The meaning and application of cost-effectiveness as a constitutional requirement for the South African public procurement system

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ABSTRACT

Satisfying the need for goods and services from external parties is an inevitable requirement for any organisation, public and private. For public bodies, this is an undertaking vastly different from its counterpart in the private sector. The freedom in private procurement allows flexibility in the objectives, systems and decisions, limited only by the confines of good corporate governance. With few exceptions, cost-effectiveness can be argued to be the primary objective of all private-sector procurement. While cost-effectiveness could lay claim to being a fundamental objective in public sector procurement, a claim to its primacy is not sustainable. South Africa's constitutional recognition that cost-effectiveness is a requirement of the public procurement system is tempered by four co-requirements and entrenched preferential provisions ensure that the broader constitutional goal of substantive equality is reserved a place among the objectives of the procurement system.

The requirement of cost-effectiveness was chosen as the focus of the study because - despite its fundamental nature and intuitive appeal – it is the requirement that has received little in the way of principles-based attention in the legal context. The definitional cost-to-outcomes assessment or decisions to award to the highest scoring tender accord with case-specific judicial interpretation, but fall short of establishing principles for its application in a system of procurement regulation.

This principles-based study approaches the question of cost-effectiveness in the balance of constitutional requirements by developing an understanding of the structure of systems that underlie the operation of the envisaged constitutional procurement system. A full understanding of the meaning of the cost-effectiveness, requirements for decisions to be cost-effective and the legal requirements for such decisions are all pre-requisites to establish the principles for a cost-effective system. This study undertakes such an enquiry by developing a model for cost-effective decision making and uses this model to

into investigate the interaction between cost-effectiveness and the other constitutional requirements of the system.

A regulatory system for public procurement is a complex set of rules, rules about rules, principles and standards. How such a system gives effect to a requirement such as cost-effectiveness can only be judged by the way it compels the design of lower order systems of decision-making to meet such a requirement within the balance of other requirements. This study addresses the question of what tests may exist for a system's cost-effectiveness by establishing a structure of generic decision sub-processes for the procurement phase to identify properties of a system that would compel cost-effective decision-making in the lower order systems.

With the model for cost-effective decision making, this study then attempts to answer the question of how the mechanisms of the South African regulatory system give effect to cost-effectiveness in the procurement phase. The system's conformance with the principles and models developed may be useful for identifying areas of regulatory strengths and weaknesses but cannot constructively provide solutions for improvement. The study addresses this constructive element by using comparative analysis techniques with a comparator regulatory system, that of the United Kingdom, to provide constructive prototypes for recommendations.

The study is conducted in two parts. The model for the constitutional system and the models for the application of legal requirements for cost-effective decision-making within a procurement system are developed in the first part to provide the theoretical basis. The second part applies these theoretical models to decision-making specific to the procurement phase of the regulatory life-cycle. This provides a framework for analysis of the live South African regulatory system and the comparator UK system to test the practical application of the theoretical model for cost-effectiveness toward understanding

the effects of regulatory mechanisms employed and to develop recommendations for the South African regulatory system.

The law is stated, as far as possible, as at 30 November 2016.

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List of Abbreviations

All SA	All South Africa Law Reports
B-BBEE	Broad-based Black Economic Empowerment
B-BBEEA	*Broad-based Black Economic Empowerment Act* 53 of 2003
B-BBEEAA	*Broad-based Black Economic Empowerment Amendment Act* 46 of 2013
BCLR	Butterworths Constitutional Law Reports
CIDB	Construction Industry Development Board
CIDBA	*Construction Industry Development Board Act* 38 of 2000
CIDR	GN 692 in GG 26427 of 9 June 2004 as amended by GN R1333 in GG No. 26991 of 12 November 2004, GN R751 in GG 27831 of 22 July 2005, GN R842 in GG 29138 of 18 August 2006, GNR1121 in GG 30510 of 23 November 2007, GN R1224 in GG 31603 of 14 November 2008 and GN R464 in GG 36629 of 2 July 2013
CSD	Central Supplier Database
DTI	Department of Trade and Industry
DPW	Department of Public Works
EC	European Community
ESPD	European Single Procurement Document
EU	European Union
EUCD	Directive 2014/24/EC of the European Parliament and of the Council of 26 February 2014 and repealing Directive 2004/18/EC OJ L 94/65
GDP	Gross Domestic Product
GG	Government Gazette
GN	Government Notice

GPA	Plurilateral Government Procurement Agreement of the WTO
HDI	Historically Disadvantaged Individual
ICT	Information and Communication Technology
ISO	International Standards Organisation
JOL	Judgements Online
MFMA	*Local Government: Municipal Finance Management Act* 56 of 2003
MSA	*Local Government: Municipal Systems Act* 32 of 2000
MSCMR	GN 868 of 2005 in GG 27636 of 30 May 2005
OJ	Official Journal of the European Union
PAIA	*Promotion of Access to Information Act* 2 of 2000
PAJA	*Promotion of Administrative Justice Act* 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
PFMA	*Public Finance Management Act* 1 of 1999
PFMAR	GN R225 in GG 27388 of 15 March 2005
PPP	Public Private Partnership
PPPFA	*Preferential Procurement Policy Framework Act* 5 of 2000
PPPFAR	GN R502 in GG 34350 of 8 July 2011
PPPFAR 2001	GN R725 in GG 22549 of 10 August 2001
RFI	Request for Information
RFP	Request for Proposal
SA	South African Law Reports
SARS	South African Revenue Service
SBD	Standard Bidding Document
SCM	Supply Chain Management
SITA	State Information Technology Agency
SITAA	*State Information Technology Agency Act* 88 of 1998 as amended by the *State Information Technology Agency Act* 38 of 2002

SMME	Small, Medium and Micro Enterprises
TFEU	Treaty on the Functioning of the European Union (2012) OJ C326/47
UNCAC	United Nations Convention on Corruption
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America
VAT	Valued Added Tax
WTO	World Trade Organisation

The meaning and application of cost-effectiveness as a constitutional requirement for the South African public procurement system

1 Introduction

This study is in essence an enquiry into one of the constitutional requirements of the South African public procurement system: that such a system must be cost-effective. This requirement exists in the context of other requirements of the constitutional system and in the broader context of requirements of public procurement as a function of public administration. The study focuses on the legal regulation of the public procurement system as a means to meeting the requirement of the system to be cost effective within this setting.

The foundations for arguments made in the study are derived from the principles established from research, development and practices in the legal discipline of public procurement regulation over the last 20-plus years. In order to frame and establish the relevance of the research questions in the concluding paragraphs of this chapter, a brief overview of the foundational concepts and principles is set out. A further exposition of these concepts and principles is conducted in Chapter 2 at the level of detail required for the principle-based enquiries in the body of the study.

1.1 Public procurement overview

The acquisition of goods and services by the state is an established and significant phenomenon in free-market and mixed economies.[1] While public procurement activities are fundamentally driven to meet the need for goods and services and related economic goals, its goals extend to satisfying the requirements of state conduct and indirect goals of public policy relating to public procurement.[2] While fundamental goals

[1] The observations, arguments and conclusions underpinning the overview in this par 1.1 are set out in Chapter 2. As this overview is to provide context for the research questions, Chapter 2 is referenced directly to avoid repetition. See 2.1.1.

[2] Par 2.1.2.

- such as effectiveness, efficiency, value for money, equal treatment and equal opportunity - can be said to exist in all systems, the degree to which each receives attention is determined by factors attaching to a particular environment that may change over time.[3] The goals of public procurement are therefore concluded to be neither universal nor static.

Internal control by the political arm of state and by the central executive authorities within the bureaucracy over the public procurement activities is required to ensure alignment and the achievement of goals.[4] The legal form of this control is termed public procurement regulation. This form of control has advantages: the mechanisms of regulatory control allow the compliance of procurement to be assessed in terms of its adherence to the regulation without the need to assess individual outcomes in term of systemic goals. A further advantage is the ability of external parties to monitor the compliance of the activities thereby reducing the burden of monitoring on the state.[5]

The public procurement environment is susceptible to a number of threats and weaknesses - for example, corruption, bias, collusion and inherent inefficiencies - which place the achievement of the goals at risk.[6] Specific strategies, instruments and principles of public procurement regulation are aimed at the achievement of the goals set for the environment as well as those stemming from the need to counter these weaknesses and threats to the overall achievement of the goals.[7]

The challenge for regulators is to define a system for the control of public procurement that balances the various objectives for public procurement. There are many dimensions to this balance through regulation: immediate transactional goals versus those of the longer term, control versus discretion, rules versus principles, direct versus indirect and standardisation versus flexibility. These represent competing directions and choices for regulatory design.[8] In the South African context, the

3 Par 2.1.2.
4 Par 2.1.4.
5 Par 2.2.
6 Par 2.2.2.
7 Pars 2.2.2 and 2.2.3.
8 Par 2.3.

requirements for public procurement regulation are not simply matters of policy or of executive control but are entrenched as constitutional requirements, thus elevating the principles for regulatory design to this level.

The achievement of public procurement goals is dependent on the outcomes determined by the life cycle of public procurement: the planning phase, procurement phase and the contract management phase.[9] As the procurement phase determines the parameters and procedures for each transaction and encompasses the decision-making processes for selecting the external contracting party, it is a critical phase for the achievement of the goals of the system.[10] As this phase affects external parties and is open to monitoring in this phase during the procurement phase, it is also the subject of most disputes.[11] This study is primarily motivated by issues arising from disputes relating to the procurement phase that relate to a fundamental requirement of the procurement system, that of cost-effectiveness. The study examines this requirement in the context of regulatory mechanisms for achieving this requirement within the broader challenge of balance in the regulatory systems.

1.2 Public procurement regulation in South Africa

1.2.1 Constitutional status

South Africa, as a mixed economy, satisfies its needs through internal provision and where necessary, through the procurement of goods and services from the market.[12]

The significance of public procurement and its regulation in South Africa was recognised by according the principles governing the public procurement system constitutional status.[13] The *Constitution of South Africa, 1996* (hereafter the

9 Par 2.2.7.
10 Par 2.2.7.
11 Par 2.2.7.
12 Bolton *Law of Government Procurement* 3. Expropriation is a further means of meeting its needs in exceptional circumstances.
13 Section 187 of the *Constitution of South Africa* Act 200 of 1993 and subsequently in section 217 of the *Constitution of South Africa,* 1996.

