financial services; thereby playing a big and intrusive role in the lives of people (Levine 1988:3).

“Government institutions form part of the public sector and function at central, provincial and local levels. They all depend on one another and on the community they serve to provide products and services that meet their needs” (Du Toit & Van der Waldt 2008:8). For instance, the Department of Social Development cannot process an application for a child’s welfare grant if a birth certificate has not been issued by the Department of Home Affairs. Practically every aspect of people’s everyday life – including communication, travel, health services, education, and business development – is influenced by the public domain. “It is virtually impossible for South African citizens to escape the personal impact of government and the political process” (Van Niekerk 2002:6).

Government’s service delivery arm is public institutions. To allow for the smooth functioning of the various institutions, goods and services such as stationery, medical equipment, office furniture, quantity surveyors and software technicians are required and often externally procured. A differentiation is therefore made between internal and external beneficiaries of procurement.

2.4.1 Internal clients

Procurement as part of a supply chain practice is essentially a staff or auxiliary function that provides goods and services to line functions that will enable them to achieve government objectives. For procurement purposes government departments make use of a computerised system called Logistical Information System (LOGIS) and payment vouchers are generated by a system known as Basic Accounting System (BAS).

2.4.2 External clients

External clients that depend on government's procurement processes are the "people". Examples of services that government must provide are for instance, national defence, justice, clean air, courts, public health, public schools and basic scientific research, to name a few (Pauw et al 2002:19).

Government's main source of national income is tax, mainly income tax and Value Added Tax (VAT). Taxes are public in two aspects, firstly because individual and company taxes are not voluntary but enforced by law and secondly because taxes are solely to finance expenditure in the public interest. For this reason public goods and services must have tangible positive results to be to the benefit of the people. Within this context, the need for the control of public money becomes clear (Pauw et al 2002:12–13).

2.5 Theory of supply chain management

In 2001 Mentzer submitted that the term "supply chain management" has risen to prominence over the preceding 10 years. He considers it to be a "hot topic" often discussed in periodicals on manufacturing, distribution, marketing, customer management, transportation or related topics (Mentzer 2001:3). In a South African context, a study by Balia focuses on "Fighting corruption in the South African public sector with special reference to cost

and impact”. He also reviewed the contribution that SCM is making towards fighting corruption. He highlights the Code of Conduct for SCM practitioners (Republic of South Africa 2003: Practice Note SCM 4) that was issued together with the PFMA. The code “... binds all SCM officials to a ‘policy of fair dealing and integrity’ in conducting government transactions and a position of trust, implying a duty to act in the public interest” (Balía 2005:213). Despite the aforementioned, Balía asks “[w]hether a rule-based code of conduct can be any more effective than a values-based code of ethics in promoting professional conduct is as difficult a question to answer as whether codes of themselves are effective in creating awareness of ethics in public life” (Balía 2005:226). He is however, of the opinion that SCM introduced a significant change in the procurement of goods and services.

2.6 Concepts of supply chain and supply chain management

In the life span of goods and services certain steps should be followed in order to deliver the required goods to their final destination. According to Vogt et al, “... the supply chain incorporates all the cost, time, transport, storage, and packaging that may be associated with the various stages of the process of conversion in order to supply a finished product” (Vogt, Pienaar & De Wit 2002:7).

Supply chain management entails the planning, design, and control of all the information and material flowing along the supply chain to ensure that customer needs and wants, present and future, will be met in an effective and efficient manner” (Kruger 2006:294: see also Lowe & Leiringer 2006:400). “In essence, supply chain management integrates supply and demand management within and across companies” (Vogt, et al 2002:7). Relevant to the private sector, Kruger et al identify supply chain to be “... that process which starts with the supplier and continues through manufacturing and distribution until the product reaches the ultimate customer ...” (Kruger, De Wit & Ramdass 2006:294). “The cycle is often repeated several times in the journey from the initial producer to the ultimate customer as one organisation’s finished good is another’s input” (Baily

1978:88–89). Vogt et al introduce a new perspective to the supply chain process. According to them, supply chains nowadays “... take into account the return journey that many finished products undergo after being used a considerable time by the end-user”. According to them, this incorporates replacement parts, re-usable packaging “... as well as the disposal of waste and recycling of parts, components or whole products” (Vogt et al 2007:8).

Within the public sector, the same definition provided by Kruger and others, is applicable. In a nutshell: when there’s a need for tangible goods, the end-user identifies the need, quotations or open tenders are used to source the goods from outside suppliers and goods are received at the department, registered and delivered to the end-user. When goods, for instance reach their pre-determined life span, institutions dispose of it in the most economical way for government.

2.7 South African public sector supply chain management

The role of civil society and potential investors in any country should never be underestimated. The importance and application of public procurement is reflected in government’s procurement programmes and policies. Most countries direct their regulation of public procurement towards the attainment of efficiency which is, amongst others, achievable through the implementation of best practice. With the aim of applying best practises, the National Treasury introduced a supply chain management system for implementation by all organs of state on 5 December 2003. Documentation enforcing supply chain management will be discussed in more detail in chapter 4. The phases in South Africa’s supply chain management system are set out in the next sections.

2.7.1 Demand management

The objective of the first phase of supply chain management is to ensure that the resources as per the strategic plan of the department are delivered at the correct time, price and place and that the quantity and quality of those

resources will satisfy the needs (Republic of South Africa 2000a. Guide for Accounting Officers 2004:25).

2.7.2 Acquisition management

During the second phase organisations must determine how the market should be approached. Acquisition management is the phase when attention is given to drafting of specifications, invitation of tenders, closing of tenders, contract award and contract management (Republic of South Africa 2000a. Guide for Accounting Officers 2004:28).

2.7.3 Logistics management

Logistics management can be described as the science of process which includes: planning, implementing and controlling the efficient, effective flow and storage of goods, services and related information from point of origin to point of consumption for the purpose of conforming to customer requirements (Coyle, Bardi & Langley 2003:39). It includes for instance, coding of items, inventory management, vendor performance and transport management (Republic of South Africa 2000a. Guide for Accounting Officers 2004:86–88).

2.7.4 Risk management

Risk management takes place to determine and manage possible risks associated to projects on a case by case basis. In terms of the Guide of Accounting Officers, the institution should allocate the risk to the party best equipped to manage the risk (Republic of South Africa 2000a. Guide for Accounting Officers 2004:40). Methods for risk management are for instance, insurance, warrants and performance security provided by the successful service provider (Bolton 2007:112–113).

2.7.5 Disposal management

In terms of the National Treasury, disposal management refers to the disposal and letting of state assets, including the disposal of goods no longer required (Republic of South Africa 2003: Practice Note SCM 4: section 3(b)).

2.7.6 Supply chain review

Here a monitoring process takes place, by undertaking a retrospective analysis to determine whether the proper process is being followed and whether the desired objectives are achieved (Republic of South Africa 2000a. Guide for Accounting Officers 2004:11).

2.8 Conclusion

In an effort to achieve the ideals of good governance in public procurement, government acknowledged in the Green Paper on Public sector Procurement Reform that fundamental institutional reforms will have to be implemented. Such reforms need to promote efficient and effective procurement systems and practices which will enable government to deliver not only the required quality and quantity of services to its constituents but also promote their general welfare and quality of life.

In this chapter the concept of procurement and the concept of supply chain management were dealt with. The difference in terminological meanings of the words “procurement”, “acquisition”, “supply chain”, “purchasing” and “sourcing” were provided. The methods available for the procurement of goods and services were identified and briefly discussed. The reader was also informed of the shortcomings in the PPPFA with regard to disposal.

Under the heading *Theory of supply chain management*, the six phases within the supply process were discussed. The six phases were introduced

to cover the whole procurement process in an effort to obtain and dispose of goods and services in an economic, effective and efficient manner. Risk identification, for instance, allows institutions to identify possible areas of risks beforehand and to develop plans to deal with these risks. Supply chain review, on the other hand, allows institutions to review the effectiveness of their procurement system.

In the following chapter, articles and literature relevant to public procurement and related fields of study are reviewed as a basis for examining relevant regulations and procedures within the South African public sector.

CHAPTER 3

LITERATURE SURVEY

3.1 Introduction

Undertaking scholarly research on a topic such as public procurement reform depends on related work done by other scholars. In this chapter the researcher intends to analyse the writings of various scholars and practitioners. In order to do this the researcher undertook a systematic survey of existing literature both nationally and internationally. In contrast with most developed countries, South Africa lacks literature that examines existing processes, procedures and applicable legislation. Although various authors wrote about public procurement from various perspectives, the period between the promulgation of South Africa's supply chain management system and the writing of this dissertation is mostly captured in scholarly literature and not yet well covered by research.

3.2 Literature study

For the purpose of this dissertation, public procurement will be discussed by means of studies where the authors mainly concentrated on procurement in terms of political, legal, procedural and descriptive aspects. Focus is placed in literature on *procurement as a political and policy tool* due to government's drive towards social and economic upliftment through, amongst others, public procurement.

The studies, together with their authors can be summarised as follows:

TABLE 2: LITERATURE STUDY TAXONOMY

Literature study		
Political	Legal	Research
Gounden Studies sponsored by WTO and others	Labuschagne Bolton Arrowsmith	Labuschagne Studies sponsored by the World Bank Arrowsmith and others

3.2.1 Political approach

Gounden was part of the first cadre of management after 1995 tasked with implementing the new government's vision. His research focused on the impact of South Africa's preferential procurement policy in the construction industry. He also examined the way in which government had made provision for the use of procurement to deal with past discriminatory policies and practices. Gounden found that the financial premiums borne by the state in adopting affirmative procurement policy in the construction industry proved to be insignificant when compared with the initial estimated outcomes and the overall benefits (Gounden 2000:3–11).

He also established that the use of affirmative procurement in the construction industry has had a positive impact on the participation of affirmable business enterprises (ABEs). Bolton defines ABEs as businesses that are owned, managed and controlled by previously disadvantaged persons and which have annual average turnovers within a prescribed limit (Bolton 2007:7–8; see also Shezi 1998). Gounden's study found that the financial premium incurred by the state is insignificant. He also concentrated on how procurement was utilised as *a means to an end*, the end being the

achievement of preferential procurement in the construction industry. Gounden has a clearly demarcated field of study focussing on the role of procurement in achieving government's political goals.

To expand Gounden's study to the international arena, the researcher will provide contributions of other authors on the topic of preferential procurement policies. In the quest for achieving political goals, authors such as Arrowsmith acknowledges that secondary policies can result in higher standards of social, political and environmental matters. Notwithstanding this, Arrowsmith warns that "the cost of procurement policies are often less visible than those of other instruments, such as subsidies or training, (since) procurement policies often do not require the parliamentary approval necessary for, for example, regulatory programmes or tax breaks" (Arrowsmith 2006:116–117). In agreement with Arrowsmith's caution, the researcher suggests that the overall financial implication for all citizens should be used as a benchmark to determine the actual value for money achieved in South Africa.

Procurement preference is not only fostered in developing countries, but is also a reality in developed countries. One of the main reasons for this is to "... return tax money to domestic residents, create more jobs at home and reduce imports" (Miyagiwa 2006:346). As already stated in section 2.3.1, governments' expenditure in terms of public procurement represents a huge portion of any country's gross domestic product. According to Choi "... the world's total potential non-defence government procurement market in 2003 was estimated to be close to \$1.5 trillion a year" (Choi 2006:249).

The mentioned amount provides valuable information to the WTO in pursuit of their objectives. One of the WTO's primary objectives is to raise global living standards through liberalisation of international markets. The WTO is of the view that free trade maximises the use of global resources and global wealth. Free trade allows governments "... to enjoy a comparative advantage in the production of goods or services when it can produce these relatively efficiently in comparison with other states" (Arrowsmith 2003:8; 25).

The WTO has 22 signatories that strive towards “contributing to greater liberalisation and expansion of world trade, eliminating discrimination among foreign products/services or foreign suppliers; and [to] enhance the transparency of relevant laws and practices” (Hoekman & Mavroidis 1995:2).

Martin Fernández asks whether “contracting authorities apply discriminatory practises systematically?” If this should be the case, he distinguishes between two situations. The first being when “... discriminatory practises may be [the] result of complying with national regulations, rules or even political guidelines requiring such conduct from awarding authorities.” According to him, when there is a political agenda various degrees of public accountability are required. In the second situation, “... biased decisions [are] adopted outside the framework of binding obligations on the independent initiative of contracting parties.” He is also of the opinion that discriminatory practises takes place to ensure votes or financial rewards (Fernández 1996:23). According to Labuschagne South Africa also had, at the time of his study, a system of local preference when awarding public procurement contracts. Preference was mainly directed towards the development of marginalised regions. He is however, of the opinion that secondary objects were mostly directed towards ensuring that a minority’s interest remains cardinal (Labuschagne 1985:289).

On the other side of the coin, Fedrico Trionfetti identifies two types of inefficiencies due to discriminatory procurement: the first being the inefficient production of government output and secondly inefficient specialisation of the country (Trionfetti 2006:3), the latter having a direct implication on the economy as a whole.

As one of the WTO’s signatories, the USA is criticised because of the Buy American Policy. The USA has an explicit policy of preference, whereas other signatories do not. In the USA’s defence Mattoo found “... that under certain conditions it may simply not matter if governments discriminate in their procurement” since trade is unlikely to be affected, also that the real

effects "... [are] likely to enhance the welfare of the procuring country" (Mattoo 2006a:43).

South Africa's PPPFA is just as explicit. The PPPFA was introduced to mainly deal with secondary objectives. Procurement has taken preference in South African's supreme law section (217(3)). Constitutionally public procurement must take place in terms of the five Constitutional principles, but recognition of the achievement of social objectives is one of the primary contributions when procuring goods and services. Institutions "may" award points for the "promotion of export orientated production to create jobs" (PPPFA), but they are not allowed to dispense with the allocation of points for HDIs.

Bolton compliments South Africa's preference point system created by the Procurement Act and Regulations and is positive about the balancing of costs and "benefits in the use of procurement as a policy tool" (Bolton 2007:276). It is suggested that besides the aforementioned, figures are not provided of the number of HDI companies that due to institutions' late payments, are placed in financial dispute and in some instances liquidated.

The researcher completes this section with Arrowsmith's perception of the protection of industries. According to her the protection of industries is mainly to protect political considerations rather than genuine economic concerns. She describes this statement in terms of infant industries, "[t]he infant never outgrows its infancy, and 'temporary' preferences and subsidies tend to be extended through adolescence, adulthood and premature senility" (Arrowsmith 1996:11).

3.2.2 Legal approach

Most governments have developed procurement policies and mechanisms similar to the principles captured in section 217 of the South African Constitution. These governments are, amongst others, aware of the potential benefits to a nation where regulated procurement takes place.

It is submitted that the output of any tender process should be to enter into legally binding contracts. This can only be achieved if the processes followed from identification of needs up to the final award of a contract were above reproach.

Arrowsmith defines procurement as "... the function of purchasing goods or services from an outside body". According to her the process takes place through contractual arrangements, in line with three categories – being construction services, supplies and services (Arrowsmith 1996:1–4). Bolton complements Arrowsmith's processes by identifying three stages of procurement, being the planning stage, the process of procurement and the contract maintenance or contract administration stage (Bolton 2007:9). It is within these stages that those responsible for the procurement process should be aware of the consequences of their actions or inactions.

Within the procurement process, Behan considers a contract to be "a legally binding agreement between two or more parties" (Behan 2004:18). For a more practical perspective, Behan provides the most essential elements that form part of a contract:

- an offer
- an unqualified acceptance of an offer
- consideration
- an intention to create a legal relationship
- the capacity of the parties to enter into a contractual relationship
- the lawfulness of the object of the contract
- reality of consent

Bolton found that aside from a few shortcomings the legal regime in South Africa generally gives adequate effect to section 217 of the 1996 Constitution. She concluded that the procurement principles "... serve to prevent manipulation by organs of state in the award of government contracts and give power to the courts to review government procedures and decisions." She is of the opinion that the principles in section 217 will

form part of South Africa's government procurement system for a long period of time (Bolton 2007:71).

In the application of the Constitutional principles, Bolton provided explicit examples of shortcomings in terms of the concepts competitive and cost-effective, fair and transparent. It should however, be noted that she did not provide examples of legislative shortcomings regarding equitable.

The researcher will provide only a few of the shortcomings under every principle. According to her (Bolton), "... legislation [...] generally gives effect to the principles of fairness and transparency." She, however, identified shortcomings concerning tender opening, specification writing, acceptance of alternative offers, and changes to specifications (Bolton 2007:208). With reference to "competitiveness", she is of the opinion that advertisements in the context of supplier lists are not "... sufficiently wide", and provision is not made for "... proper safeguards to be in place when it comes to petty cash purchases" (Bolton 2007:175). Although acknowledging the presence of processes aimed at achieving "cost-effectiveness", she highlights the absence of "... guidance on the different factors that organs of state may take account of in the evaluation and selection process." Another point of concern for her is that the monitoring of contractual performance is left to the discretion of institutions. The attainment of value for money is thereby not regulated and enforced by procurement processes (Bolton 2007:129). Bolton discusses "equality" under the heading "procurement as a policy tool". She is positive of the advantages that preferential procurement holds, but submits that "... racial inequality and both conscious and unconscious racial discrimination still persist in South Africa." Bolton is also of the opinion "... that it is often difficult to accurately estimate, on the one hand, the cost involved in policy promotion and, on the other hand, the benefits that may be achieved thereby" (Bolton 2007:253–257).

Arrowsmith contributed as part of a "three member team" researching "The economic impact of the European Union Regime on public procurement: lessons for the WTO in 1998" (Gordon, Rimmer & Arrowsmith 1991:431). The authors found that the implementation of European procurement

legislation resulted in some price savings by the public sector for member states. They also found among the surveyed purchasers "... that the application of the legislation has created additional administrative costs." The following example was provided; "... in many cases an increased number of interested suppliers had emerged, without this translating into any change to the supplier base and any consequent efficiency savings. The costs of applying the rules were exacerbated by the fact that, in view of the potential threat of legal action, purchasers tend to adopt a cautious and defensive approach in applying the legislation" (Gordon et al 1998:449–450).

A study that can be categorised under both administrative and legal approach is that of Labuschagne. His study "Staatskontrakte ter verkryging van goedere, dienste en werke" is a PhD thesis published in 1985 (Labuschagne 1985:289–291). Under this dispensation, it can be said that Labuschagne aims to identify the similarity between public and private procurement contracts.

He considers a contract to be any agreement under administrative law that takes place in terms of mutual trust and agreement (Labuschagne 1985:3–9). With reference to government contracts, Labuschagne puts it that it should be understood to be a combination of both private and administrative law. He, however, cautions that the word "combination" should be understood to mean "supplement" since the South African law, as yet, does not acknowledge government procurement contracts under administrative law. He uses Britain as an example where legal actions relevant to public procurement seldom takes place in a court of law since disputes are dealt with by means of arbitration (Labuschagne 1985:57–58).

Labuschagne discusses three types of contracts that government institutions can enter into, the first being general term contracts. This type of contract takes place when one contractor is the sole provider of a pre-determined article for a specific period of time against a specific price. Blankets for use in government hospitals and correctional and social services are an example under this type of contract. Contracts for specific

goods or services are another type of contract that is entered into when specific goods or services are required for one specific institution. For instance the procurement of services on behalf of the Department of Agriculture takes place under contracts for specific goods or services. The last type of contract that can be entered into, takes place in terms of delegation and exemption. In this case government institutions procure goods and services below R1 000 (this amount has since increased) (Labuschagne 1985:101–103).

3.2.3 Procedural approach

Arrowsmith and Hartley describe “[p]ublic procurement as an area of great economic, political and legal significance, representing a significant proportion of economic activity in most countries.” They are of the opinion that “[g]overnment procurement involves a complex set of choices embracing what to buy, from whom to buy, how to buy, and selection of the choice criteria” (Arrowsmith & Hartley 2002: introduction).

Labuschagne also contributes under this heading. His study provides readers with broad information of South Africa’s tender processes in 1985. He finds a similarity between South Africa, the USA and Britain’s procurement system, whereby one institution is responsible for procuring goods and services on behalf of other institutions. In South Africa, Treasury is the responsible institution (Labuschagne 1985:11–14). Labuschagne does not discuss procurement according to definite tender stages but provides a chronological discussion of the procurement function. Procurement is discussed under the headings “tender invitation”, “submission of tenders”, “consideration and award of a tender”. These headings capture extensive detailed information that also includes examples of court cases relevant to these stages (Labuschagne 1985:114–151).

According to Labuschagne two methods of procurement are available, the one by means of competitive tendering and the other, negotiation. In terms of competitive bidding, sealed and confidential tenders are received from various tenderers, broad and complete specifications are provided and the

contract is usually awarded to the lowest price tenderer. Negotiation as a method of procurement is described as any method that does not take place in terms of competitive bidding. Labuschagne acknowledges that although said description is not comprehensive, little doubt exists as to when negotiations should take place. Labuschagne identifies four possible scenarios: the first being when government is unable to provide specifications or in the case of confidential tenders; secondly, when two or more capable and interested tenderers are not in agreement with the provided specifications; the third in the case of an emergency when the compilation of competitive specifications is not practical, and lastly, when price is not the only considering factor (Labuschagne 1985:98–99).

As part of procurement control, Labuschagne highlights a dual control system. He submits that public procurement is regulated by means of various treasury policies but accounting officers (*rekenplichtige beamptes*) stay responsible for this function within their respective departments. Payment should only be effected once confirmation of the achievement of value for money is received and also when goods or services are provided against the required standards. Labuschagne is of the opinion that the dual system contributes to minimising irregular expenditure (Labuschagne 1985:86).

To conclude, Labuschagne submits that although government procurement is regulated by legislation, policies and delegations, administrative law is not applied. He, however, is of the opinion that administrative law should be recognised in those instances where regulated tender activities take place. His study therefore finds that private law is primarily used and only in certain instances, public law.

Bolton identifies three stages in government procurement, namely the planning stage; the process of procurement; and the third stage being contract maintenance or contract administration (Bolton 2007:9). Long, for the sake of clarification, distinguishes between contract administration and contract management. According to him contract administration encompasses the tasks to be accomplished, whereas contract management

deals with how these are accomplished and how they are controlled (Long 2000:528).

Notwithstanding the three stages in government procurement, Bolton goes into more detail when she identifies "... six key events where use is made of tendering as a procurement method". According to her, similar events may apply when procurement takes place by means of, for example quotations. The events are: "(1) the solicitation of tenders; (2) the submission of tenders; (3) the receipt and evaluation of tenders; (4) the award or acceptance of a tender; (5) the conclusion of a contract; and (6) the maintenance and administration of the concluded contract" (Bolton 2005:13–14).

3.2.4 South African government research

Under this heading the researcher will provide three studies where it is found that the procurement policies are good but that problem areas can be found in the execution of the policies.

A valuable contribution in terms of public procurement research in South Africa can be found in a study initiated by the Eastern Cape Provincial Government. The Provincial Department realised that the twelve Provincial Departments within the province was in dire need of intervention in their purchasing processes. The Department of Finance was chosen as a pilot study to identify areas for improvement in processes.

From this initiative an academic study by Randall developed that acknowledged the opportunities that supply chain management hold for the public sector. Randall's objectives were to conduct a procurement diagnosis that can create significant sustainable strategic sourcing and infrastructure improvements and to assess E-Procurement readiness and the possible roll out of E-Procurement Systems (Randall 2002:10).

While concentrating on the procurement processes and distribution in the government sector, Randall identified the following problem areas: Firstly, the procurement processes used were significantly inadequate; and a key finding is that procurement is not a strategic priority, with the result that the purchasing processes were not adding any value to the organisation (Randall 2002:11). To add to this, Randall found that “[i]n many organisations purchasing staff are often seen as obstacles rather than partners in completing the tasks” (Randall 2002:105). From a managerial perspective, Randall concluded that procurement is seen within a broader strategic context to develop and implement a preferential procurement management framework (Randall 2002:82).

The need for monitoring SCM practises becomes a reality when considering the total Consolidated General Government Procurement in South Africa. According to Randall the estimated “amount of R65 billion for the 1999/2000 financial year, constitutes approximately 13% of GDP and represents some 30% of all government expenditure” (Randall 2002:80). Randall found that although a perception existed that SCM only applies to a manufacturing concern, there are similarities between the key businesses processes of SCM found in a manufacturing organisation that also apply to a service organisation. Within this context Randall is of the opinion that the development of procurement strategies, rationalising the existing supplier’s base and implementing a supplier development programme were eminent (Randall 2002:17).

A significant finding in her analysis is that “... the current [in 2002] processes are not the most efficient and effective” but she is of the opinion that “effectively the policy is good [but] the procedures are weak” (Randall 2002:80).