"Constitution") currently sets out the requirements for a public procurement system as being whenever an organ of state in any sphere of government contracts for goods or services it must do so "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".[14] Notwithstanding these requirements, *Section 217* explicitly provides for the implementation of preferential procurement policies for the advancement of persons or categories of persons disadvantaged by unfair discrimination, subject to national legislation prescribing a framework for such policies.[15] The requirements of the *Constitution* for a procurement system are expressed at a principle level, anticipating a system of statutory and subordinate legislation to regulate the procurement process in practical terms especially with regard to horizontal goals. In line with the constitutional provisions, the legislature has promulgated several acts since 1996 that - together with regulations and guidelines issued in terms of these acts - constitute the legal framework for the system of public procurement regulation in the Republic.

1.2.2 Statutory and subordinate legislation

Subsection 217(2) provides for the implementation of preferential procurement policies for categories of preference in the allocation of contracts and for the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. These policies must be implemented within a framework of national legislation. Legislation has been promulgated to give effect to this and other constitutional requirements related to public procurement. Primary statutes include the *Public Finance Management Act*[16] (hereafter the "PFMA"); *Local Government: Municipal Finance Management Act*[17] (hereafter "MFMA"); *Preferential Procurement Policy Framework Act*[18] (hereafter "PPPFA"); the *Construction Industry Development Board Act*[19] (hereafter "CIDBA") and the *Broad-Based Black Economic Empowerment*

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14 Section 217 of the *Constitution of the Republic of South Africa*, 1996.
15 Subsections 217(2) and 217(3) of the *Constitution*.
16 Act 1 of 1999.
17 Act 56 of 2003.
18 Act 5 of 2000.
19 Act 38 of 2000.

Act[20] (hereafter "B-BBEEA"). Complementary legislation - such as the *Promotion of Administrative Justice Act*[21] (hereafter "PAJA"), *Promotion of Access to Information Act*[22] (hereafter "PAIA"), *Promotion of Equality and Prevention of Unfair Discrimination Act*[23]*, Prevention and Combating of Corrupt Activities Act*[24] and the *Competition Act*[25] - also forms part of the overall legislative regulatory scheme. These statutes - together with their regulations and guidelines - regulate public procurement activities including the procedures that may be used and the methods used for evaluation, selection and award.

While the PFMA and the MFMA are the primary statutes regulating public procurement for goods and services in the national provincial and local spheres of government, the CIDBA provides the statutory framework for the public procurement of construction works. The PPPFA is the primary source of legislation specifically dealing with the evaluation process and binds all organs of state in all types of procurements.[26] These legislative instruments assign powers to departments within the executive to administer and further regulate public procurement within the statutory framework. The National Treasury plays a critical role in this structure in promoting and enforcing transparency and effective management in respect of the revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.[27] Other departments within the executive are competent to regulate procurement for specific classes or specific procurement activities, such as the Department of Public Works (hereafter the "DPW") for the classes of procurement defined as construction works and the Department of Trade and Industry (hereafter the "DTI") for local

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20 Act 53 of 2003. The Broad-based Black Economic Empowerment Amendment Act 46 of 2013 (hereafter the "B-BBEEAA") amends the B-BBEEA significantly. The amendments themselves are not discussed in any detail and, unless relevant to the discussion, a reference to the B-BBEEA will be inclusive of the amendments made by the B-BBEEA*A*.

21 Act 3 of 2000.

22 Act 2 of 2000.

23 Act 4 of 2000.

24 Act 12 of 1994.

25 Act 89 of 1998.

26 Section 1 of the PPPFA. An 'organ of state is defined to be a national or provincial department, a municipality, a constitutional institution, Parliament, provincial legislature or any other institution included in the definition of organ of state in s239 of the *Constitution*.

27 Sections 6 and 76 of the PFMA.

production content. Regulations, instructions notes, guides and practice notes issued by these administering departments regulate the detail of the procurement processes and are variously prescriptive or directive in nature for the public bodies and types of procurement to which these apply.

While these foundational elements of the procurement system are centrally determined, the system remains decentralised.[28] A feature of the regulatory framework for procurement in South Africa is the requirement for public bodies to determine their own policies and supply chain management system within the framework of the constitutional principles, legislation and regulations, which together determine the regulatory framework for procurement binding on a public body. The execution of a procurement transaction is undertaken independently by public bodies but within the regulatory framework and subject to the requirements of authorisation, review and reporting requirements of the system.

1.3 Problem statement

1.3.1 Introduction

Section 217 of the *Constitution* provides as follows:[29]

> 217. Procurement
>
> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
> (a) categories of preference in the allocation of contracts; and
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

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[28] Recent policy announcements indicate the increased centralisation of certain common procurement activities for increased central control and efficiencies. South African Government *2016 Budget Speech* http://bit.ly/2ix1GmS.

[29] S217 of the *Constitution*. See par 3.3.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

Section 217(1) therefore requires that when an organ of state within the application of subsection 217(1) procures goods and services:[30] (i) a system must exist; (ii) the system must be fair, equitable, transparent, competitive and cost effective; and (iii) the organ of state must execute the procurement in accordance with such system. This distinction between the constitutional requirements being requirements of the system, as opposed to being direct requirements of an individual procurement transaction, was underlined in *Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd*.[31]

> This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of section 217(1), the question whether any procurement is "valid" must be answered with reference to the mentioned legislation or regulation.

The validity of the actions and decisions of procurement transaction are therefore primarily judged in terms of their adherence to the system. While the adherence of a procurement transaction to the system must be determined within the principles of administrative law, the constitutional requirements have been given an embedded role in administrative determinations as these may "inform and enrich or give content to" the principles of administrative law in a particular public procurement context.[32]

The requirements of principles and strategies - such as fairness, transparency and competitiveness - in their own right may have absolute meaning and application, but as conjunctive requirements may require certain concessions on the part of each.[33]

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30 The scope and application of s217 of the *Constitution* is discussed in more detail in paragraphs 3.3.2 and 3.3.3.

31 2013 2 All SA 501 (SCA) 15. See also *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 1 SA 604 (CC) 45. (Hereafter "Allpay").

32 *Allpay* 43. "The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA". Also at 45, "Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA."

33 See pars 2.2.1 and 2.2.3.

While this implies that the requirements need to be applied in a balance, the *Constitution* only prescribes their presence as requirements but not the weighting or intended balance.

Subsection 217(2) introduces a qualification, that the requirements of subsection 217(1) do not prevent the implementation of procurement policies providing for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination. The qualification in subsection 217(2) is subject to such policies being implemented within a framework prescribed by national legislation and that such legislation must be enacted.[34] The subsection 217(2) qualification "does not prevent" implies that the application of the requirements of subsection 217(1) is limited to the extent that these may not prevent the policy objectives contemplated in subsection 217(2). The requirements of subsection 217(1) must also be read to imply they have applicability to the extent they do not "prevent" the policy objectives contemplated.[35]

This study focuses on one of the requirements in subsection 217(1), that the procurement system must be cost effective. Concepts that superficially correspond with cost-effectiveness - such as value for money, economic efficiency, and best value - have been the subject of analysis in the context of foreign and international systems.[36] Cost-effectiveness, as a constitutional requirement of South African public procurement, has received limited specific attention in general academic texts on public procurement regulation.[37] A focused study on this single constitutional requirement must therefore establish its precise meaning in the context of relevant constitutional provisions.

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34 Subsection 217(3) limits the implementation of such policies within a framework prescribed by national legislation.

35 Bolton *Law of Government Procurement* 61. The other implication of the subsection 217(2) qualification "does not prevent" is that, from a constitutional perspective, it is not mandatory to effect such policies. See the later discussion on equity in par 4.4.

36 References to the analyses relating to these concepts in international and foreign systems are made throughout the study.

37 For general treatment of the requirement of cost-effectiveness, see Bolton *Law of Government Procurement* Chapter 5, De la Harpe *Public Procurement Law* 289-295, Penfold and Reyburn *Public Procurement* 25-11.

1.3.2 Meaning of cost-effectiveness in context

Dictionary definitions of the term "cost-effective" vary considerably.[38] However, what is common to these definitions is the notion of favourable outcomes in relation to their cost.

In the technical sense, the use of cost-effectiveness as a means for analysing and evaluating programmes from an economic viewpoint is commonplace in diverse disciplines, for example its use in evaluating healthcare, education, defence and environmental strategies.[39] A key differentiator in evaluating programmes based on cost-effectiveness as opposed to the use of other bases for comparison is that it provides a means for deciding the best strategy for outcomes that are difficult to monetise.[40] The basic meaning however remains the same: weighing the cost against the outcome.

The goals of a public procurement system are noted, in general, to include a variety of desired outcomes including value for money, fairness, integrity, equal treatment, and equal participation, as well as horizontal outcomes.[41] In the South African context, certain horizontal outcomes and mechanisms are explicitly provided for by the *Constitution* and statutory implementation and control, at a framework level, are peremptory. As argued above, the requirement for the procurement system to be cost effective remains a requirement of the system to the extent that it does not prevent the implementation of policy toward these outcomes. Conceptually, cost-effectiveness does not examine the merits of outcomes, only the effectiveness and cost in achieving outcomes. It could therefore be questioned whether the requirement of cost-

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38 This is explored in greater depth in par 4.1.1.

39 For example the discussions on cost-effectiveness as an economic evaluation technique in Levin *Cost-effectiveness Analysis* 381-383. Sher and Punglia *Decision Analysis* 19-21. Cropper *et al Getting cars off the road* 134-139.

40 Cellini and Kee *Cost-effectiveness* 493. The measure of cost-effectiveness is expressed as the relationship between cost and units of effectiveness as opposed to, for example, cost benefit analyses, which require outcomes to be expressed in monetary units. For example, in a healthcare setting, the number of lives saved, or increase in life expectancy are not capable of being monetised in an objectively quantitative manner.

41 Par 2.2.1.

effectiveness is capable of preventing such policies, as it would only require that such policy outcomes are included in the overall outcomes sought to be achieved effectively at an acceptable cost.