Under this heading it is appropriate to also give attention to two studies that paved the way towards the introduction of an integrated SCM system within South Africa.

The Webb Report, published in April 2000, was sponsored by the Australian Agency for International Development (AusAID) and The National Treasury. The Report was part of the South African Capacity Building Program; and The Country Procurement Assessment Review (CPAR), published in February 2002 was a joint undertaking of the South African government and the World Bank. The CPAR identified certain deficiencies in current practices relating to governance aspects.

The studies focussed on the legal framework, rules and procedures, prevalent procurement practices and possible solutions for improving the South African public procurement system” (The National Treasury Strategic Plan 2003–2006:66). In April 2000 The Webb Report was prepared under the auspices of AusAid and the South African Capacity Building Program. The Webb Report found the South African procurement system is not wrong in the way that it functions but rather that it is centralised and process-driven. Five years before The Webb Report, the Green Paper on Public Procurement Reform in South Africa stated that organs of state should become best practice clients and intelligent customers (Republic of South Africa 1997: paragraph 2.2.2). There is some resemblance between the findings of The Webb Report and the Green Paper. Where applicable, these will be highlighted.

The Webb Report recommended five potential changes to the South African procurement system. First of all, the report suggested improved tracking of assistance to small, medium and micro enterprises (SMMEs) and historically disadvantaged individuals (HDIs). According to Webb there are insufficient procedures in place to accurately assess the effectiveness of the preferential procurement policies in determining whether the target group are reached. As part of the PPPFA, procedures had to be set in place to determine how effective the act has been in directing preferences, and what the outcomes have been (Webb 2000:10).

A further recommendation is that the National Treasury should be responsible for procurement policy and the Tender Boards should be abolished. During the period reviewed by Webb, the responsibility for

procurement policy and practice rested with the Office of the State Tender Board within the portfolio of the Minister of Finance. The Office of the State Tender Board served the Tender Board which was responsible for ensuring that policies and processes have been correctly followed and to approve the award of certain delegated contracts (Webb 2000:12; see also Van Vuuren 2006:3).

The Green Paper on Public Sector Procurement Reform in South Africa states that the procurement system through Tender Boards is cumbersome and in some instances results in delays of functional services performed by organs of State. The Green Paper already then recommended that the role and functions of tender boards need to be critically re-examined in view of South Africa's developmental objectives together with its programme to urgently deliver without undue delays (Republic of South Africa 1997: paragraph 2.3).

The Webb Report confirms that considerable investment should be made in training of procurement staff. The Green Paper has the same recommendation. Procurement staff should be trained in procurement in general and also in the specific areas of SCM, total quality management, customer focus and continuous improvement (Webb 2000:21; see also Van Vuuren 2006:3).

In line with global trends [in 2000], The Webb Report also indicates that procurement needs to be more cost-effective – and that does not necessarily mean getting a cheaper price. It means doing procurement better, smarter and at less internal cost (Webb 2000:2; see also Van Vuuren 2006:3). The concept *cost-effective* is one of the procurement pillars that will be further discussed in chapter 4.

Lastly, a migration to commercial information technology in order to follow the path of electronic commerce is suggested. According to The Webb Report, electronic commerce comprises of normal commercial transactions which includes ordering, delivery of receipts, invoicing and payment – all done electronically. Due to the rate of implementation of information

technology by SMMEs, electronic commerce cannot be considered to be the sole solution for procurement business practices at government level. The Green Paper states that world competitiveness depends as much on a comparative advantage in the public policy area as it relies on technology (Republic of South Africa 1995: paragraph 2.2.1). Therefore, if government does not want to be found in a reactive position when pressure for the implementation of electronic commerce arises from the business sector, major policies have to be developed on the implementation of this end-to-end procurement method (Webb 2000:29).

No reference is made to the ST36 and ST37 in the report. It is therefore not clear whether these documents were consulted to formulate the conclusions made. The researcher's analysis in chapter 5 will allow her to determine whether the regulatory changes made to public procurement deal with some of the issues identified by The Webb Report.

The Minister of Finance granted approval for a Joint Country Procurement Assessment Review (CPAR) to be undertaken by the National Treasury's Supply Chain Management unit in collaboration with the World Bank, during 2001 (The National Treasury Strategic Plan. 2003–2006:66). The findings would be part of government's assessment of the procurement reform objectives.

The investigating team found that a number of important recommendations of the Green Paper had not been implemented. While new acts were passed, legal and institutional reform did not take place, leading to policy fragmentation and confusion relating to the implementation of new acts (Van Vuuren 2006:3). The deficiencies identified were summarised under issues relevant to governance and aspects pertaining to the interpretation and implementation of the PPPFA and its associated regulations (Webb 2000:3).

3.2.4.1 Governance issues

According to the CPAR, a single legislative framework for the three spheres of government is required to guide procurement reform initiatives. Government needs to replace the outdated and inefficient procurement and provisioning practices with a SCM system that will allow for a systematic competitive system for the appointment of consultants. The SCM function must be fully integrated with the financial management processes in government and should conform to internationally accepted best practices. Minimum norms and standards need to be set in order to promote uniformity in bid documentation, advertising, receipt and adjudication procedures. The CPAR further identified a need to monitor value for money performance (Webb 2000:3).

3.2.4.2 Implementation of the PPPFA and its associated regulations

Van Vuuren summarises the alleged deficiencies relevant to the implementation of the PPPFA as follows:

- Preferential procurement policies are not well formulated in organs of state due to a lack of national targets.
- Qualification standards are insufficient or not adequately verified.
- The cost and outcome of the preferential system is not adequately assessed to evaluate the merits of the system.
- The National and Provincial Tender Boards do not adequately evaluate who qualifies as a “disadvantaged enterprise”, since 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 (Van Vuuren 2006:4).

The CPAR identified three policy interventions in an effort to deal with the identified deficiencies. Firstly, government should introduce an integrated SCM function not only to replace the outdated procurement and provisioning processes, but to also introduce internationally accepted best practice principles that will deal with government's preferential procurement policy objectives. Secondly, government needs to introduce a systematic competitive procedure for the appointment of consultants. A competitive system will allow for the acquiring of advice in an unbiased manner without any affiliation which may cause conflict of interest (Webb 2000:4–5). The third policy intervention suggests a national legislative framework to enforce minimum norms and standards and uniformity in respect of SCM practices and the interpretation of policy objectives.

The Regulatory Framework for Supply Chain Management was approved by the Minister of Finance and took effect on 5 December 2003. The Framework was promulgated two years after the Joint Country Procurement Assessment Review was completed and six years after the Green Paper on Public Procurement Reform in South Africa. If the South African procurement and provisioning system is so outdated, one can only speculate on the progress that could have been made if the Framework for SCM had been implemented four years earlier. Of significance to the study of the researcher is the absence of any reference to the ST36 and ST37 in the CPAR, especially so if one takes into account that this study was initiated by the National Treasury.

3.3 Conclusion

While authors such as Gounden is of the opinion that the PPPFA is achieving what government intended for it to achieve, research conducted by government found that since the cost and outcomes of the PPPFA are not assessed, the merits of the system cannot be evaluated. On a more practical level, Arrowsmith submits that secondary policies can result in higher standards of social, political and environmental matters. Contrary to the advantages recorded by Gounden and Arrowsmith, Trionfetti is of the

opinion that discriminatory procurement within a country leads to inefficient production and inefficient specialisation.

Bolton considers South Africa's legal regime to give adequate effect to public procurement in terms of the Constitution. With regards to the five Constitutional principles, she highlights several shortcomings in the practical application of it. When procurement legislation is enforced on WTO members, Arrowsmith suggests that a hike in administrative costs take place. The Webb and CPAR Reports highlighted aspects that required intervention in the manner in which public procurement took place in South Africa.

Chapter 4 identifies legislation relevant to public procurement. In this chapter the five Constitutional principles are broadly discussed and applicable court cases are quoted.

CHAPTER 4

REGULATION OF PUBLIC PROCUREMENT IN SOUTH AFRICA

4.1 Introduction

Constitutional change in South Africa occurred at a time when the acquired role and functions of governments were being reviewed across the globe (Calitz 2006:5). Not only did Constitutional change take place, but the public sector was also restructured. Restructuring affected the nature of public goods and services to be provided by the different tiers of government and also the groups of individuals who benefit from public goods and services (Calitz 2006:6).

Chapter 4 examines South African legislation that governed public procurement before and after 1995. The first part of the chapter focuses on the legislation that, according to government, required reform, the so-called pre-PFMA regime. The latter part of the chapter provides an overview of procurement policies that were adopted as part of the post-PFMA regime. Chapter 4 lays the foundation for the writer to consider in chapter 5 whether improvements were made for the better or not.

4.2 South Africa's procurement development

In chapter 1, the researcher provided the text that indicated the position that public procurement held in the then ruling party's legislative framework. For this reason the two documents will not again be dealt with under this heading. South Africa's Constitutional history developed from the Westminster system of parliamentary sovereignty to one with a supreme Constitution (Van Heerden 2007:33–44). Being the supreme law, consideration will first be given to how the Constitution brought forth statutory procurement reform.

4.2.1 Interim Constitution

South Africa had an Interim Constitution (Act 200 of 1993) that was drafted during the negotiating process of the Convention for a Democratic South Africa (Codesa) (Venter 1998:22). The Interim Constitution dealt with procurement in section 187, under the heading “Procurement administration.” In terms of the aforementioned section, an act of parliament and provincial laws regulated the procurement of goods and services via independent and impartial tender boards. The section stipulated that procurement had to be fair, public, competitive and tender boards had to, when requested, give reasons for their decisions to interested parties (Republic of South Africa 1993).

Administration is derived from the Latin *ad-* (to) and *ministrare* that means to serve. Administration implies that the community appoints someone and endows him or her with social trust and power to guide their living and give meaning to it. One of the characteristics of administration is that it requires an exceptionally high standard of managerial skill to achieve the aims of institutions successfully (Botes et al 1996:169–179). Semasiology (Botes et al 1996:276 describes semasiology as the study of the meaning of words) allows the writer the leeway to conclude that the writers of the Interim Constitution intended for procurement administration to take place through a system that allows institutions to contract for goods or services in a manner that will serve the needs of society, and for public service management to be involved in attaining these goals.

The latter part of section 187 of the Interim Constitution whereby tender boards had to, when requested, give reasons for their decisions to involve interested parties, does not form part of the 1996 Constitution. The 1996 Constitution added the term “transparent” to the manner in which institutions should contract. The meaning of transparent encapsulates more than just “giving reasons”, making the application of the 1996 Constitution broader. The term “transparent” will be discussed in paragraph 4.3 together with the other Constitutional procurement principles.

Government procurement gained constitutional status through section 187 of the Interim Constitution and this position was confirmed in the 1996 Constitution. Although the description of the manner in which government procurement must take place has changed from the Interim to the Final Constitution, the political and economic significance thereof was reconfirmed.

4.2.2 The State Tender Board

The State Tender Board Act 86 of 1968, as amended, was established to provide for the regulation of procurement for supplies and services, the disposal of movable property, the hiring or letting of anything, the acquisition or granting of any right for and on behalf of the State and for the establishment of the State Tender Board, to provide for the establishment of regional tender boards and to define their functions (Doyle 2002:37).

4.2.3 State Tender Board Regulations, 1 July 1988

According to Doyle the term “state” only covers national government departments; provincial governments have their own acts “that regulate the procurement of goods and services by their provincial departments” (Doyle 2002:37). With the promulgation of the State Tender Board Regulations, the power of the State Tender Board was extended so that the procurement of goods and services may only take place through the auspices of the State Tender Board (Doyle 2001:220). The State Tender Board provides procedural and directive policies to national departments for the execution of their procurement functions. These policies form part of the researcher’s comparison of the two regimes and will be discussed in chapter 5.

Changes in the manner in which public procurement must take place, was effected by the 1996 Constitution. The foundation of development can be found in history. For this reason a general overview is provided.

4.3 The Constitution of the Republic of South Africa, 1996

Government procurement is captured in chapter 13 under the heading “Procurement”. In terms of section 217(1), public sector procurement should take place in a manner that is fair, equitable, transparent, competitive and cost-effective. Haripersadh and Moodley, identify public procurement as having an overall impact on the economy of the country and should therefore be read in conjunction with portions of section 146 of the Constitution (Haripersadh & Moodley 2003:152). Section 146 states:

“(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions are met:

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies;
- (c) the national legislation is necessary for—
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.”