A complication for examining the cost-effectiveness of a system is the presence of multiple goals or outcomes. The most apparent application of a test for cost-effectiveness is against the direct outcome, the effectiveness of the delivery of goods and services as compared with the cost of the procurement transaction. This application has been accepted as the equivalent of value for money in legal procurement literature,[42] local statutes,[43] and in judgments of the courts.[44] As argued above, the application of the cost-effectiveness of the system may extend to the pursuit of objectives beyond the direct delivery of goods and services. This invites further enquiry as to the application of cost-effectiveness beyond the sense of transactional value for money to establish whether this requirement would extend to other outcomes of the regulatory system. This leads to the first research question:

> What is the meaning and extent of the constitutional requirement for cost-effectiveness of the procurement system?

1.3.3 Determining the cost-effectiveness of a system

Conceptually, an assessment of the cost in relation to the effectiveness of its outcomes is necessary to show cost-effectiveness. From a deterministic standpoint, cost-effectiveness can only be established after the outcomes and costs are known. A procurement transaction, for example, may be examined for its transactional cost-effectiveness, or value for money, in terms of the *ex post* achievement of the outcomes sought versus an *ex post* valuation of its cost. The requirement of section 217,

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42 See for example Bolton *Law of Government Procurement* 44; Penfold and Reyburn *Public Procurement* 25-11; and De la Harpe *Public Procurement Law* 371.

43 For example, subsection 112(1)(h) of the MFMA.

44 For example, *JFE Sapela Electronics (Pty) Ltd & another v Chairperson, Standing Tender Committee* 2004 JOL 12848 (C) 37; *Vuna Healthcare Logistics (Mpumalanga) v MEC of Health and Social Development, Mpumalanga Provincial Government and Others* 2012 (5948/2011) ZAGPPHC 126 (GNP) 7; *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* 2013 (21158/2012) ZAWCHC 3 (WCC) 109.

however, is that the system must be, *inter alia*, cost-effective. The question thus arises as to how a system could be said to meet the requirement and by what means this could be determined.

A single procurement transaction conducted in accordance with the system, that is determined to be cost effective in terms of, say, its direct transactional outcomes is clearly insufficient to show the system itself is cost effective in terms of these outcomes. First, individual transactional goals may not be co-extensive with the goals of the system and hence it may not be possible to assess the achievement of all system goals at the transactional level. Second, the achievement of a single cost-effective transaction is not sufficient to show systemic cost-effectiveness. For similar reasons, it could not be said that the failure of a procurement transaction to meet the requirement of cost-effectiveness is sufficient to show the system does not meet the requirement. The achievement of the value-for-money objective of a transaction may also be systematically foregone for the long-term achievement of the system in terms of the goal of fairness and public trust.[45] Therefore, no firm conclusions could be drawn regarding the cost-effectiveness of the system from the examination of successes or failures of isolated procurement transactions.

If one had to consider the holistic product of the system this would amount to the sum total of transactions, all outcomes and costs. A deterministic answer would remain elusive. The logistical difficulty of analysing the sum total of transactions alone would not render such an enquiry viable but even if possible open questions would remain regarding, for example, over what period should such analysis be done, how goals should be balanced and the effects of external influences on outcomes.

A different epistemic basis for determining the cost-effectiveness of a system can be considered. A procurement system is a system of rules about rules, rules and principles. From the perspective of legal analysis, the systematic effects of such rules - rules about rules, rules and principles - may be analysed to determine their general

[45] The example of preserving fairness of the system at the expense of achieving value for money in a transaction is explored in more detail in par 2.1.1.

promotion of, or failure to promote cost-effectiveness. In essence, this analysis can be comparative in nature in terms of a system's congruence with general principles as established by academic consensus and general professional practices. It would not be viable to examine the rules in place for every transaction, and therefore the cost-effectiveness of a system could only viably be determined by examining the effect that the system's rules would have on the rules for transactions and their effect on the execution of transactions in terms thereof.

In the light of the *Allpay* decision, the direct justiciability of the constitutional principles should be indicated in matters where the system is the subject of dispute. Case law to date, however, has produced few pronouncements regarding the regulatory system itself.[46] The weight of case law has been decided in terms of the validity of administrative action and decisions. In other words, these have mostly been decided in terms of whether the actions and decisions have been made in accordance with the system, not in terms of the constitutional compliance of the system. The *Allpay* decision does accord the constitutional requirements relevance in informing, enriching or giving content to the principles of administrative law and hence, the application of the system can be indirectly tested.

While all stages of the procurement life cycle were argued to be of importance to the achievement of cost-effectiveness, the procurement phase was observed to receive the most regulatory attention and the evaluation process was noted to be a vital decision-making juncture in the life cycle.[47] The process of evaluation and selection of the suppliers has been the subject of a significant number of disputes requiring judicial intervention. As discussed in the following paragraphs, certain of these disputes have touched on systemic issues.

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46 The question of what constitutes the system may include considerations of the regulatory system being distinct from the system of rules put in place by a public body for a particular transaction. This is discussed in more detail in Chapter 3.

47 Par 2.1.4.

1.3.4 Cost-effectiveness in the evaluation process

Giving effect to cost-effectiveness in the process of evaluating offers in the procurement process involves efficiently selecting the offer with the best proposition for achieving the desired outcomes in balance with it cost. This is generally a non-trivial exercise as an offer's proposition for achieving the desired outcomes involves a multi-faceted enquiry into, not only the cost, but factors including risk, quality, capability, solution and capacity.[48] The offer's proposition for the achievement of horizontal goals may introduce further factors.[49] The cost dimension of the transaction is similarly complex. Beyond the price paid to the supplier, sources of cost are present throughout the life cycle of a procurement transaction and may include the costs associated with the tender procedure; internal costs associated with management of the contract; and future costs, for example licencing, maintenance and repair. If the widest perspective of the sources of cost were taken, costs may also include the costs borne by all participants and the cost of externalities borne by third parties.

Prior to 2010, the regulations issued in terms of the PPPFA regulating the evaluation of public tenders purported to permit the ranking of tenders in terms of a compensatory evaluation method incorporating quality related criteria together with pricing and horizontal preference criteria.[50] It was decided in *Sizabonke Civils CC v Zululand District Municipality*[51] that the direct interplay between price and other factors is precluded by provisions of the PPPFA. Subsequent regulations to the PPPFA explicitly separate the evaluation of quality-related criteria - such as quality, reliability, viability, durability, technical capacity and ability of the tenderer - from the evaluation of pricing and specific goals in a discrete preceding step.[52] Concern was noted by, amongst others, the CIDB, that this constraint could lead to the unfair elimination of tenderers,

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48 Bolton *Law of Government Procurement* 103-127. Turpin *Government Procurement and Contracts* 140. Especially in the case of complex tenders.

49 The question of whether the requirement of cost-effectiveness includes such outcomes is dealt with as part of the first research question.

50 GN R725 in GG 22549 of 10 August 2001 (hereafter the "PPPFAR 2001".

51 2010 JOL 25535 (KZP) 9-11 (hereafter "Sizabonke Civils"). While this concerned the validity of aspects of the system, it did not involve reference to the constitutional provision. Gorven J judged these provisions *ultra vires* and therefore impermissible in terms of the PPPFA.

52 GN R502 in GG 34350 of 8 June 2011 (hereafter the "PPPFAR").

reduction in competition and that, in the absence of a mechanism to differentiate between satisfactory and superior performance, contract performance could suffer.[53] The CIDB's concern could be seen to raise systemic issues regarding the compliance of the provisions of the PPPFA with the constitutional requirement of, amongst others, cost-effectiveness.

A separate provision in the PPPFA relating to the evaluation of tenders requires the consideration of 'objective criteria' that are permitted to trump the mechanism for ranking tenders.[54] These 'objective criteria' would perforce have to be considered after the execution of the method for determining the ranking based on the criteria of price and *B-BBEE*. What criteria may be considered as 'objective criteria' in terms of this provision and on what basis these criteria may be considered justified are not defined in the PPPFA nor in its attendant regulations. Judicial interpretation has clarified that objective criteria may not comprise specific criteria listed in subsections 2(1)(d) and 2(1)(e) of the PPPFA; however it is less clear what criteria should be used other than that such criteria must be ascertained objectively.[55]

In *Rainbow Civils CC v Minister of Transport and Public Work*s, *Western Cape*[56] the separation of quality-related criteria by operation of the system was again considered. The effect of relegating the evaluation of quality-related criteria to qualification status, in the judgement of Davis J, was not cost effective in the circumstances of the particular case.[57] Davis J made the point that, in the interests of cost-effectiveness, quality-related criteria "should not be ignored in the final adjudication between competing tenders".[58] The resolution, avoiding a pronouncement on the regulatory

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53 CIDB 2010 http://www.cidb.org.za/documents/corp/news/corp_news_cidbpositionpaper _evalbestvaluemoneytenders_4aug2010.pdf.

54 Subsection 2(1)(f) of the PPPFA.

55 See *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province & others; Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province & others; Star Asphalt/Kgotsong Civils Joint Venture & another v MEC for the Department of Transport and Roads, North West Province & others* 2007 JOL 19022 (B) 33. See also *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and Others 2002* All SA 336 (T) 40-41.

56 2013 (21158/2012) ZAWCHC 3 (WCC) 110–114. (Hereafter "Rainbow Civils").

57 *Rainbow Civils* 109-110.

58 *Rainbow Civils* 110.

system, was found in employing the mechanism contemplated in subsection 2(1)(f) of the PPPFA. However, academic opinion[59] has not supported the validity of re-considering quality-related criteria as part of an enquiry in terms of subsection 2(1)(f) of the PPPFA. The *status quo* therefore leaves an unresolved question: if, as Davis J determined, the separation of quality-related criteria in the evaluation does not give effect to cost-effectiveness and if section 2(1)(f) is not available to resolve this, should this raise a constitutional issue regarding the procurement system in terms of *Section 217*?

The achievement of cost-effectiveness is not the only goal at which the regulatory framework is directed. The balance with other objectives, principles, standards and policy-driven considerations ultimately determine the weight of the requirement of cost-effectiveness of the regulatory system. If it can be established that the presence or absence of regulatory prescription exposes systemic risk to the achievement of cost-effectiveness, taking into account the advancement of other goals, this could be of value to regulatory design in cycles of reform.[60]

This will be explored in the second research question:

> How does the South African procurement system give effect to the requirement of cost-effectiveness in the process of evaluation and selection of competitive tenders?

1.3.5 Alternate regulatory approaches to the evaluation and selection process

Frameworks for the regulation of the tender evaluation process found in foreign law, for example those that regulate public procurement in the *EU*[61] regulate the evaluation of public procurement tenders, *inter alia*, in terms of their proposal for the achievement of value for money.[62] A comparative analysis of the South African regulatory

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59 See generally Quinot *Role of Quality* and Bolton *Analysis of Criteria.* The conclusions from academic opinion and recent case law are discussed par 6.5.8.1.

60 Par 2.2.4 and 2.2.5.

61 *EU Procurement Directives*.

62 In the *EU*, this is expressed as being the most economically advantageous tender.

framework for the evaluation of tenders with that in a foreign jurisdiction may be of value in understanding particular regulatory procedures and processes set out to achieve cost-effectiveness. The requirement of cost-effectiveness for the South African public procurement system versus corresponding concepts such as value for money, most economically advantageous, best value and economy and efficiency would have to be investigated as a prerequisite for such analysis. As noted above, using a foreign regulatory framework such as the *EU Procurement Directives* or an implementation of the *EU Procurement Directives* as a comparator would have to be carefully considered in light of the community's objectives, which may differ from the objectives in the local jurisdiction.[63] The principles underpinning a foreign regulatory framework would therefore require examination, evaluation and comparison with principles of the local framework before drawing any conclusions as to the validity and applicability of a comparative approach.

The third research question intends to investigate the value of provisions of a foreign system for proposing positive alternatives to the current South African regulatory implementation:

> What recommendations for improving the achievement of cost-effectiveness in the South African system for tender evaluation in the procurement phase could be established using comparative legal analysis techniques?

1.4 Research methodology

In developing answers to the research questions, after a short contextual exposition of the principles of public procurement regulation, the study embarks on an investigation into the South African constitutional framework for public procurement. Sources, including constitutional and statutory provisions, academic texts, theses and articles, case law and electronic sources covering public procurement and general operation of procurement frameworks are synthesised to develop an understanding of the operational framework intended by the *Constitution*.

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63 The use of a comparative framework is discussed in the research methodology in par 1.4 below.

The first research question is investigated through an analysis of the South African constitutional provisions focusing on the meaning of the requirement to be cost effective. The general meaning of the term, its application in various contexts, from its definitional application to its general meanings in industry. Juridical interpretation is also considered in its application to administrative decision-making. The correspondence of the meaning of the term to similar terms more commonly applied in the public procurement context is conducted for the application of conclusions reached using research into such terms in the procurement context. A model construct for cost-effective decision-making is developed based on consensual opinion on the general meanings of the term. Sources for analysis include constitutional and statutory provisions, academic texts, theses and articles, case law and electronic sources.

Each constitutional provision is investigated with reference to general and local public procurement texts, academic theses and articles, electronic sources, and local case law. The investigation into the balance of the constitutional requirements is conducted with reference to the above sources as well as academic writing on general public procurement principles. The risks of presuming similarities in incorporating general or extra-jurisdictional conclusions are addressed by exposing the context though deductive reasoning to ensure their relevance in the local context.

The second research question requires an analysis of how the South African system of public procurement gives effect to the requirement to be cost effective. The third research question seeks to find recommendations to improve to the South African regulatory system in terms of the achievement of cost-effectiveness.

A possible route to establishing how well the South African system gives effect to the system, in theory, could be answered by an empirical analysis. However, to draw conclusions regarding cost-effectiveness from an empirical analysis of outcomes of

the procurement system would be fraught with difficulty.[64] The approach is therefore to pursue a principles-based approach in respect of both questions examining the decision-making provisions of the system.

A comparative analysis provides a constructive and appropriate method to answering both the second and third research questions by establishing a referential basis for the analysis of a regulatory implementation. The subject of comparative legal methodology is somewhat controversial.[65] The use of comparative legal techniques also raises a number of issues such as what is the purpose of the comparison, what should be compared and what does the comparative analysis actually entail?[66] The approach to the proposed comparative analysis is therefore set out in some detail to disclose the rationale, steps in the analysis and limits of conclusions that may be validly drawn.

The subject of the study is limited to the legal function of regulating the public tender evaluation process. A comparative enquiry based on the approach taken in South Africa to providing a framework for regulating this function compared to that taken in a comparator framework to regulating the same function would address the scope of the research question. A functional comparative analysis focuses on the effects of

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64 If cost-effectiveness means that the notional value of the outcome versus its cost is favourable, an empirical evaluation of a representative product set of transactions, in theory, could answer the question of whether a system is cost effective. The sheer volume of public procurement transactions to be analysed and the problems associated with determining notional value would not render this approach viable. If the meaning of cost-effectiveness requires that the regulatory framework should enable the selection of the most cost-effective solution offered, it would remain an impossible task to answer the question whether the framework has enabled such selection through empirical analysis. Even for an isolated transaction, it would be impossible to postulate validly what would have ultimately transpired, in terms of outcomes and cost, were an alternate competitor to have been selected, or indeed a supplier who may not have even have competed owing to constraints imposed by the regulations. The second problem with an empirical analysis is that the outcomes of procurement transactions may only be partly due to the scheme of the regulatory framework. The success of the legal framework would have to be isolated from the performance of actors in the transaction or other external factors. In addition, an empirical analysis could only determine whether procurement transactions concluded within the South African system were achieved cost effectively but could not recommend improvements to the system.

65 Samuel *Comparative Law Theory* 24. Leading textbooks, for example, claim the only useful method is the functional approach, an assertion disputed by others. Samuel summarises the difficulties with comparative law beyond the method, such as the presumption of similarity and the viewpoint as insider versus outsider.

66 Samuel *Comparative Law Theory* 24.

rules rather than the rules themselves.[67] Provided the functional elements of the two legal frameworks are comparable, it can be concluded from a functional comparative analysis that, if similar, the comparator system offers no prospect of further analysis. If dissimilar, conclusions may be drawn through an analysis of the effects of the differences and deductive reasoning as to the potential of the comparator system offering a better solution.

To enable a functional comparative study, comparable elements must be identified to provide a scheme for the comparison.[68] The approach taken is to identify the generic constituent elements of the tender evaluation process and to establish their function within the process. This aims to establish a scheme to ensure the comparability of elements in the ensuing comparative analysis. It is not the intention of the study to establish a normative construction for tender decision-making in the evaluation process and it is only intended to facilitate systematic comparison of functional equivalents.[69]

A model of decision-making is therefore constructed which devolves the decision-making in procurement phase into distinct procedural decision-making steps using general procurement, public procurement and decision theory sources including academic texts and articles.

Answering the second research question therefore involves analysing the provisions of the South African regulatory system relating to the decision-making steps in the procurement phase in terms of the constructed model. Statutes, regulation, guidelines, case law and academic texts are used to establish the functional implementation of cost-effectiveness in terms of both the models for cost-effective decision-making and the functional model for decision-making in the procurement process.

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67 Samuel *Comparative Law Theory* 81.

68 Samuel *Comparative Law Theory* 82. This is also referred to as an 'epistemological invariant' or place where comparison can take place.

69 The functional scheme is considered in a broad context and its further development to establish a normative scheme may be of value although beyond the scope of this study.

The final research question is approached by analysing a foreign regulatory system using the same model of decision-making. Legal frameworks regulating public procurement are dynamic in nature; exist at different stages of maturity; and embody characteristic jurisdictional priorities, policies and objectives.[70] In order to answer the third research question, the comparator framework should be that of an up-to-date, developed and mature public procurement regime. The implementation of the *EU Procurement Directives* in the *UK* was selected as a comparator framework for this study as: (1) the *EU*, including the *UK*, represents South Africa's largest trading partner; (2) the *EU Procurement Directives* have been actively developed since the formation of the *EU*; (3) the *EU Procurement Directives*, and the *UK* implementation, represent an up-to-date framework, with the *UK* transposition being enacted in 2015; (4) the *EU Procurement Directives* are the result of a multi-national collaborative; and (5) the viability of the analysis is improved by the concise exposition of the *EU* and *UK* regulatory provisions. Although the *UK* implementation of the *EU Procurement Directives* is largely a copy-out of the *EU Procurement Directives*,[71] it was selected as the comparator framework rather than the *EU Procurement Directives* directly, as assertions drawn from the comparison of a supranational framework to a national framework would raise avoidable questions regarding the validity of the comparison.

The objectives, policies and priorities of public procurement in South Africa are assumed dissimilar from those of the *UK* and are therefore examined and compared in order to provide a macro-level context for the ensuing micro-comparison, and to provide possible explanations for dissimilarities. The differences in the objectives, policies and priorities between the two may limit the possibility of valid conclusions being drawn. In order to analyse the detail of the framework provisions, a micro-level comparison of regulatory provisions is undertaken and the macro-context is therefore considered only to the extent necessary to enable the micro-comparison.[72]

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70 See par 2.3 for a detailed discussion of this statement.

71 See the discussion in par 7.4. The copy-out approach taken by the *UK* does hold the advantage for present purposes of enabling direct application of interpretations of the principles, rationale and purpose of provisions of the *EU Procurement Directives* to the *UK* implementation.

72 Samuel *Comparative Law Theory* 47.

This comparative study will thus be undertaken by: (1) constructing a comparative scheme, (2) examining the provisions of the South African and *UK* frameworks with reference to the comparative scheme, (3) examining similarities and dissimilarities between the underlying principles of the two frameworks, (4) analysing the provisions of both frameworks in terms of the functional elements of the comparative scheme for their attribution to cost-effectiveness, and (5) proposing recommendations for the cost-effectiveness of a system in the South African context.

1.5 Outline of the thesis

The thesis is set out in two parts. The first part focuses on the principles of public procurement, the interpretations of the constitutional provisions regarding a procurement system and the meaning of the requirement of cost-effectiveness in the balance of other requirements of such a system. Chapter 2 examines the fundamental principles that underlie the challenges for the regulation of public procurement. Chapter 3 examines provisions of the *Constitution* relating to procurement to establish the context of a procurement system in South Africa. Chapter 4 explores the meaning of the requirement of such a system to be cost effective in this context, as well as the meaning of other constitutional requirements and the implications for the balancing of requirements with respect to cost-effectiveness. Models for cost-effective decision-making within the regulatory system are developed in Chapter 4.