In an article by Pauw and Wolvaardt, the writers note "... that the five requirements were not explicated in detail in the 1997 Green Paper on Public Sector Procurement Reform postdating the Constitution." According to them, one should assume that concepts such as "... transparency and fairness permeate the Constitution" (Pauw & Wolvaardt 2009:71).

The 1996 Constitution refers to principles known as the four pillars of world class procurement, being value for money, open and effective competition, ethics and fair dealing as well as accountability and reporting. They are called pillars because if any one of them is taken out, the procurement system falls down (Webb 2000:6). Within the South African procurement context, a fifth political imperative is identified, namely, equity (Van Vuuren 2006:3).

Pauw and Wolvaardt introduce a new dimension to the application of South Africa's Constitutional principles. They examine the relationship between the principles and note that although some of them go hand in hand, such as fairness and equitableness and cost-effectiveness and competitiveness, sometimes a trade-off between meeting the criteria will be inescapable. "[f]or example, too much transparency may hamstring competitiveness and the consideration of too many tenders will work against cost-effectiveness" (Pauw & Wolvaardt 2009:68).

Bolton agrees with Pauw and Wolvaardt when stating "... the non-use of competitive procedures does not necessarily mean that an organ of state did not attain value for money." Bolton continues, "... the principle of cost effectiveness or efficiency may, at times, limit or qualify the use of competitive procedures". When use is made of competitive procedures, such procedures "... must give rise to efficiency and cost effectiveness" (Bolton 2007:46; see also Heal 2006:59–68).

The five Constitutional procurement principles are not only enforced by the supreme law, but also forms part of the accounting officers' responsibilities in terms of section 38(1)(a)(iii) of the PFMA. Various aspects of the PFMA were highlighted throughout this dissertation, and for this reason a broad

discussion under the heading PFMA will not take place. The researcher will now provide a comprehensive discussion of the five principles. In defining the principles, consideration was given to relevant dictionary meanings of the terms and the subsequent importance thereof for public procurement.

4.3.1 Fair

Bolton captured the most relevant dictionary meanings ascribed to “fair” in a government procurement context as: “... free from discrimination, just and appropriate in the circumstances, impartial, in conformity with rules or standards, treating people equally, unbiased, uncorrupted, and unprejudiced” (Bolton 2007:46). According to Pauw and Wolvaardt, fairness “... is much more than a legal requirement: it is the basis of civility.” They submit that “[f]airness relates to getting what you deserve: due process and just allocation” (Pauw & Wolvaardt 2009:71–73).

According to Bolton, government procurement is of an administrative law nature and “fair” as it stands in section 217 of the 1996 Constitution “... refer[s] to procedural fairness as opposed to substantive fairness.” In short, procedural fairness is concerned with the manner in which a decision is taken, whereas substantive fairness examines whether the decision itself is fair or not (Bolton 2007:47).

In *Laingville Fisheries (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2008, both substantial and procedural fairness were used as factors in determining “the requirement of administrative reasonableness in review proceedings.”

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the

nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution” (Laingville Fisheries (Pty) Ltd v The Minister of Environmental Affairs and Tourism (C)).

Bolton considers “... procedural fairness in the relationship between an organ of state and private contracting parties “... to mean that an organ of state should afford potential contractors sufficient access to the procurement process. Government contracts should be widely advertised, all contractors should be familiar with the rules of the competition and all contractors should be afforded enough time to participate in the process” (Bolton 2007:48).

In *South African Post Office LTD v Chairperson, Western Cape Provincial Tender Board, and others*; the complainant argued that the tender process lacked transparency due to the weighting criteria for award of tenders not being disclosed prior to evaluation of tenders.

The court held that since all the tenderers were treated equally, “(n)one of them received any information which enabled it to gain any advantage over any of the others (...), “the system of procurement was clearly fair, competitive and cost-effective.” In other words, procedural fairness did take place (SA Post Office Ltd v Chairperson, Western Cape Provincial Tender Board and Others (C)).

4.3.2 Equitable

The *Collins dictionary and thesaurus* reconfirms the interconnection and relation between the principles “fair and equitable” (Gilmour 2002:260).

Pauw and Wolvaardt confirm the interconnection when they submit that "... 'equitable' simply means 'fair' and 'equity' or 'equitableness' therefore means 'fairness'." They are however, "... convinced that the lawgiver did not intend just to give the same idea two names from an abundance of caution" (Pauw & Wolvaardt 2009:74).

Whereas "fair" considers the manner in which decisions are taken, "equitable" should be aimed at improving the position of vulnerable groups in South Africa. The intention of government in terms of section 217(1) with the terms "equitable" is to ensure that "[i]nstead of treating all groups exactly the same, groups who face different levels of resources and development should receive different treatment" (Bolton 2007:50). Equity also finds application in Wessel's understanding of affirmative action. According to him "... affirmative action is seen in the context of equality and equity, it is considered to be a means to enable the disadvantaged to compete competitively with the advantaged of society" (Wessels 2005:126). Equitable is therefore not only "... about allocation, but is also according to [...] a right given to a group of people" (Pauw & Wolvaardt 2009:74). In this context, Fernández's definition of social policy is appropriate where he defines social policy "... as any purposeful governmental action intended to improve the social welfare of the whole or part of the same population" (Fernández 1996:39).

Equality in terms of public procurement can also be heard by an equality court. In the case between *Manong and Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape Province and another*, the appellant brought an application in the High Court (sitting as an equality court) for an interim interdict preventing the respondent from processing the tenders received by it for the upgrading of certain roads pending the finalisation of a review application in that regard. In essence, the appellant's complaints related to the allocation of tenders by the Department for the upgrading of a number of roads in the province. They contended that the tender process was unfair as envisaged in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, read with the Constitution of the Republic of South Africa, 1996, since according to them; it amounted to indirect discrimination against previously disadvantaged persons. The

respondents questioned the Equality Court's jurisdiction to entertain the relief sought by the appellant. The argument was based on the court's jurisdiction to review administrative action under "PAJA"; it does not have jurisdiction under that act. Judgment held that the Equality Court does have jurisdiction to entertain the relief sought by the appellant in the present matter, such jurisdiction being accorded to it by the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Manong and Associates (PTY) Ltd v Department of Roads and Transport, Eastern Cape Province and Another (SCA)).

4.3.3 Transparent

According to Hood the term, "transparent", has attained quasi-religious significance in debate over governance and institutional design. One of the several definitions quoted by him encapsulate some of what might be expected of transparency from a procurement perspective; "... the availability of information to the general public and clarity about government rules, regulations and decisions" (Hood 2006:4). Pauw expands on Hood's definition by stating that transparency is reflected in government by "[r]eliable and open information about government procurement in general" and that such information [...] gives the public a better idea of how government has used their tax revenues, [it is also] a corruption disincentive [...]" (Pauw & Wolvaardt 2009:74).

Clarke considers transparency not to be a normal condition and therefore needs to be produced (Clarke 2005:43). Examples within the procurement process that enable transparent process are: "[p]rocurement information should be generally available; there should be publication of general procurement rules and practices; government contracts should be advertised; and contractors should be able to access the criteria that will be applied in selecting a winning contractor" (Bolton 2009:54). To add to the aforementioned; tenders should be opened in public, record should be kept of tenders opened, all meetings must be recorded, and so forth. In essence, there should be a transparent trail where all actions and decisions are open for scrutiny.

4.3.4 Competitive

Competition can be defined "... as a situation in the market environment in which several businesses, offering more or less the same kind of product or service, compete for the patronage of the same consumers" (De J Cronje et al 2000:69). In terms of the 1996 Constitution, competition entails awarding tenders after a number of suppliers have been afforded an opportunity to compete for contracts.

Bolton provides a valuable observation on the word selection of section 217 of the 1996 Constitution. According to her "... competition can take a variety of forms [since] no specific reference is made to 'tendering' as a procurement method. In other words, competition can take the form of, *inter alia*, the solicitation or calling for tenders, getting quotations, competitive negotiation or other types of competition" (Bolton 2007:42). Treasury Regulations in terms of the Public Finance Management Act, 1999: Framework for Supply Chain Management 6(1), provide some direction. In terms of said Framework section 6(1), "[p]rocurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury [...]."

At the start of this section the reader was sensitised to the fact that a trade-off between some of the principles might be inescapable. In order to reach goals of good governance, some principles should be considered as inseparable. In terms of competitive procurement, Bolton provides clarification when stating that "... the principle of cost-effectiveness or efficiency may, at times, limit or qualify the use of competitive procedure. At the same time, where competitive procedures are used for the procurement of goods and services, this must give rise to efficiency and cost-effectiveness. Thus, while the principle of cost-effectiveness may, at times, limit or qualify the use of competitive procedures, when use is made of competitive procedures, such procedures must enhance or reinforce the principle of cost-effectiveness" (Bolton 2007:45).

The researcher is of the opinion that in some instances institutions adheres to one or more principles as a smoke screen to disregard another principle. For instance, a company that has been supplying the defence force with rat packs for the past three years alleges it lost the contract due to “irregularities” in the allocation process. Dewina Food Consortium sued the Department of Defence for excluding them from an R75m, two-year contract to supply ration packs to the military (The South African Navy & Marine and Coastal Management). One of the “irregularities” that supports the researcher’s statement of “smoke screen” adherence to the constitutional principles was publicly confirmed by a departmental official. Dewina’s unit price at R44,91 came in cheaper than the successful tenderer, Ibhubesi’s at R46,02. The Chief Director: Acquisitions responded by saying “Ibhubesi’s higher price would be adjusted”. The aforementioned statement warrants questioning of the Department’s application of not only competitiveness but also fairness and cost-effectiveness. To conclude, Curry is of the opinion that “[c]ompetition contributes to discouraging corruption; however, competition does not eliminate the possibility of procurement corruption” (Curry 2010:88).

4.3.5 Cost-effective

The *Oxford dictionary of economics* defines “cost-effective” as the achievement of results in the most economical way. This approach assesses efficiency by verifying whether resources are being used to produce any given results at the lowest possible cost (Black 2002:94). Bolton submits that cost-effectiveness in a government procurement context should be applied throughout the procurement process and throughout the process effect must be given to the attainment of value for money (Bolton 2007:43). According to the University of Cambridge value for money is a term used to assess whether or not an organisation has obtained the maximum benefit from the goods and services it both acquires and provides, within the resources available to it (University of Cambridge 1988–2006). Cost-effective also becomes a point of decision when deciding whether to “... procure goods or services from an outside entity, as opposed to providing the goods or services in-house, only if doing so will lead to cost-savings” (Bolton 2009:43). The achievement of value for money is often

described in terms of the “three Es” – economy, efficiency and effectiveness. *Economy* refers to the careful use of resources to save expense, time or effort; whereas *efficiency* is the delivery of the same level of service for less cost, time or effort and *effectiveness* focuses on delivering a better service or getting a better return for the same amount of expense, time or effort.

Government procurement in South Africa evolved from when the State Tender Board was responsible for the procurement of goods and services on behalf of most departments. Due to their highly specialised needs, only a few departments such as the departments of Water Affairs, Public Works and Government Printer had standing delegations to procure their own goods and services. According to Labuschagne public institutions did not have free discretion in the selection of their suppliers but had to adhere to acts, regulations and internal policies. Labuschagne concludes that these “restrictions” were there to allow for economic and effective procurement and for the protection of public interest. He is also of the opinion that the laws and regulations that were in place in 1985 were used to protect contractors from unfair actions and for the advancement of government goals towards service delivery (Labuschagne 1985:98).

From section 217 of the 1996 Constitution several acts and regulations were approved that provide direction in the attainment of the Constitutional principles. A general overview of applicable legislation will be provided.

4.4 Regulations in terms of the Public Finance Management Act 1 of 1999: Framework for Supply Chain Management

The Regulations in terms of the PFMA forms part of the post-PFMA era. The Minister of Finance has, in terms of Section 76 (4) of the PFMA, 1999 approved the Regulations in respect of the Framework for SCM. In 2005, the National Treasury issued amended Treasury Regulations for departments, trading entities, constitutional institutions and public entities. The 2003 regulations with regard to the “framework for supply chain management” appear as section 16A in the 2005 regulations. In February

2004 the National Treasury issued a SCM guide for accounting officers/authorities. The Guide for Accounting Officers is a guiding document designed to assist accounting officers to implement changes in their procurement and provisioning system as per the PFMA. Annexure A to the Guide is a general condition of contract that must form part of any procurement and provisioning contract. The regulations, guide and general conditions form part of the researcher's research question and will be dealt with in chapter 5.