The second part of the study deals with the implementation of the constitutional requirement for a cost-effective system in terms of the models developed in Chapter 4. Prior to examining the provisions governing the procurement phase in both the South African regulatory system and the comparator UK system, Chapter 5 establishes a generic functional structure for decision-making in the procurement process. Conclusions regarding the attribution of features of regulated decision-making in terms of the generic functional scheme toward cost-effectiveness are drawn in the conclusion of Chapter 5. Chapter 6 examines the provisions of the South African regulatory framework relating to the procurement phase in accordance with the generic functional decision-making scheme. Observations regarding the cost-effectiveness, or otherwise, of features of the South African framework are made

although detailed conclusions are deferred to the comparative analysis. Chapter 7 examines the provisions of the UK procurement regulations in accordance with the generic functional scheme of decision-making. Observations regarding the cost-effectiveness of regulatory features are made in a similar fashion to the approach in the previous chapter. A structured analysis of the similarities and dissimilarities in the provisions of the two jurisdictional systems is conducted in Chapter 8. The dissimilarities are analysed in some depth to establish the potential of their application in improving cost-effectiveness in the South African regulatory framework. Where identified, recommendations for improvement are made in the conclusion of the Chapter 8.

Chapter 9 concludes the study, summarising the key findings and observations from chapters of both parts of the study and drawing overarching conclusions.

2 Principles of public procurement regulation

2.1 Public procurement

2.1.1 Context of public procurement

In free-market and mixed economies, the state invariably requires goods and services from outside parties operating in the private sector economy in order to fulfil its public functions.[1] The reasons for doing so may be varied, but ultimately these can be argued to arise from a state body's inability to provide such goods or services itself, or through decisions not to develop its own internal capacity to provide or deliver. Such decisions may be taken, for example, for reasons of efficiency: that the cost of contracting with an external party is lower than the internal cost of delivery.[2] The activities involved in fulfilling these requirements of the state, and those of public bodies under control of the state, are regarded as the activities of public procurement.[3] The central planning and allocation of resources, core to the ideology of command economies, obviates the need to procure from a private market so making public procurement a phenomenon relevant only in free-market and mixed economies.[4]

In performing the functions of public procurement, the state is not simply another buyer in the market. The *persona* of the state, the size of its economic activity and its domestic and international commitments differentiate it from other market buyers. The

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1 The word 'state' is used loosely to mean the broad concept of government, in its political and bureaucratic roles, and as it may exist in constitutional state constructs, for example national, federal or local authorities and other bodies under state control. The terms "goods and services" are used in a wide sense including works, or construction works, under different forms of contract including concession contracts. Trepte *Regulating Procurement* 30-32. For the purposes of defining public procurement in domestic systems, which is the context of this study, there is generally no reason to narrow the definition of goods nor to exclude any form of services.

2 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 6. See also Domberger and Jensen *Contracting Out* 72-73. Empirical evidence has shown significant savings through contracting services out without loss of service quality.

3 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 1-2*. Thai *International Public Procurement* 3. Bolton *Law of Government Procurement* 2. Quinot *State Commercial Activity* 12. Quinot notes that the extent of activities forming part of 'public procurement' is limited to the acquisition of goods, services and construction works by organs of state and excludes acquisition from organs of state. Further, that 'public procurement' is generally limited to the acquisition of goods, services and construction works and excludes the acquisition of things outside these categories, for example, the acquisition of land.

4 Trepte *Regulating Procurement* 19.

state's capacity to engage in commercial activity may be derived from specific constitutional or statutory enactments that restrict the freedom in the way that it may participate in the market when compared to private participants. These restrictions also extend to the way the state contracts in that it may not fetter its discretion to the extent that it cannot perform its public functions.[5] As a custodian of public funds, the state has fundamental duties and responsibilities to ensure the welfare of its citizens, including ensuring the delivery of public goods and services within the resources available, which places demands of accountabilty beyond those of other market participants.[6] Further, unlike other operators in the market, the state's mandate to govern may include effecting socio-economic policies which may, in part, determine its agenda for public procurement. Extra-domestic commitments may also impose limitations on a state's freedom to procure as it chooses.

From an economic point of view, public procurement represents a significant proportion of general commercial activity, as much as 20% of national GDP.[7] From the viewpoint of the market, the policies of the state are determiners of rights allocations, which ultimately determine the point of equilibrium of economic efficiency. Owing to the significance of public procurement activity in the market, how the state conducts its buying activities may also directly affect supply and demand in the market and ultimately the equilibrium of the market.[8]

The ideological shift away from command economies over the last 20 years has seen increasing dependence on - and hence an overall increase - in public procurement

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5 Turpin *Government Procurement and Contracts* 83.

6 Trepte *Regulating Procurement* 133. As Trepte observes, this is an ideal and does not necessarily reflect the actual state of affairs.

7 Dimitri, Piga and Spagnolo *Handbook of Procurement* 3. Public procurement in the United States is reported to be as high as 20%. The reported percentage in the European Union was 16.3% of GDP in 2007. In South Africa, this figure is currently estimated at 14.7% of national GDP. National Treasury *2015 Public Sector SCM Review* 2015 http://bit.ly/2iHUJ0K. National Treasury estimated the public sector expenditure on goods, services and construction works at R500bn. In the same period, the South African GDP was estimated at R3.4tn. Statistics South Africa 2013 *Gross domestic product 2013* http://bit.ly/2iwWfEx. This is not a precise assessment but sufficient to provide an indication of the scale of public procurement. See also Bolton *Regulatory framework* 180. Bolton, quoting from a 2002 OECD report, quotes the figure as high as 21.77%.

8 Trepte *Regulating Procurement* 65-66.

internationally from the private sector. General organisational strategies for improving performance and cost, such as the outsourcing of non-core services, have also been implemented in the public sector, increasing the reliance on bought-in services and the significance of public procurement activities.[9] In general, public procurement worldwide has exhibited a trend of increasing significance in terms of its proportion of general economic activity and for the successful functioning of public bodies.

2.1.2 Objectives of public procurement

The interest in what the state buys, how it does so and from whom, can be considered from various stakeholder perspectives, exposing some of the tensions that lie between them. These tensions underlie some of the fundamental issues and complexities in defining the objectives of public procurement:

(a) Citizens' interests have three broad perspectives. As benefactors of public procurement and as a source of procurement funding their interests broadly lie in the economical and efficient use of funds.[10] As the beneficiaries of public goods and services, the citizenry has an interest in the outcomes or effectiveness of publicly procured goods and services. As the source of the state's mandate to govern, the interest of citizens lies in the implementation and effectiveness of policies underlying the mandate given to the state.

(b) The interests of the state lie in two fundamental perspectives: those of the political sphere and of the bureaucracy.[11] Its political interests lie in public procurement as a deliverer of its fundamental commitments to the welfare of its citizenry. From a different political interest perspective, public procurement may play a role in the implementation of socio-economic policy imperatives as they

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9 Johnson *Trends in Governmental Outsourcing* 157.

10 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 8.* The source of funding may include external sources such donor countries, or external organisational funding such as the World Bank who could also be regarded as stakeholders.

11 Trepte *Regulating Procurement* 13. The observation that the state is not a unitary organ is key to understanding the purpose of regulation. The term 'bureaucracy' is used in its neutral connotation to include both aspects of the central executive and the public administration. Hoexter *Administrative Law* 6.

may form part of the political mandate. The political interest therefore lies in the implementation of policy as well as the effectiveness and legitimate execution of public procurement from an oversight perspective.[12] The interests of the bureaucracy, as the function charged with the execution of public procurement, lie in the ability to organise and administer the efficient execution of the public procurement function. Different perspectives may also exist within the bureaucracy: between those of bodies charged with bureaucratic control, the central executive, and the general bodies of public administration charged with execution.

(c) The interests of suppliers from whom performance is solicited, and with whom the state may contract, lie broadly in the commercial gain from public procurement, specifically in their ability to access and participate in public business. In the pursuit of public business, suppliers' interests lie in the fairness of the allocation of business and other aspects such as procedural efficiency in the execution of the public procurement process.[13]

(d) In certain contexts, bodies external to domestic stakeholders have an interest in public procurement. These interests may arise from supra-national commitments, for example the achievement of economic efficiency within a particular community, or more directly in the promotion of intra-community trade created through public procurement.[14] Other examples of direct interests may lie with bodies or nations as the source of funding for initiatives requiring public procurement.[15]

While the objectives of public procurement may "hold many similarities, they will differ, often substantially, in their detail"[16] and therefore cannot be universally determined for all states. The objectives of public procurement in any particular state will be reflective

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12 The extended role of policy-making that may be delegated to the central executive may blur the lines of the perspectives of policy in practice. For an introduction of the perspectives of policy-making and execution at this stage of the study the above distinction will suffice.

13 De la Harpe *Public Procurement Law* 19. See also Bolton *Law of Government Procurement* 4.

14 For example the *EU*. In the case of the *WTO*, ultimately to promote global trade.

15 For example the World Bank or conditions relating to specific donor funding. Trepte *Regulating Procurement* 43.

16 Trepte *Regulating Procurement* 48.

of the state's history, economic and political ideology, maturity, development, policies, programmes and level of participation in an international community. Telgen, Harland and Knight[17] provide a general insight into the objectives of public procurement by proposing a seven-stage framework distinguishing the progression of public procurement system development observed in public bodies. Their framework stages are summarised below:

(a) Sourcing and delivering goods and services. This stage represents the delivery fulfilling the basic interests of the citizenry as receivers of the goods and services procured. Achieving the objective of fulfilling the need of the public body would be the most fundamental requirement of any public procurement transaction.
(b) Compliance with legislation. This is primarily aimed at serving citizens' interest in the proper use of funds and integrity in the procurement process. This stage is concerned with the formal aspects of the public procurement process.
(c) Efficient use of public funds. This is primarily serving citizens' interests by not incurring wasteful expenditure of available funds they have contributed.
(d) Accountability. In this stage, the citizenry's interest in the use of public funds is attended to by the transparency of the public procurement process and the ability to hold the executive to account.
(e) Value for money. In this stage, there is a shift in maturity to the importance of the achievement and worth of the desired outcomes. Value for money moves beyond just the efficient use of public funds to the achievement of broader value in relation to the public expenditure.
(f) Support for government policy objectives. This stage is noted by its departure from the focus on internal objectives to supporting the achievement of objectives of government policy lying outside those of the procurement transactions themselves.[18]

17 Telgen, Harland and Knight *Public Procurement* 21.
18 This is distinguished from the following point, in that these support policies as opposed to active promotion of the achievement of policy objectives.

(g) Deliverer of broader government policy objectives. This stage builds on the previous stage by actively leading government policy objectives.[19]

Telgen, Harland and Knight note that any particular situation may represent a snapshot of a procurement system in the context of its environment and that it may change under the influence of policy, legislation or the resourcing of the function. Nevertheless, it provides a useful model to introduce the various public procurement issues and position stakeholder interests broadly as objectives of public procurement systems observed to manifest in stages of system development.[20] The underlying conclusion from the authors' observations is that objectives of public procurement are neither universal nor static.

2.1.3 Life cycle and scope of public procurement activities

Public procurement only exists in the context of fulfilling the needs of the state for goods and services.[21] A need arises independently of the need to procure and thus procurement must be recognised separately as one of several means to satisfy public needs. For example, after having identified a need, the decisions of the state as to how it fulfils the need may include the use of in-house capabilities, the machinery of other state departments, the use of supplementary external capabilities, the procurement of only specific goods or services, or the complete fulfilment of the need by external parties. This is important from two aspects. First, the proper identification of the need and the proper means for its fulfilment are both fundamental to the outcome. Second, the role identified for public procurement in satisfying the need will determine the transactional outcomes sought from public procurement. In other words, the outcomes of a public procurement transaction, in the context of satisfying the need, will depend on the extent to which the outcomes of the procurement transaction are

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19 Telgen, Harland and Knight *Public Procurement* 22. The black economic empowerment provisions in the South African public procurement system is specifically noted as an example of this active role in delivering government policy.

20 Telgen, Harland and Knight *Public Procurement* 21.

21 Quinot and Arrowsmith *Public Procurement Regulation* 8. "Public procurement is thus never an end in itself, but a means to a public end". Goods and services procured are only ever acquired to fulfil a public function.

co-extensive with the outcome of fulfilling the need.[22] The identification of the need and decisions determining how the need is to be fulfilled are therefore considered to fall outside the life cycle of public procurement regulation. This is because - in general, fulfilling the need does not necessarily involve public procurement.[23] Without attempting to answer conclusively the question of where the public procurement life cycle starts, for the purposes of this study it will be regarded as the point where the public body has decided that the means for satisfying the need includes a role for public procurement. Owing to the consequences of decisions in the planning stage on subsequent procurement activities, certain aspects of the planning stage may be included in the discussion.[24]

When procurement has been identified as a means, either fully or partially, of fulfilling the need, depending on the powers of the state body, appropriations, authorisations and budget approvals may be required prior to proceeding further with any procurement activities. This may require a series of activities to comply with governance requirements, such as approvals, authorisations and project and committee appointments.[25]

After the approval to proceed with the procurement transaction, the procedure for engaging the market must be decided and planned. In most cases, detailed rules for the engagement are determined. The procedures for engaging the market may vary depending on the circumstances, size and complexity of the need, the number of potential suppliers, and the value of the intended contract. The procurement need must be articulated in the form of specifications for the transaction: the definition of the

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22 For example, where electronic tablets are identified as the means of fulfilling the need for educational materials as opposed to textbooks, the outcomes of a procurement transaction to purchase electronic tablets can only be measured in that context and not in the educational outcome.

23 It should also be noted that in some circumstances the need could incorporate an outcome linked to the workings of the market. While the direct outcome sought from the procurement may be the goods or services, the reason for procuring from the market is to stimulate innovation in the market.

24 Arrowsmith *Horizontal Policies* 168-170. Arrowsmith makes the point that decisions of whether to procure and what to procure may be driven by policies of public procurement. Such decisions could be included in the broadest view of the life cycle of public procurement.

25 Thai *International Public Procurement* 11-12.

required performance; the contracting model; and other considerations, for example the contractual allocation of risk, incentives and penalties.[26] Depending on the information available to the state body, this may require preliminary formal or informal interactions with the market to determine the capabilities of the market, availability of solutions, costs and other factors, which may assist in determining the final specifications. The immediate need to establish the specifications may also give rise to the requirement for the procurement of specialist or professional services to deliver the ultimate specifications.[27]

With the final specifications and the rules of engagement, offers can be solicited from the market in accordance with defined procedures to find and select a suitable supplier and to conclude a contract for the performance as specified. Regardless of the particular procedure employed, a decision-making process - embedded in the procedure - must be undertaken to select a supplier. After the identity of the supplier has been established through this process, a contract can be concluded to formalise and regulate performance.

The final phase in the life cycle is the delivery of the contracted performance. The aspects of management of the contract may include contract initiation activities, delivery management, performance monitoring, dispute resolution, payment and termination.

In summary, the life cycle can be segmented into three phases. The planning phase: consisting of the activities from the identification of the need to procure to obtaining approval to proceed. The procurement phase:[28] consisting of all activities from the

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26 Thai *International Public Procurement* 13-15. For goods, this may include specification of the materials, manufacturer specifications, engineering drawings, functional specifications, brand or specifications of equivalents, samples, designs, performance specifications. For services, this would typically include a statement of work, performance statement or service level agreement and/or statement of objectives.

27 While this "procurement within the procurement process" can be regarded as a separate transaction, it may have implications for the further involvement of the parties in the original transaction. See pars 4.3.3.1 and 5.3.4.1 for a detailed discussion.

28 The procurement phase can be broken down into two distinct sub-phases:
(1) the preparation sub-phase consisting of all activities involved in the design and finalisation of

choice and design of the procedure, drawing up of specifications, market engagements, the evaluation and selection of supplier(s), to the finalisation of the contract. The contract management phase: consisting of all activities from the initiation of delivery to the termination of the contract.[29]

The life cycle of activities presented above is the life cycle of a procurement transaction. While these represent the core activities in execution, the full scope of public procurement activities extends to those involved in, for example, central system administration, regulation, research, training, supplier education and other activities not specific to any particular transaction.[30]

2.1.4 Control of public procurement

Any complex organisation requires controls for its proper functioning.[31] While the initiative, skills and knowledge of individuals and departments are essential to the functioning of the organisation, controls must exist to organise, channel and direct individual actions which may include specifying roles, purpose, processes, procedures and methods.[32] The bureaucracy of the state is charged with execution of public

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the procurement procedure and the specifications, or the tender documentation, up to the solicitation of offers from the market; and

(2) the implementation sub-phase consisting of all activities from receipt of the offers up to and including the finalisation of the contract.

The distinction between the two sub-phases is quite clear: the preparation phase in effect regulates the activities to be performed in the evaluation phase. They are sequential in nature and may even require a separation of duties. See for example Bolton *Committee System* 62-77. The reason for treating these under one umbrella is that the design of the implementation sub-phase is performed in the preparation sub-phase and hence their joint treatment is preferred for the purposes of this study.

29 There is reasonable consensus in public procurement literature that there are at least three phases. This categorisation aligns with that of Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 1-2. See also Thai *International Public Procurement* 11-19. See also Bolton *Law of Government Procurement* 9, De la Harpe *Public Procurement Law* 25-26, Watermeyer *Regulating Public Procurement in South Africa* 2 and Trepte *Regulating Procurement* 35-36. Other categorisations include - for example - pre-tendering, tendering and post-award. OECD *Principles for Integrity* 14. The categorisation used for this study is preferred for the reason that it is not limited to a specific procedure.

30 For the purposes of this study, the system regulating the activities of procurement transactions is considered and not the general administration of procurement organisation.

31 Trepte *Regulating Procurement* 12*.*

32 Trepte *Regulating Procurement 13.* Trepte makes the point that direct supervision of all activities of every individual would defeat the inherent value of an organisation.

procurement activities and, as a complex organisation, appropriate controls are therefore necessary.

The requirement for control of the bureaucracy of state is not purely motivated by internal organisational considerations. Given the political and economic significance of public procurement activities, the question of control of public procurement is of crucial concern in ensuring operational effectiveness, compliance with policy objectives and with the underlying legal requirements of the state. In particular, public procurement objectives sought by the political sphere of state public procurement may not necessarily coincide with the *de facto* objectives of the bureaucracy for various reasons and therefore controls are necessary to achieve alignment.[33]

Direct methods of control over the bureaucracy, such as layered bodies separating decision-making authority, provide an immediate and effective level of control. However, the coverage of such direct supervisory methods is limited by resourcing and the effect on the efficiency and cost of the operation. Direct oversight can also not axiomatically be regarded as effective as it is itself susceptible to abuse.[34] *Ex post* methods of monitoring compliance, such as audits, are similarly onerous and bear the additional disadvantage of being reactive in nature. The opportunities to rectify non-compliance after discovery, or in the face of a challenge, may be limited. In many cases, the practical effect of *ex post* control is that the state may be forced to continue transacting in terms of a flawed process to avoid disruptions to critical service delivery. If performance has been delivered, it is effectively moot.

Regulation - by way of compelling pre-determined and publicly available processes, procedures and methods on the bureaucracy, as a method of concurrent control - has certain advantages. The powers and functions of the bureaucracy are generally derived from a basis defined in domestic law.[35] For actions and decisions of the bureaucracy to be maintained effectively within the requirements and limits of these

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33 The factors inherently present in the bureaucracy that contribute to this are discussed in par 2.2.2.
34 Trepte *Regulating Procurement* 17.
35 This legal basis may be a fundamental constitutional expression, founded in legislation or common law, which defines general requirements and standards for bureaucratic decisions and actions.

powers and functions, expression of these legal requirements in terms of processes, procedures and methods provides practical and proactive guidance to the bureaucrat procurement agents. Practical steps to ensure compliance with policy requirements can be built into procedures and thus regulatory control is a means of ensuring compliance without having to assess compliance in terms of desired outcomes.[36] Public knowledge of the regulatory rules and procedures has a further advantage as it provides interested parties with the opportunity to be involved as a means of control in the public procurement process, reducing the burden of monitoring on the state.[37]

The controls implemented by a state that define the rules, principles and methods governing the activities of public procurement in law are termed public procurement regulation and, in form, generally include a combination of constitutional, statutory and subordinate legislative instruments, administrative notices, instructions and circulars. A point of significance is that procurement regulation is internally focused: it primarily regulates the activities of the bureaucracy although may indirectly impose requirements on parties participating in, or interested in participating, in public procurement activities.[38]

The interest and research in this field of law has developed apace with the increasing significance of public procurement and the growing attention to the achievement of the goals of public procurement.[39] The concentration of the interest in public procurement regulation is centred on the procurement phase. The processes of decision-making in this phase are naturally of greatest interest from the supplier stakeholder viewpoint, and form a critical juncture in the process for determining transactional success. The predominance of the interest in the regulation of this phase does not suggest in any

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36 Trepte *Regulating Procurement* 18. As Trepte points out, regulation determines compliance possibly without knowledge of the outcome. This is stated as an advantage of regulation as a method of control. However, the clarity of the outcomes desired and the congruence between the desired outcomes and those produced by compliant procedures may be open to question and is a central theme of this study.