Section 217 of the 1996 Constitution not only provides the manner in which public procurement should take place; it also reflects in section 217(2) how government intends to use public procurement as a tool to address past discriminatory policies and practices. The policy that prescribes the manner in which section 217(2) may be implemented came into effect on 3 February 2000.

4.5 Preferential Procurement Policy Framework Act 5 of 2000

The Preferential Procurement Policy Framework Act is the result of section 217 of the Constitution "... and is the foundation on which all government, parastatal and government-owned agencies' procurement activities are to be based." Janisch adds that notwithstanding the fact that the Act is "remarkably short "[...] [it] dictates how the government will go about awarding contracts for goods and services" (Janisch 2006:7). The Preferential Procurement Regulations came into effect in 2001 and provide broader interpretation and application. Since there is no equivalent Act in the pre-PFMA stage, this Act and accompanying regulations will not be included in chapter 5.

The Construction Industry Development Board (CIDB) defines a preferential procurement policy as "... a procurement policy that promotes objectives additional to those associated with the immediate objective of the procurement itself" (*Best Practice Guide B1 2004:1*). The South African government is not unique in their sourcing objective. Several government entities are not only buyers of goods and services, they are also concerned

with objectives such as the creation of and protection of jobs within their domestic economies (Sherman 1991:331).

“Due to South Africa’s history of discrimination, unfair practices and marginalisation of people, various groups in society were denied the privilege of being economically active within the government procurement system” (Bolton 2007:256). An example of such discrimination is “... by means of government policies that under-funded black primary and secondary education, [resulting in] [...] black contractors [having] to compete with fellow countrymen who had a much better state-funded education than they” (Pauw & Wolvaardt 2009:74). “The Act was passed with the aim to encourage uniformity among diverse systems of preferences that existed amongst the different organs of state, to serve as a tool for development, to create advancement for previously disadvantaged individuals (PDI) and to force the procurement process to be more inclusive by allowing competitive advantage for the PDI owned businesses” (Hugo et al 2004:55).

Before implementation of the PPPFA, price was the decisive criteria in the evaluation and award of tenders. The PPPFA introduced a point system as criteria. Bolton provides a practical explanation of the preference point system that must be followed. “The total number of points that may be awarded to contractors is 100, and to ensure that organs of state still obtain the best price for goods and services, more preference points are awarded for lower value contracts and less preference points for higher value contracts” (Bolton 2007:274). In 2009 the following applied: for all contracts with a Rand value equal to or above R30 000 but below R500 000, a maximum of 20 points may be allocated for specific goals. In this instance the lowest acceptable tender must score 80 points for price. For contracts with a Rand value above R500 000, only a maximum of 10 preference points may be allocated for specific goals provided that the lowest acceptable tender scores 90 points for price. The contract must be awarded to the tenderer who scores the highest points unless objective criteria in addition to that, pertaining to specific goals, justify the award to another tenderer (PPFA 2000:2(j)).

The Act provides direction in terms of the goals for which points “may” be awarded; being, contracting with HDIs and implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994. Although the Act in section 2(d) uses the word “may”, the regulations dictate in section 13(1) that HDI must be included as part of the specific goals. The word “may” in this case allows organisations to, for instance, include “youth” as part of their goals.

The CIDP considers “objective criteria” and specific goals to be different concepts. They explain it as follows: “accordingly, socio-economic considerations fall outside the scope of objective criteria. Objective criteria relate to compliance with legislative requirements (for example tax obligations) and commercial (i.e. on technical, quality, capability and capacity issues)” (CIDB 2004:5).

The South African Chamber Of Business (SACOB), in 2003, considered preferential procurement to be a system whereby black and white businesses “pit” against each other (Comments by the South African Chamber of Business (SACOB) on the Preferential Policy Framework Act 5 of 2000, and the Preferential Procurement Regulations 2003:9). The CIDB has another view. According to them “[p]referencing strictly in accordance with the provisions of the PPPFA, i.e. in terms of the points scoring system, is not considered to be unfair discrimination as no person is denied an opportunity to tender and a means is provided for promoting equality” (CIDB 2004:6).

Not all international writers are correctly informed of government’s application of the PPPFA. As part of their introduction to an international publication, Evenett and Hoekman state: “... South Africa has considered instituting a scheme which will favour black entrepreneurs and firms that employ stipulated numbers of black employees. This is part of a sweeping initiative to enhance the economic status of the majority black population after the fall of the apartheid regime” (Evenett & Hoekman 2006:XV). In order not to discredit South African legislation, the researcher considers it as

a necessity to find a forum where the application and aim of the PPPFA can better be explained to not only within the international community but also to our civil society.

“South Africa is not a welfare state and the government cannot foot the social bill for an uneducated and unskilled workforce” (Janisch 2006:1). To address this and other relevant social economic objectives, the Broad-Based Black Economic Empowerment Act 53 of 2003 was passed (hereafter called BBEEA). This Act does not have a counterpart in the pre-PFMA era, and will therefore not form part of chapter 5.

4.6 Broad-Based Black Economic Empowerment Act 53 of 2003

The researcher will not provide an elaborate discussion on this Act. The Act is applicable to any enterprise that provides goods and services to any organs of state or public entities, the applicable enterprises must measure their BBEE status against the codes of good practise that the Minister of Trade and Industry have promulgated. Pauw and Wolvaardt highlight the fact that although the Act provides for preferential procurement, the relationship between the PPPFA and BBEEA is not specified. They, however provide clarification by stating; “under the general principles of the interpretation of statutes one must assume that the later legislation would take precedence over the earlier legislation” (Pauw & Wolvaardt 2009:320). Janisch defines BBEE to mean “... the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated social-economic strategies [...]” (Janisch 2006:8). White people are excluded from the Act that only speaks to a generic term “black people” which refer to coloureds, Indians, Chinese and Africans. Through the BEE Act “.... capital is being redirected to black people through the manifestation of government’s significant [...] procurement budget and regulations [...]” (Balshaw & Goldberg 2008:18).

4.7 Conclusion

Government's intension to regulate public procurement on a "high" level was identified in the so-called Interim Constitution of 1993. The Interim Constitution paved the way for legislative changes in the application and regulation of public procurement. The manner in which public procurement was to take place is captured in section 217 of the Constitution of the Republic of South Africa, 1996. According to section 217(1) of this Act, public procurement must take place through a system that is fair, equitable, transparent, competitive and cost-effective. To attain these principles, public institutions must implement, amongst others, procedures that reflect the application thereof. However, it is necessary to acknowledge that a trade-off is in certain circumstances required, for instance, too much transparency might not be cost-effective.

Notwithstanding the attainment of Constitutional principles, public institutions should also implement procurement systems that allow for categories of preference, the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in the allocation of contracts. In this regard, national legislation was enacted in the form of the PPPFA and the BBBEEA. These and other Acts were introduced as part of the post-PFMA era with no counterparts in the pre-PFMA era. Noticeably legislative expansion took place in the pre-PFMA era but not necessary enhancing service delivery through public procurement.

Chapter 5 is aimed at answering the researcher's research question, being to determine the progress, if any, made by introducing new regulations and policies in the South African public supply chain. As explained in chapter 1, a desk study and interpretation was followed to determine whether a "new" SCM policy was indeed created or if the context of the previous procurement regulations were merely rewritten.

CHAPTER 5

A CRITICAL COMPARISON OF THE TWO REGIMES AT THE LEVEL OF SUBSIDIARY PROVISIONS

5.1 Introduction

The researcher provides the motivation for this dissertation in chapter 1 where she expresses her personal frustration with lengthy procurement and provisioning procedures according to the State Tender Board Act 86 of 1968. After public procurement was elevated in 1996, National Treasury introduced supply chain management to replace the so-called obsolete and outdated practises.

Personal and government's expressions should always be subordinate to the utilisation of procurement and provisioning systems that should form the basis for society to benefit as a whole. For this reason the researcher conducted a comparison between the two regimes in order to establish whether the change from a so-called process-orientated practice to a best practise approach really took place and if so, if it is an improvement on the pre-PFMA procurement environment.

Only a general overview of the applicable procurement prescripts is provided and detailed information will follow from the comparison.

5.2 Overview of the procurement prescripts

As stated in chapter 1, there are two main prescripts that regulated public procurement in terms of the State Tender Board Act 86 of 1968.

5.2.1 State Tender Board General Conditions and Procedures (ST36)

The law required the State Tender Board to set procedural policies for public sector procurement and the socio-economical policies were still set by government. The Board's general procurement conditions and procedures are contained in the State Tender Board General Conditions and Procedures (ST36). The ST36 covers the whole procurement process and sets out definitions, general directives, invitation of tenders and the administration of contracts (Labuschagne 1985:98).

5.2.2 State Tender Board User Manual: Directives to Departments in respect of Procurement (ST37)

To assist departments in the execution of their procurement needs, the State Tender Board issued a general user's manual in which the policy and directives of the State Tender Board are explained. The manual is known as the State Tender Board User Manual: Directives to Departments in respect of Procurement (ST37) (Republic of South Africa 1998). It is submitted that although most procurement aspects might have been dealt with, not all procedures were comprehensively set out, thereby opening the door for departments to use their own interpretation and discretion. This statement will be tested in section 5.3.

5.2.3 General and special conditions of contract

The National Treasury issued General Conditions of Contract that should form an integral part of all tender documents. The purpose of the document is to draw special attention to certain general conditions applicable to government tenders, contracts and orders and to ensure that clients are familiar with regard to the rights and obligations of all parties involved in doing business with government (Guide for Accounting Officers 2003, cover page of annexure A). Although the contents of the GCC may not be amended for a specific contract, Special Conditions of Contract (SCC) that

will supplement the GCC may be compiled separately for every tender, where applicable.

5.2.4 Supply chain management – a guide for accounting officers/authorities

According to the National Treasury, the Guide “sets out the philosophy behind the adoption of an integrated SCM function across government and will assist stakeholders to understand the responsibilities this implies” (Guide for Accounting Officers, 2003:2, preface). The Guide is intended to assist accounting officers in the smooth implementation of SCM management within their institutions.

5.3 Comparison of procurement in terms of pre- and post-PFMA system

The ST36 consists of 61 pages and 63 paragraphs that are divided into five parts, which are: definitions, general directives, invitation of tenders, consideration of tenders and administration of contracts, thereby giving broad directives for the entire tender process. A total of 28 definitions are given as an introduction to the conditions and procedures that intended to provide for uniformity in the interpretation of tender-related matters.

The GCC is annexure A to the Guide and focuses more on the contents of contracts than the administrative process leading up to a contract. The GCC consists of 14 pages and 33 clauses. Since one of the aims of the SCM function is to address inefficiencies in the pre-PFMA method of procurement, the “new documents” were used as the point of reference, thereby identifying any changes to the existing documentation. The comparisons took place under three headings, namely being different; exactly the same; and same intention but different stated.

The heading “different” encapsulates aspects where the intention of definitions or directives are in totality different from those in the pre-PFMA documentation. Considering that government intended to move away from a

so-called outdated procurement system, this heading should reflect various areas where improvement, according to government, has taken place. The heading “exactly the same” is self-explanatory but significant in terms of governments intention to address inefficiencies in the pre-PFMA method of procurement. Under the heading “same intention but differently stated”, the researcher included items where both documents are structured in a manner that has the same intention but with more detail.

The researcher compared the two documents according to the GCC’s numbering. Items in the ST36 that have relevance to the GCC are captured in brackets after the GCC number. To confirm the similarities the researcher included a second line where the GCC numbering is placed in brackets behind those of the ST36.

Part one of the GCC is definitions.

Except for numbering, six definitions are exactly the same and five have the same intention but are differently stated in the GCC. The ST36 does not provide definitions for contract price, corrupt practice, countervailing duties, country of origin, day, dumping, force majeure, goods, fraudulent practice, project site, purchaser and services. The definitions GCC and SCC have no relevance to the ST36 and “corrupt practice” is defined.

Heading 1: Definitions

	Different	Exactly the same	Same intention but differently stated
GCC (ST36)		1.1(1.6), 1.8(1.9), 1.9(1.10), 1.10(1.11), 1.17(1.17), 1.22(1.22).	1.2(1.7), 1.16(1.14), 1.18(1.7), 1.19(1.18), 1.25(1.28).
ST36 (GCC)		1.6(1.1), 1.9(1.8), 1.10(1.19), 1.11(1.10), 1.17(1.17), 1.22(1.22).	1.7(1.2), 1.14(1.16), 1.7(1.18), 1.18(1.19), 1.28(1.25).