37 Trepte *Regulating Procurement* 18. In particular, the invariably present disappointed supplier will be quick to seize the opportunity to point out non-compliance.

38 Trepte *Regulating Procurement* 46.

39 Quinot and Arrowsmith *Public Procurement Regulation* 1.

way that the other phases are not important determiners of successful outcomes.[40] However, the regulatory focus on the procurement phase can be justified from a legal perspective by the public exposure of the process, the requirements of administrative procedure, parties' rights to challenge and the susceptibility of the environment to improper dealings in this phase. While the focus of this study is likewise directed at the regulation of the procurement phase, it is recognised that the outcomes of public procurement are dependent on all three phases. Overall success cannot be assured by isolated success of the procurement phase.[41]

2.2 Regulation of public procurement

2.2.1 Goals of public procurement regulation

As introduced in the previous paragraph, the basic organisational goal of public procurement regulation is control over how the bureaucracy conducts procurement. The substance of regulating how procurement is conducted must be informed by the goals a particular state may have for public procurement. While these goals are not universal,[42] certain of the goals can be argued to be of such a fundamental nature that these would present as goals of most or, to a certain degree, of all systems.[43] For the analysis of the goals of public procurement regulation, it is necessary to differentiate between ultimate goals, proximate goals, strategies and instrumental mechanisms.[44]

As argued above, public procurement is not an end in itself. It only exists in the context of satisfying a need for goods and services. While this may appear to be self-evident, the most directly derived goal for public procurement regulation is to ensure that the

40 Gutman *Room for discretion* 12. "Failure at any stage can lead to poor outcomes. Moreover, success and compliance at one stage are necessary but not sufficient to ensure a good outcome."

41 Gutman *Room for discretion* 12-16. Gutman emphasises the importance of a holistic approach to the public procurement process for the achievement of the outcomes.

42 Par 2.1.2.

43 For example, see footnote 49 below.

44 The overview of these concepts in the ensuing paragraphs is only set out at the level necessary to support arguments in this study.

goods and services required to satisfy the need are delivered or simply ensuring the effectiveness of the procurement transaction in terms of meeting the need.[45]

While effective performance may be an inherently fundamental goal, the ability of the state to counter-perform is not unlimited. The cost of the counter-performance in excess of what is otherwise necessary will have the ultimate effect of diminishing the ability of the state to satisfy other needs or initiate a requirement to increase its funding. From the perspective of looking after the interests of the citizenry as both the beneficiaries and benefactors of state delivery, systematic wasteful expenditure in public procurement would be politically untenable. Sources of excessive costs may be found in all three phases of procurement such as incorrectly identified needs,[46] inaccurate specification of requirements,[47] process inefficiencies, contracting inefficiencies (such as contracting on less-than-optimal terms), or poor contract management.

As the expression of a goal of public procurement regulation, the separately identifiable goals of economy, efficiency and effectiveness are commonly conflated in the single concept of 'value for money'.[48] Value for money is generally regarded as a fundamental goal of public procurement regulation.[49]

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45 Par 2.1.2. While identified as the first step in the development framework set out by Telgen, Harland and Knight, simplicity of this goal belies the complexities that may be involved in defining the procurement need, specifying goods and services, selecting a capable contractor and in ensuring full and timely performance.

46 Gutman *Room for discretion* 13. See also the discussion in par 2.1.3 for the extent to which this may lie outside of the actual public procurement process from a definitional standpoint.

47 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 29.* Over-specifying or "gold-plating" the requirement will not be economical. Under-specification of the requirement will generally have a negative effect on effectiveness.

48 Quinot and Arrowsmith *Public Procurement Regulation* 8. Summarising from Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 28-31, the concepts of economy, efficiency and effectiveness are concretised in the public procurement context as being: ensuring the goods are suitable, contracting on the best possible terms; and ensuring the supplier is able to perform.

49 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 28. Value for money is positioned as a goal of procurement systems as follows: "a main objective of all public procurement systems is to achieve the best possible value for money". Quinot and Arrowsmith *Public Procurement Regulation* 8. "Value for money has in many systems come to be considered the key objective of public procurement systems."

For successful engagement in the market, the state is - in some respects - just like other commercial participants. Economic efficiency is a fundamental goal in the profit-seeking motive in private procurement transactions. Although subject to different dynamics, the pursuit of value for money by the state can be considered an analogous proxy for the pursuit of profit in the private sector. Ethical and fair dealing by a party, although not necessarily required of private market participants, can be argued to be qualities enhancing the willingness to conduct business with such party. Purely from the viewpoint of achieving the goal of value for money, ethical and fair dealing in the conduct of public procurement could thus be motivated as goals to attract the most suitable suppliers thereby enhancing the proposition for achieving value for money.[50]

From the position of the state as a public body, probity[51] can be argued to be a fundamental requirement of its conduct. Regardless of the contribution it may make to the pursuit of other objectives, these requirements may simply be basic tenets of constitutional and statutory provisions regulating state conduct. Fairness and ethical behaviour can thus be regarded as independent, standalone goals of public procurement regulation simply for the reason of these higher standards being required of the state in its commercial dealings.

The pursuit of fairness as an independent goal may operate in a way counter to the achievement of value for money. For example, where deciding to contract on the best possible terms would necessarily involve condoning a formal defect, the goals of value for money and fairness would be placed at odds with each other.[52] Absent controls, a procurement agent's perspective is likely to be focused on the visible and immediate goal of value for money. However if the goal of fairness is to hold sway, it can be argued that supplier trust will in turn benefit the achievement of value for money over the long term by increasing the pool of competitors through trust in the system.

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50 This is further motivated from the perspective of fairness later in this paragraph.

51 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 32. Probity, or alternatively integrity, in the system is commonly seen as being the prevention of corruption and avoiding the opportunity for corruption. Schooner *Objectives for a System of Government Contract Law* 106. Integrity is described as the absence of "bribery, favouritism or unethical behaviour" or, in the positive, the assurance of fair treatment and ethical behaviour.

52 Dekel *Legal Theory of Competitive Bidding* 243-244.

Regulation can therefore steer consistent courses of action by balancing these goals. This example of the role of regulation in balancing goals illustrates a more general point: the meta-goal of public procurement regulation is to determine the balance between competing goals,[53] in this case to balance the long-term view with the more visible short-term goals.

Linked to the concept of fairness, a separate objective may be identified as that of equal opportunity. It is argued by Dekel[54] that as public procurement involves public funds and given the state's fiduciary duty owed to its citizens, all citizens should be afforded an equal opportunity to benefit from the economic advantage of doing business with the state.

The state's goals for public procurement may extend to goals that may be considered external to the inherent transactional goals discussed above. Given the power and influence of the state's involvement in the market, the state may use public procurement as an instrument to effect policy outcomes. Such policies may be directed at changing the market equilibrium, for example by, promoting market participation of certain groups; changing production factors; protecting national industries or labour; promoting sustainability goals, legal compliance or even to promote achievement of more remote political goals, for example those forming part of the state's foreign policy.[55] These goals are referred to as indirect, secondary or, more neutrally, horizontal goals of public procurement.[56] Horizontal goals may not be cooperative in nature with the achievement of value for money or fairness at the transactional level

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53 Quinot and Arrowsmith *Public Procurement Regulation* 8. Quinot and Arrowsmith describe this as the overarching goal of public procurement regulation.

54 Dekel *Legal Theory of Competitive Bidding* 246. Dekel makes the point that this is a duty owed to citizens only and that this fiduciary duty does not generally extend to foreigners in the state-citizen relationship. See the discussion on extra-domestic commitments in the presence of international and community treaties later in this paragraph.

55 The list is illustrative. See Watermeyer *Facilitating sustainable development* 39. Watermeyer sets out the results of a European Community study into domestic horizontal policy objectives. McCrudden *Using public procurement* 263. The use of selective purchasing linkages to apply economic pressure has been used, for example, in the US to encourage foreign political change in apartheid South Africa, Myanmar and Northern Ireland as a matter of foreign policy in procurement policy.

56 Arrowsmith *Horizontal Policies* 150.

although they may be argued to complement these goals over the long term.[57] The meta-goal of public procurement regulation is again apparent in determining the balance between the inherent direct transactional goals and horizontal goals.

In the extra-domestic context, states may have bound themselves to international treaties, which may affect the way in which domestic public procurement must be conducted. These treaties, in general, have as a goal among others opening up international trade.[58] Accession to such treaties may be limited to particular economic or political communities[59] or may be open to the wider international community.[60] The general effect of such treaties from a regulatory perspective is to ensure the goals of equal treatment and participation in public procurement are extended to include international operators. Extra-domestic considerations for public procurement regulation may also arise from the source of funding for domestic public initiatives. The conditions imposed - for example by the World Bank or those of tied aid by donor nations - may involve conditions affecting the regulation of public procurement.[61] From the viewpoint of the goals of public procurement, compliance with such obligations is a proximate objective of public procurement regulation with the ultimate objectives being the state's reasons for acceding to the treaties or entering into such agreements.[62] Again, the role of regulation in balancing the goals may be at play as the diminution in the opportunities for the state's citizens to participate in state business on offer is in exchange for the ultimate goals sought by the state from such treaties.[63]

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57 Turpin *Government Procurement and Contracts* 67, 70. Horizontal goals may well may coincide - in the long term - with value for money, for example improving competition in the market by promoting SMME's and infant industries. Fairness is used here in the narrow sense of equal treatment.