The second heading, *application*, identifies the procurement areas that should take place in terms of the GCC. Bids, contracts and orders, professional services, sales hiring, letting and granting or acquiring of rights are identified. The conditions are not applicable on immovable property. The ST36, under the heading *conditions and procedures*, identify the areas of reference to be, tenders, contracts and orders. Both documents acknowledge that in certain instances there is a need for special conditions of contracts.

Heading 2: Application

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)		2.2(2.2).	2.1(2.1), 2.3(2.1).
ST36(GCC)		2.2(2.2).	2.1(2.1), 2.3(2.1).

Direction in terms of the cost for preparing tender documents and place of advertisement is found under the third heading, *general*.

Heading 3: General

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)		3.1(8.1).	3.2(1.26/8.1/8.5/8.6)
ST36(GCC)		8.1(3.1).	1.26/8.1/ 8.5/ 8.6(3.2).

The last sentence in paragraph 3.1 of the GCC and ST36 paragraph 12 are different in terms of the fee chargeable for tender documents where the GCC allows for a non-refundable and the ST36 a refundable fee. The Guide

to accounting officers contradicts the GCC in so far as allowing for a refundable fee. The GCC only allows accounting officers the discretion to charge a fee for documents but it must be non-refundable. Section 4.9 of the Guide under the sub-heading *sale of documents* provides accounting officers the discretion to charge a refundable or non-refundable fee.

Heading 4: Standards

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			4.1(13/25.1.3).
ST36(GCC)			13/25.1.3(4.1).

Heading 4, stipulates that goods must conform to the standards set by the bidding documents and specifications. The ST36 includes SABS specifications in paragraphs when reference is made to the standard of work that is expected.

Stipulations on the *use of contract documents information and inspection* are provided under heading 5. This heading is supplier directed where the disclosure of any aspect of contracts are prohibited. No similar reference is made in the ST36.

Heading 6: Patent rights

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			6.1(57.1).
ST36(GCC)			57.1(6.1).

Heading 7, *performance security*, is specific in terms of the time in which a tenderer should provide a performance security. Whereas the GCC 7.1 stipulates 30 days, the ST36 makes no mention of the time frame and therefore allows accounting offers to use their own discretion. Paragraph 7.4 of the GCC also identifies the period of discharge of a security to be not later than 30 days after the suppliers delivered in terms of the contract. Again the ST36 does not identify the period in which discharge must take place. Although, the ST36 does identify the security to be 10% of the contract value, no stipulation is found in the GCC.

Heading 7: Security

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			7.1(60.1), 7.3(a & b)(60.3.1).
ST36(GCC)			60.1(7.1), 60.3.1(7.3(a & b)).

Despite having the same heading, a number of similarities are found between the GCC and ST36 in terms of *inspections, test and analysis*. When the content is the same but the numbering is different, the classification took place under “exactly the same”. The GCC does not provide any direction in terms of the cost associated when rejected supplies are returned to suppliers. The ST36 stipulates that the cost be for the account of the supplier.

Heading 8: Inspections, test and analyses

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)		8.6(44.4), 8.7(44.5), 8.8(44.8).	8.1/8.2(44.1), 8.3(44.3), 8.4(44.3.1), 8.5(44.3.2).
ST36(GCC)		44.4(8.6), 44.5(8.7), 44.8(8.8).	44.1(8.1/8.2), 44.3(8.3), 44.3.1(8.4), 44.3.2(8.5).

The manner in which goods must be packed is prescribed under the heading *packing*. In terms of both the GCC and section 32 of the ST36 the contractor is responsible for providing packaging material. Only the ST36 allows for the returning of packaging material at the cost of the contractor.

Heading 9: Packing

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			9.1(32/32.3), 9.2(32.5).
ST36(GCC)			32/32.3(9.1), 32.5(9.2).

Information provided in section 10 of the GCC under the heading *delivery and documents* are not directed to a specific requirement. As it stands, a range of contract specifications are applicable, such as place of delivery, delivery date, quantities and method of transportation. Documents that may

be specified in the SCC are for instance export licences, harbour and quarantine applicable certificates. No similar requirement is in the ST36.

Both the GCC and ST36 refer to *insurance*. However, section 11 of the GCC can rather be classified as a new addition to the procurement system. Whereas the ST36 only stipulates that local insurance companies should be used for goods imported, the GCC stipulates full insurance against loss or damage incidental to manufacture or acquisition, transportation, storage and delivery.

Heading 11: Insurance

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			11(38).
ST36(GCC)			38(11).

The ST36, paragraph 35.1 provides general information in terms of transportation services, containers and the cost thereof, whereas heading 12 of the GCC, *transportation*, only refers to an all-inclusive delivered price that must be specified in the SCC.

Heading 13, *Incidental services* and 14, *Spare parts* are not captured in the ST36. Incidental services specify additional services that may be required of the contractor, such as supervision of on-site assembly, furnishing of specific tools, furnishing of operation or maintenance manuals. The contents of paragraph 13 do not relieve contractors of their warranty obligations. In terms of heading 14, an institution may specify in the SCC that materials, notifications and information pertaining to spare parts manufactured or distributed by the contractor are provided.

Warranty, according to heading 15, encapsulates the terms “quality” and “guarantee” reflected in the ST36.

Heading 15: Warranty

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			15.1(39.1). 15.2/15.4(40.1).
ST36(GCC)			39.1(15.1). 40.1(15.2/15.4).

Both the GCC and ST36 stipulate a warranty period of 12 months after receipt of the required goods. The GCC adds to this period another six months from the date of shipment from the port or place of loading in the source country. Paragraph 40.3 of the ST36, provides clarification of the cost implications in the case of replacement of defective supplies, the liability of the contractor includes free delivery and installation of the goods to be replaced and the replaced goods shall be guaranteed for a similar period.

Heading 16, *Payment* stipulates that the accounting officer must provide the method and conditions thereof in the SCC. In terms of the GCC, payment will be made in Rand; the ST36 does not clarify the currency. The ST36 emphasises the importance of an official order and identifies specific documentation required for various types of services rendered.

Heading 16: Payment

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			16.1(43.1), 16.3(43.1.5).
ST36(GCC)			43.1(16.1), 43.1.5(16.3).

In terms of heading 17, *Prices* charged by the supplier under contract shall not vary from the quoted prices unless the SCC allows for adjustments.

Heading 17: Prices

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			17.1(50).
ST36(GCC)			50(17.1).

No *contract amendments* may take place according to paragraph 18 of the GCC unless it is in writing. The ST36 has the same stipulation but also adds that such amendments cannot be enforced.

Heading 18: Contract amendments

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			18.1(63).
ST36(GCC)			63(18.1).

The ST36 does not make any reference to the *assignment* of obligations as is stated in paragraph 19 of the GCC, but provides examples of the circumstances under which an institution may for instance appoint a contractor or allow a trustee or liquidator to take over a contractor's obligations.

Heading 19: Assignment

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			19.1(48.1).
ST36(GCC)			48.1(19.1).

In terms of paragraph 20 of the GCC, suppliers must inform the purchaser of all *subcontracts* awarded. The ST36 does not provide the same stipulation.

Paragraph 21, *Delays in the supplier's performance* of the GCC refers specifically to delays in terms of the agreed time schedules, whereas paragraph 45.2 of the ST36, provides an umbrella reference to failure in terms of any conditions of contract. Where the GCC only deals with delays in the case of a supplies contract, the ST36 includes service contracts.

Heading 21: Delays in the supplier's performance

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)		21.4(62.1), 21.6(45.4).	21.1(45.2), 21.3(62.2).
ST36(GCC)		62.1(21.4), 45.4(21.6).	45.2(21.1), 62.2(21.3).

The headings, *Penalties* and *termination for default* identifies the remedies available to an institution in those instances where a supplier fails to deliver in terms of the contract or is engaged in corrupt or fraudulent practises. Whereas the GCC makes a distinction between the two, the ST36 combines penalties and termination under the heading “failure to comply with conditions and delayed execution”.

In terms of section 22, *Penalties*, of the GCC, institutions must take into account the current prime interest rate when calculating a sum that will be deducted from the contract price as a penalty. The ST36, on the other hand, stipulates a flat value of one-fourteenth per cent per day for the period of delay.

Heading 22: Penalties

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			22.1(45.5.2).
ST36(GCC)			45.5.2(22.1).

The GCC's heading 23, *Termination for default*, is dealt with in a similar manner in the ST36 but under the heading "Failure to comply with conditions and delayed execution". The GCC allows for a termination in whole or in part, whereas the ST36 only refers to a cancellation of the contract. Both documents inform the contractor that the institution can procure, for the cost of the supplier, any goods, works or services outside of the contract if the requirements are not met. The ST36, however, only refers to a supplies contract. The ST36 provides for a financial penalty per day that can be charged. The GCC is more transparent in the application of a restriction for instance, the period of restriction in the ST36 is left to the discretion of the Board, and the GCC stipulates that a restriction may not be longer than 10 years. Both the GCC and ST36 allow for a restriction of any other business endeavours of any other companies where a restriction is imposed directly on a person. The GCC includes the Prevention and Combating of Corruption Activities Act 12 of 2004 as a reason for restriction. The said Act was promulgated in 2004 and does therefore not form part of the ST36. To conclude, although there are definite similarities between the two documents, the GCC is broader and more direct in the application of restrictions.

Heading 23: Termination for default

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			23.1(45.2), 23.1(a)(45.5.2), 23.1(c)(46.1).
ST36(GCC)			45.2(23.1), 45.5.2(23.2(a)), 46.1(23.1(c)).

Clarification in terms of any expenditure to the state when *Anti-dumping and countervailing duties and rights* are dealt with are provided under heading 24. The exact same wording is used in the ST36, paragraph 17.1.4 but

under the heading “Tender prices and delivery periods”. The GCC adds the contractor’s responsibility when money is owed to the State.

Heading 24: Anti-dumping and countervailing duties and rights

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			24.1(17.1.4).
ST36(GCC)			17.1.4(24.1).

Heading 25, *Force majeure*, not only provides for the contractor not to forfeit his/her performance security due to a force majeure event, but also his/her responsibility towards the purchaser in such events. Consideration as a result of a force majeure event is dealt with in the ST36 under the heading “Failure to comply with conditions and delayed execution”.

Heading 25: Force majeure

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			25.1(45.6), 25.2(45.7).
ST36(GCC)			45.6(25.1), 45.7(25.2).

In terms of heading 26 of the GCC, *Termination for insolvency*, the purchaser has the right to terminate the contract in those instances where a contractor becomes bankrupt or insolvent. The ST36 includes “death of a contractor” and in accordance with section 48.1.1, the estate of the

contractor will not be relieved from any liability according to the original contract.

Heading 26: Termination for insolvency

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			26.1(48.1/48.1.1/48.1.2/48.1.3).
ST36(GCC)			48.1/48.1.1/48.1.2/48.1.3(26.1).

Whereas the ST36 under the heading *Settlement of disputes* only stipulates the Board’s decision-making power, the GCC with the same heading allows for mutual consultation, mediation and settlement in a South African court of law.

Heading 27: Settlement of disputes

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)	27.1/27.2/27.3/27.4/27.5a(30).		27.5b(30).
ST36(GCC)	30(37.1/27.2/27.3/27.4/27.5a).		30(27.5b).

Section 28, *Limitation of liability*, is not handled in the ST36. The GCC identifies the areas for which the contractor will not be held liable and the maximum cost that is applicable.

The ST36 does not stipulate the language in which a contract must be written. Heading 29 of the GCC stipulates that the *governing language* “shall” be written in English whereas the Guide provides room for

interpretation by directing that documents should be prepared in at least English.

Both the GCC and ST36 identify the *applicable law* to be in terms of the South African laws.

Heading 30: Applicable law

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			30.1(8.3).
ST36(GCC)			8.3(30.1).

Both section 31 of the GCC under the heading *Notices* and the ST36 stipulate that written acceptance must be by means of registered or certified mail. The two documents are also in agreement regarding the date of contract commencement.

Heading 31: Notices

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)		31.1(7.1), 31.2(7.2).	31.1(28.1).
ST36(GCC)		7.1(31.1), 7.2(31.2).	28.1(31.1).

The heading 32 of the GCC, *Taxes and duties* captures an important requirement for all contractors when doing business with any government

institution, being of good standing in terms of income tax matters. The ST36 makes no reference to income taxes but only to import taxes.

Heading 32: Taxes and duties

	Different	Exactly the same	Same intention but differently stated
GCC(ST36)			32.1(55), 32.2(55).
ST36(GCC)			55(32.1/32.2).

Heading 33 of the GCC, *National Industrial Participation Programme* has no equivalent in the ST36.

A revised GCC was introduced in July 2010 that added heading 34 *prohibition of restrictive practices*. In terms of this heading the department may refer any matter where it is suspected that concerned parties participated in a horizontal relationship or collusive bidding to the Competition Commission for investigation and possible administrative penalties. This matter is not dealt with in the ST36.

As stated in paragraph 5.2.1, the ST36 captures the whole procurement process, whereas the GCC is more contract specific. The Guide complements the GCC by providing additional information that also covers the whole procurement function. For this reason the researcher included a comparison between the ST36 and the Guide to determine whether any change took place between the contents of the documents. The Guide's numbering makes it difficult for easy referencing, for instance, paragraph 4.10 with the heading *Receiving responses* include the following sub-headings without any paragraph numbers: opening of bids, late bids, clarification or alteration of bids, confidentiality and completeness of documentation. In order to provide numerical structure the researcher used the ST36 as point of reference. To assist the reader the researcher included the sub-heading names and page numbers for both documents.

Despite different headings, the following information forms part of the differentiation “same intention but differently stated”. However, special mention should be made of the Guide’s stipulation that the closing of tenders should take place after 30 days. According to the ST36 tenders should close after four weeks. Although having the same intention, 30 days include weekends and public holidays. In the researcher’s past experience, institutions used, when required the four week stipulation as a loophole to exclude weekends and public holidays, therefore advertising with a shortened tender period.

Table 3: ST36 and The Guide

ST36			Guide		
Item	Item number	Page number	Item	Item number	Page number
Approved list.	10.	8.	Approved list.	4.9.	41.
Validity periods.	16.	10.	Validity of bids.	4.8.1.	39.
Tender prices and delivery periods.	17.	10.	Price adjustments due to escalation.	4.8.1.	37.
Charge of documents.	12.	9.	Sale of documents.	4.9.	43.
Closing of tenders.	15.1.	9.	Bid submission.	4.8.1.	37.
Closing of tenders.	15.3.	9.	Preparation time.	4.8.1.	37.
Validity periods.	16.	10.	Validity of bids.	4.8.1.	39.
Tender prices and delivery periods.	17.1.1.	10.	Price adjustments due to escalation.	4.8.1.	37.
Firm prices.	51.	20.			
Non-firm prices.	52.1.	21.			
Alternative offers.	18.	10.	Bid content.	4.8.1.	35.

Lodging of tenders.	20.1.	11.	Opening of bids.	4.10.	44.
Lodging of tenders.	20.3.	11.	Bid submission.	4.8.1.	37.
Late tenders.	21.	11.	Late bids.	4.10.	44.
Late tenders.	21.1.	11.	Late bids.	4.10.	44.
Opening of tenders.	23-23.1.	11.	Opening of bids	4.10.	44.
General.	24.2.	12.	Fraud and corruption.	2.8.2.	23.
			Vendor assessment.	4.12.	46.
General.	24.8.	12.	Fraud and corruption.	2.8.1.	24.
General.	24.3.	12.	Rejection of all bids.	4.11.	45.
Quality.	39.2.	16.	Specification of goods/works or services.	3.4.1.	27.
Inspections test and analysis.	44.1.	17.	Inspections test and analysis.	4.8.1.	35.
Remedies in the case of bribes etc.	46.1. 46.2.	19.	Corrupt practice.	2.8.1.	24.
Security.	60.	23.	Sureties.	4.8.1.	40.

The researcher made a comparison between the GCC and the ST36 and also the ST36 and Guide. No fundamental changes were introduced to the so-called outdated and rule-driven procurement system. The Guide, however, provided broader information pertaining to the different methods of procurement available to institutions when procuring goods and services.

For this comparison the researcher highlighted items where the difference in presentation needs special mentioning and where according to her past experience items in the ST37 should have been reflected in the Guide. The

existence of an approved departmental procurement policy does not necessitate consultation of the pre-PFMA documentation, thereby allowing for practices that might not be in line with the 1996 Constitutional procurement principles. In these instances ignorance can be blamed.

A major contribution to the procurement process is chapter 5 of the Guide. The appointment of consultants was identified by Cabinet as an area where a systematic approach is required. Although the ST37 does provide directives, a more wide-ranging explanation of the procedures for selecting, contracting and monitoring of consultants are found in the Guide. The disposal of goods is also broadly discussed in chapter 7 of the Guide whereas the ST37 provides very limited information in this regard.

The Guide introduces standard bidding documents to be used for all standard procurement of works and services. These documents are for instance numbered as SBD 1. According to the National Treasury the introduction of standard bidding documents will promote advantages such as, cost-effectiveness both in financial and human resource terms, easier understanding and interpretation by new emerging contractors and simplification of the documentation process. The Standing Tender Board also prescribed standard forms that must serve as a basis for all tender invitations. These documents are numbered for instance, B 1. As is the case with the Guide, allowance was made for institution to customise documents in those instances where the standard forms are not suitable for a specific need. The ST37 documents include several generic functions such as informing tenderers that the closing date has been extended, application for export facto approval and a request to extend validity periods. Similarities can be found between some of the B and SBD documents for instance, matters relating to tax (B 4 and SBD 2), professional services (B 9 and SBD 3.3), declaration of interest (B 20 and SBD 4) and the National Industrial Participation programme (B 22, SBD 5).

Part of the Guide's standard bidding documents are those having reference to preference points claimed such as small business, purchases, sales, locally manufactured products and empowerment of skills and knowledge

(SBD 6.1 to SBD 6.12). Although it is not stated how bidding documents will contribute in achieving the objectives thereof, the researcher is of the opinion that the documents are not so cumbersome as those of the State Tender Board and the contents are simplified.

With regard to the acceptance of tenders, chapter 9 of the ST37 clarifies what constitutes a contract and provides a broad overview of the administrative actions required to enter into a legal binding contract. The Guide only stipulates that a contract or service level agreement should be signed and that the original documents should be kept safe. Considering that the successful completion of all projects are dependent on legally correct contracts, the researcher is of the opinion that more detailed information should have been provided in a document intended to “guide” all aspects of the procurement process.

One of several procurement aspects that are now left to the discretion of accounting officers are *securities*. Chapter 14 of the ST37 provides for instance levels of securities that must be set for building and construction contracts. These levels are based on the monetary value of contracts. The percentage that may be claimed varies between 0% and 10% of the estimated contract amount. In terms of the Guide, accounting officers may decide whether bidders should supply securities, and if so, at what percentage. The only direction provided is that the percentage should not be so high as to discourage bidders. It is therefore within the accounting officer’s delegation to set securities on a case by case basis without being consistent in this regard. The application of securities not only contradicts government’s aim of promoting a uniform SCM process but also allows for instances of breach of the requirements of good governance.

The ST37 provides a definition for a *case*. In terms of section 2.2 of the ST37, a case is:

The consolidated requirement of related items, which requirement exists at a given point in time and at the time of consolidation is known to the specific organisation and has been quantified. It covers the estimated total value (VAT included) of all the items concerned for the complete service or supply

and not only the value of any individual item appearing on the consolidated schedule of requirements (such as a requisition, job card, worksheet or procurement schedule).

The value of this definition lies in the recognition of what constitutes *splitting of tenders*. Splitting of tenders is a deliberate action to split tenders into smaller portions or phases with the advantage that an institution does not for instance need to go out on open tender. The different phases have their own estimated value below R500 000 whereas in reality the consolidated requirement of related items are above R500 000. Splitting up of tenders does not only constitute irregular expenditure but also prevents transparent and competitive tendering. Since the ST37 is to be replaced by an institution's own policy and procedures, the inclusion of the definition of a case in the Guide would have ensured that this activity be highlighted as unlawful practice.

Although the pre-PFMA stage is marked as, amongst others, having deeply ingrained practices, the role of the State Tender Board allowed for transparent processes due to their delegation to scrutinise and approve institutions' tenders. For instance, where the tender conditions are not fully complied with, where the validity has expired and the lowest tenderer is not prepared to extend his or her offer or where a tender is recommended that has family ties with a member of the standing tender committee, a motivated recommendation has to be forwarded to the State Tender Board for further attention. In terms of the post-PFMA stage the accounting officer regulates matters such as the aforementioned through internal policies and procedures that may compromise transparency and accountability.

5.4 Conclusion

In chapter 1 the researcher identified the method of study to be a desk study and interpretation of policy documents within a framework developed for this study. The desk study was done in this chapter where the researcher made a parallel analysis between the GCC and the ST36 as well as the Guide and the ST37. The Constitution and PFMA require institutions to procure through

a system that is fair, equitable, transparent, competitive and cost-effective. In chapter 6 the researcher will provide a summary of the five Constitutional principles and also identify those items, if any where the post-PFMS system allows for an improvement in the manner in which public procurement should take place.

CHAPTER 6

CONCLUSION: THE ANSWER TO THE RESEARCH QUESTION

6.1 Introduction

The research question will be answered in this chapter and for this reason the researcher reminds the reader of her research aim, namely to determine to what extent the regulations and policies since 2003 embody progress in public procurement in South Africa?

In his budget speech of 2010, Minister Pravin Gordhan, referred to public procurement as wasteful and inefficient. According to the minister, greater transparency and accountability in procurement systems can assist in dealing with corrupt practices, inefficiency and poor planning. The minister also referred to the tendency to award contracts to contractors that cannot perform, resulting in society not receiving the goods and services that they require and are entitled to (<http://www.treasury.gov.za/comm.-media/speeches/2010/2010051101.pdf>).

One year later in minister Gordhan's 2011 budget speech, he referred to public procurement as vulnerable to waste and corruption. The minister acknowledged that the integrity of governance is compromised and that the country is in dire need of a strong procurement framework. Minister Gordhan called on senior managers to work actively to improve their procurement processes and oversight of this function (<http://www.treasury.gov.za/docu,emts/national%20budget/2011/speech/speech2011.pdf>).

Considering the minister's acknowledgement of the state of public procurement in South Africa, the researcher submits that the compilation of a strong procurement framework cannot be separated from the manner in which the framework is executed. When such a framework is part of

irresponsible bureaucracy the absence of terminology such as integrity, efficiency, effectiveness and accountability contributes towards questionable governance of those in public office. The PFMA allocates the responsibility of developing an appropriate procurement system within certain guidelines for accounting officers' respective institutions. It is therefore possible that government's procurement initiatives are executed in a manner that makes it vulnerable to waste and corruption.

Information that the researcher considers to be relevant not only towards answering her research question, but also highlighting the role of public procurement in the public services, will now be summarised.

6.2 Procurement and supply chain management

At the start of her study the researcher provided the reader with information on government initiatives that were directed towards the utilisation of public procurement as a tool to achieving predetermined outputs and outcomes relevant to the attainment of societal goals. As identified in section 1.2 government's first initiative to address the so-called inequalities of the past was introduced as an interim strategy in 1995. The 10-Point Plan was replaced in 1997 by a Green Paper on Public Sector Procurement Reform that government viewed as a milestone in the transformation of public sector procurement in South Africa. Whereas the aforementioned two documents were introduced with a political approach, the PFMA came into effect as part of the introduction of financial management rather than financial control. Financial management is in line with government's approach on a performance-driven system based on measurable outputs. However, the state of public procurement in South Africa reached a point where government acknowledges that the integrity in the country's governance is undermined. The latter strengthens the researcher's observation that the problem might not necessarily be the introduction of new regulations but rather the execution thereof.

Although procurement is a means to an end through which goods and services are obtained, it is in South Africa also utilised by government as an

end to means for the attainment of non-monetary goals. As indicated in section 2.3.2, *when, where, what* and from *whom* government procures goods and services plays a crucial role towards the attainment of these goals. Labuschagne is of the opinion that governments are compelled to consider the economic contribution that public procurement holds for the attainment of specific political, economic and social goals (Labuschagne 1985:283). The researcher's study focused on the regulations that stipulated *how* public procurement took place before and after the introduction of the PFMA.

The ST36, ST37, the Guide to accounting officers and GCC were identified in section 1.5 to be units of observation, but in order to answer the research question these documents were also units of analysis in chapter 5. Information collected from the units of observation were compared in order to determine if any regulatory changes really took place when analysing specific items against each other. Interpretation of information gained will be analysed later in this chapter.

The word *procurement* is part of her study title and for this reason she considered it important to clarify terminological confusion in literature and official documentation in section 2.2. Chapter 2 was dedicated to conceptualisation of procurement and supply chain management. In section 2.1, the researcher quoted Behan who in 1994 captured words that reflect, according to him, the role that public procurement often plays in public institutions, being, low-level, low-profile and a low-powered activity. This only captures the internal perception that institutions may have, but in reality public procurement holds significant secondary objectives for government and the South African community. Since South Africa is not a welfare state, public procurement is used as a tool to address and achieve social economic objectives through the introduction of legislation such as the PPPFA and BBEEA. However, the economic advantages that public procurement holds for eradicating poverty and unemployment is often overshadowed by malpractice when people execute public procurement.

According to Balia the SCM system introduced by the National Treasury in 2003 is significant in terms of changes that were introduced. As indicated in section 2.5, he especially highlights the importance thereof with regards to the Code of Conduct for SCM officials. Section 2.7 identifies procedural actions that must be included in an institution's procurement policy, like demand management, acquisition management, logistics management, risk management, disposal management and supply chain review. These stages are significant in terms of recognising the operational linkage between different areas of procurement that were previously dealt with in isolation.

For the purpose of this dissertation, the researcher included literature where the authors mainly concentrated on procurement in terms of political, legal and government research. The heading, "government research", refers to research that was commissioned by the South African government with the aim of identifying areas where revised systems and processes can contribute towards the establishment of an economic and effective public procurement function.

6.3 Literature study

Since the researcher's study focuses on South Africa's public procurement system, she only refers to local authors in this chapter.

6.3.1 Political perspective

From a political perspective a study by Gounden in 2000 found that the application of a preferential procurement policy in South Africa had a positive impact on eradicating past discriminatory policies and procedures in the construction industry. According to him, his study found that the adoption of such a policy outweighs the financial premiums paid by the state. Bolton shares the same sentiment in terms of cost and benefits in the application of the preference point system created by the PPPFA. However, both authors did not provide any indication of the rand value coupled to the cost and benefits allowing readers to test their founding.

Two local authors, Labuschagne and Bolton tested the authority of the judiciary in public procurement. In 1985 Labuschagne researched the similarities between public and private procurement contracts where he found that the South African law did not acknowledge government procurement contracts under administrative law. Bolton's study in 2007, with the title, "The legal regulation of government procurement in South Africa" found that the legal regime in South Africa generally gives adequate effect to section 217 of the 1996 Constitution, thereby awarding powers to the courts to review procurement procedures and decisions. In section 4.3.2 the researcher presented a court ruling where it was found that the Equality Court has jurisdiction to entertain administrative actions relevant to public procurement. There is clearly a reformation from 1985 in the role of the judiciary in public procurement. The researcher is of the opinion that this is a positive contribution towards enforcing public service accountability.

6.3.2 Procedural perspective

The researcher also did a literature survey of public procurement in terms of a procedural approach. Labuschagne and Bolton contributed to her study with their respective identification of similar procurement processes. The main headings differ but the general application stays the same. Of significance to her study is that legislation governing the execution of public procurement was changed but similar procurement procedures are still followed.

6.3.3 Government research

The heading, "government research", included studies that were commissioned by the South African government. The researcher provided information of a study that took place in the Eastern Cape, the Webb Report and a CPAR. In all three studies government's aim was to identify problem areas within South Africa's public procurement system and to make recommendations on how to address the identified shortcomings. The studies found, amongst others, that procurement was not adequately used to deal with government goals, that a migration is needed to form a process

driven system to a result orientated approach, that principles of governance should be adhered to and that procurement staff should be adequately trained.

In section 3.2.4, the researcher informed the reader that no reference was made to the ST36 and/or ST37 in any one of the three reports (Randall's study, the Webb Report, and CPAR). Since no items in the two documents were given as reasons to recommend change to the existing procurement system, the researcher could not test the validity thereof. The research used her analysis in chapter 5 to identify those items in the ST36 and ST37 that, she assumes, necessitated change.

The reader was informed in section 4.2.1 that government procurement gained Constitutional status through the inclusion thereof in the 1996 Constitution. According to the definition of procurement provided in section 2.2, government can obtain goods or services through for instance, borrowing, leasing and even force or pillage. Whatever the need or method of procurement, the South African 1996 Constitution prescribes in section 217 that it should take place in a manner that is fair, equitable, transparent, competitive and cost-effective. The researcher's personal opinion is that the inclusion of public procurement in the 1996 Constitution and other legislation do not necessary enhance service delivery. However, since the 1996 Constitution stipulates the manner in which procurement must take place, potential and contracted suppliers can test the application thereof in a court of Law. Because a broad discussion of the principles took place in chapter 4, the researcher will now only provide a short summary of the five principles.

The five Constitutional principles

6.4.1 Fair

Society's requirement for the fair application of administrative action in public procurement is strengthened by section 33 of the Bill of Rights. In terms of the said section prospective and contracted suppliers have the right to fair administrative action. In practise a fair procurement system is, amongst others, one where contractors are given sufficient access to the procurement process, contracts are widely advertised, all contractors are provided with the same information, all tenders must be considered and enough time is allowed for the preparation of tenders.

6.4.2 Equitable

In section 4.3.2, the researcher provided a few authors' interpretation of the meaning of "equitable" in terms of public procurement. Wessels's interpretation of where disadvantaged groups are provided with the means to compete competitively with the advantaged is according to the researcher capturing the essence of government's aim with the introduction of legislation such as the PPPFA. Other relevant legislation was discussed in chapter 4.

6.4.3 Transparent

As is the case with fair, transparency in public procurement is also ensured by means of the South African Constitution. Section 32 of the Bill of Rights provides contractors with the right to have access to information held by the state. In practise tenders should for instance be opened in public, records should be kept of tenders opened, all meetings must be recorded and general procurement rules and practices must be advertised. Tenders were also advertised during the pre-PFMA era but post-PFMA stipulations allow

society to scrutinise processes followed and decisions taken. The latter did not take place before 1999.

6.4.4 Competitive

The researcher discussed competitive procurement in section 4.3.4. A general theme of competition in public procurement is that several suppliers are given the opportunity to tender and that the more the competition the lower the prices. However, Pauw and Wolvaardt, allege that the consideration of too many tenders will work against cost-effectiveness. For example, it is not cost-effective for an institution to follow a procurement process that costs R500 000 to obtain a product that is worth R100 000. Competition also contributes towards identifying the role players in the market and the various products available.

6.4.5 Cost-effective

A cost-effective procurement system is a system where an institution gets the maximum benefit from the goods and services they required in the most economical way. As indicated in section 4.3.5, cost-effectiveness also implies that institutions should decide whether to procure from an outside entity or to provide goods or services in-house. For instance, the question arises if the institution has the required skills and capabilities inside the organisation to develop a procurement policy or will an external supplier be contracted to do the job. The institution should however also take into consideration that while a contractor is paid for this type of service, the internal knowledge base is often used to fulfil the contract obligations.

As already stated, public procurement in South Africa took place through the auspices of the State Tender Board prior to 1995. The State Tender Board Act 86 of 1968 provided for the establishment of the State Tender Board. With the introduction of the 1996 Constitution and thereafter the PFMA in 1999, public procurement became one of the accounting officers' performance responsibilities. In section 5.2, the researcher provided a

compressed summary of the four documents that formed the basis for answering the research question. By comparing the pre- and post-PFMA prescripts, the researcher is able to determine whether a procurement framework was developed that moved away from a system that is quoted to be rule-driven, outdated, cumbersome, undermining accountability, inefficient, process-driven and dependent on process and procedure.

6.5 Interpretation of analysis

Whereas the Webb Report and CPAR failed to provide readers with items in the ST36 and/or ST37 that directed their findings, the researcher will provide the reader with factual information on which she basis her findings.

In the past accounting officers had to adhere to the ST36 and ST37 when procuring goods and services and with the introduction of the PFMA they are required to develop and implement their departmental procurement policies in terms of the GCC and Guide. In terms of paragraph 1.2.2 and 1.6.2.2 of the Guide, bid documents must include the GCC and the accounting officer should implement measures suggested in the Guide. Paragraph 1.2.2, provides substance to guideline documents since accounting officers may personally be held accountable if they do not implement measures suggested in these documents. In chapter 5 the researcher explained to the reader the three differentiations under which the comparison between the pre- and post-PFMA would take place. She opts for reflecting the information in a table format allowing the reader to at first glance get a visual understanding of the context in which the reflected information will be analysed. She has already discussed the comparison between the definitions and for this reason she will only concentrate on the remaining headings of the GCC. The analysis reflects:

- five headings where items appear in both the columns *exactly the same* and *same intention but differently stated*. This is the case for headings 2, 3, 8, 21 and 31

- a further five headings have items that are *exactly the same* as in the ST36
- 23 headings contain items that have the same *intention but are differently stated* in the ST36
- only heading 27, “*settlement of dispute*” contains six items that are reflected in the column *different* but the same heading also has one item under *same intention but differently stated*
- ten of the GCC headings have no similarities to the ST36.

Due to the contextual similarities between the ST36 and the Guide, the researcher provided a table reflecting these similarities. The Guide also does not contain any differences but 21 similarities were found.

The comparison between the Guide and ST37 was not so much a parallel analysis as an identification of items that she considered to be important additions to public procurement and those items in the ST37 that should have been included in the Guide. The researcher is of the opinion that the National Treasury must stipulate consultation of the ST37 by institutions when compiling their own procurement policies. In so doing, Minister Gordhan’s request for improving procurement processes might be realised.

6.6 Answer to the research question

The innovations introduced during the period 1999 to 2005 mainly brought about a SCM function for which accounting officers are held responsible for the introduction and execution of an appropriate procurement system for that department. Whereas public procurement was regulated by the State Tender Board in terms of the ST36 and ST37, the post-PFMA introduced the GCC and Guide to accounting officers to direct procurement. This dissertation has shown that public procurement regulation takes place through regulatory documents that mainly underwent a name change and that the only changes are found in the reporting framework.

6.7 Recommendations

The researcher is of the opinion that Mr Gordhan's call for a strong procurement framework can be realised through existing structures within institutions. The recommendations of the researcher in this regard are the following:

- The accounting officer, chief financial officer and other members of top management should annually attend SCM training. The outcome of the training should form part of their performance agreements and appraisal.
- The pre-PFMA procurement systems must be consulted and where appropriate included in post-PFMA policy documents.
- Departmental procurement and provisioning should not be over-regulated through lengthy procedures that do not add value to service delivery.
- Procurement practitioners from various government institutions should meet at least annually to share knowledge and experiences.
- Public institutions should be technologically connected to cross reference contractors' past performance and to confirm shareholding status with the Department of Trade and Industry.
- Government initiatives to address unemployment and economic development of previously disabled groups are sabotaged by public institutions that do not pay contractors promptly within 30 days. A public office can be an office of trust when information is made public of those instances where government institutions played a role in the liquidation of contractors.
- To ensure fairness and transparency in the selection process, institutions should hold, where practical, debriefing sessions for unsuccessful tenderers.
- Not only must public institutions develop a procurement policy but they should also develop procedural manuals that complement the policy. Procedural manuals contribute towards transparent systems and informed decision-making.

- A stronger message of accountability will be communicated when the political will to combat fraudulent procurement practices are reflected through legal actions and not only internal departmental processes.
- Not all officials are corrupt and not all procurement processes are questionable. Society should also be informed of “success stories” that will motivate officials in delivering goods and services to the best advantage of society.

6.8 Conclusion

In this chapter the researcher provided a summary of the findings of the study. This was done by way of a compressed discussion of procurement and supply chain management, an overview of the literature contributions in terms of South Africa’s public procurement process, and a summary of the five constitutional principles. She also provided an interpretation of the analysis conducted in chapter 5 in section 6.5. This chapter also presents the answer to her research question. The South African legislation and literature contributions that she made use of stretches over a period of thirty nine years, thereby allowing her to answer her research question based on historic and current public procurement regulation and practises. The researcher also provided recommendations that, according to her, are valuable towards establishing a strong public procurement framework.

Democratic principles can be realised when executive actions and decisions are focused on the foundation of “by the people for the people” Such a foundation will contribute towards a procurement framework where society is the sole beneficiaries of public goods and services.

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