58 Trepte *Regulating Procurement* 209-210. The primary advantage sought is argued to lie in the theory of economic advantage between nations.

59 Such as the EU, see par 2.2.8.

60 Such as the GPA, see par 2.2.8.

61 La Chimia *Donor's influence* 219-225.

62 They may include political goals, for example, forming geo-political alliances or economic goals, such as gaining access to external markets. Trepte *Regulating Procurement* 49. By opening up internal markets to external operators, the advantage sought is premised on the belief that by reciprocation, domestic suppliers will benefit in the balance.

63 See footnote 54 above.

2.2.2 Characteristic weaknesses in the environment

The pursuit of the identified goals for public procurement does not fully motivate nor explain the need for regulation or particular regulatory mechanisms. The internal focus of regulation is an acknowledgment of the imperfect nature of the state as a purchaser.[64] The environment in which public procurement takes place exhibits characteristic threats and weaknesses that jeopardise the achievement of the goals identified above. As a response to countering these threats and weaknesses, the aspects and degree of regulation would therefore be informed by their prevalence in any particular environment.

The state generally delegates the performance of public procurement to its procurement function within the bureaucracy. The size and dynamics of the state bureaucracy create problems of organisation in this delegation.[65] A common feature of such delegation is the prioritisation of the objectives of the agents - or of a public body - above the goals of their principals. Personal goals of agents may manifest themselves, at worst, in acts of corruption, favouritism or simply, and still of concern, in plain indifference to the outcomes of procurement transactions.[66] The performance of agents is difficult to measure and the ability to provide incentives for achievement is limited. As there is no market pressure on the agent officials and since the function is generally secure from an employment perspective, the ability of the state to sanction officials for poor performance is limited and then generally only for misconduct.[67]

While the state procurement proxy for the market-driven profit motive is cost saving or the achievement of value for money, the procurement agents' ineffectiveness in achieving this does not bear the same consequence as their market counterparts. No

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64 Trepte *Regulating Procurement* 46.

65 Trepte *Regulating Procurement* 12.

66 Soudry *Principal-Agent Analysis* 434. This is attributed to the common features of the principal-agent problem: actions or procurement officials are not easily observed, superior knowledge on the part of officials and the attraction of deviant activities owing to the amounts of money at stake.

67 Soudry *Principal-Agent Analysis* 436. This statement is made to illustrate the limitations of the state as an employer versus the relative flexibility in providing incentives for performance in private procurement.

clear benchmarks exist for determining their achievement and resultant survival of the entity is generally never in question.[68]

Given the large stake of business on offer by the state, the factors set out above create opportunities for exploitation by market operators. Exploitative practices may involve procurement agents, in corruption, improper influence or capture. These practices also may also not even involve the state agents, for example the phenomenon of collusion between market operators to manipulate pricing.[69] The susceptibility to influence and capture is not limited to procurement agencies as institutional or political-level capture by external interest groups can manipulate the entire system of public procurement.[70]

The pursuit of long-term objectives external to the direct and immediate objectives of the procurement transaction is problematic if left for implementation in the hands of procurement agents. Horizontal goals are not necessarily apprehended in context at a transactional level as, in general, they will be placed in opposition to the direct and immediate objectives of the transaction. A wide discretion to implement policy objectives at an individual transaction level may lead to inconsistent and unbalanced outcomes across the system of public procurement.[71]

From a domestic procurement agency's perspective, the objectives of supranational agreements may not be apparent in the achievement of the direct objectives of a transaction. Factors such as the procedural overhead, spatial proximity and parochial preference may threaten the achievement of the external treaty objectives.[72]

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68 Trepte *Regulating Procurement* 72-80.

69 Owing to the nature of procedures such as public tendering, they are particularly susceptible.

70 Trepte *Regulating Procurement* 82.

71 Quinot *Promotion of social policy* 379. Quinot motivates the need for clear rules given the difficulty in assessing whether a procurement decision has been properly made given the broad set of objectives in a procurement system that includes horizontal policy objectives.

72 Trepte *Regulating Procurement* 53.

The susceptibility of public procurement to corruption threatens the achievement of the goals of fairness, equal treatment, equal opportunity and public trust.[73] Corruption also poses a threat to the achievement of value for money as the costs of corruption necessarily result in economic inefficiency.[74]

To a lesser degree, bias or favouritism are still manifestations of unfairness and therefore a threat to the achievement of fairness. Even perceived bias - for example a conflict of interest - may not in itself result in actual bias but it represents a threat to the integrity of the process. To the extent that it presents market operators with an opportunity to challenge proceedings, this also represents a threat to efficiency and effectiveness and consequently a threat to the achievement of value for money.

Informational asymmetry between procurement agents and market operators, while generally a feature of all procurement, is exacerbated by the requirements for fairness, equal treatment and equal opportunity in public procurement. These requirements limit the ability of the state to engage freely with market operators to establish optimal solutions for procurement needs.[75]

Although the weaknesses inherent in public procurement are deserving of full treatment in the analysis of public procurement effectiveness, the abbreviated survey above is sufficient for the current purpose of supporting arguments in the study.

2.2.3 The regulatory response: conceptual principles and strategies

Regulation has the direct effect of restricting discretion on the part of the procurement function within the bureaucracy by imposing principles, rules and procedures for the actions and decisions of procurement officials. These principles, rules and procedures have developed around some central conceptual principles and strategies toward the

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73 Dekel *Legal Theory of Competitive Bidding* 243-244. Although corruption falls under the same umbrella of fairness, it is generally considered worse than other forms of discrimination. Williams-Elegbe *Perspective on corruption* 337-341. The susceptibility of the procurement system to corruption may be due to circumstances relating to the political, social or cultural systems, which may blur the line of what may otherwise be defined as fair.

74 Trepte *Regulating Procurement* 72-77.

75 Trepte *Regulating Procurement* 81.

achievement of the goals of public procurement and as specific responses to identified weaknesses and threats.

Transparency as a conceptual principle can be understood to mean the openness and publication of opportunities, rules and procedures and that the means exist to verify adherence to the rules.[76] Transparency can be seen as a principle driving regulation to achieve various objectives, themselves contributing to the ultimate achievement of public procurement goals. Practically in the context of public procurement, the principle of transparency obliges the contract opportunities, rules of participation and decisions to be made public. In addition, the procedures for access to reasons and other information need to be made public in order to verify adherence to the publicised rules.[77] The contribution of these concrete examples of the principle of transparency can be directly linked to the goals of public procurement. For example, making contract opportunities public increases the possibility of finding the best possible contractor, reduces the possibility of the improper awarding of business and promotes the achievement of equal opportunities.[78]

In principle, transparency is not restricted. However, its application in the public procurement regulation context, for practical reasons, cannot require complete openness. In pursuit of the best contract, confidentiality of supplier-held information must be guarded in the interests of supplier willingness to supply all relevant information. Inefficiencies introduced by increasing levels of transparency, at a point may outweigh potential gains. Transparency can thus be seen as a conceptual principle or instrument underlying specific and concrete regulatory mechanisms in the context of achieving the purpose of the transparency rather than being pursued for transparency's own sake.[79]

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76 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 73-74.

77 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 73-74.

78 This is covered in some depth in Quinot and Arrowsmith Public Procurement Regulation 17-18. See also Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 73-74.

79 Quinot and Arrowsmith Public Procurement Regulation 16-17. Transparency is not an objective in its own right but rather a means to achieving the objectives of public procurement regulation.

Competition as a strategy or regulatory mechanism imposes procedures requiring operators to compete for the business on offer by the state.[80] Objective, pre-determined rules and procedures for the competition, together with the publicity requirement of the transparency principle, promote open and equal access to the business on offer. A competitive process demonstrates commitment to the goal of equal opportunity to benefit from state business.[81] A competitive process reduces the procurement agent's role, in theory, to that of an orchestrator of rules and a disinterested facilitator in the execution of the competitive process.[82] The rules of the competition decide the ultimate winner, exposing the decision-making process to the principals and competitors alike, avoiding the suggestion of favouritism.[83] Competition therefore promotes fairness and equal treatment not only by the nature of the procedure itself but in that the process can be monitored externally by the competitors, the parties with significant interest in the outcome, as well as other interested parties. The openness and monitoring associated with competitive procedures will also promote public confidence and trust in the outcomes. Apart from the procedural aspects of competition promoting fairness, objective and formal decision-making, making the criteria for determining the most meritorious competitor public will encourage competitors to make their best offer thereby promoting the achievement of value for money.[84] A competitive process also discourages monopolies which, from a public procurement perspective, may avoid situations of price setting by a dominant player in the future.[85] However, the preparation and organisation of a fully open and competitive procedure imposes a procedural cost in time and money on the state and competitors alike. Hence, competition may not be an appropriate strategy for all procurement transactions. For example, in the case of low-value procurements, where

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80 Quinot and Arrowsmith Public Procurement Regulation 16-17. Competition is described as a mechanism, as is transparency. The description of competition as a strategy is preferred as it embodies the notion of it being a mechanism to achieving a separate and higher goal.

81 Dekel *Legal Theory of Competitive Bidding* 246-247. This aspect is argued by Dekel to raise the value of competition to equal treatment above competition's purely instrumental or strategic value. See also Quinot and Arrowsmith *Public Procurement Regulation* 10-11.

82 Trepte *Regulating Procurement* 120.

83 Turpin *Government Procurement and Contracts* 69.

84 Trepte *Regulating Procurement* 94. Trepte advances the commitment theory: to obtain the commitment of one's counterparts, one offers one's own commitment to extract maximum benefit.

85 Turpin *Government Procurement and Contracts* 69.

rigid adherence to a competitive procedure may compromise the achievement of value for money or in situations where it is known that no real competition exists, a competitive process for the sake of it may introduce unnecessary inefficiencies into the system.

Accountability can be argued to be a goal of the system from the viewpoint that every expenditure is expenditure that could have been applied to a different public purpose. Public procurement must therefore be susceptible to scrutiny.[86] Accountability as a mechanism operates together with the principle of transparency. Where the principle of transparency, *inter alia*, aims to provide a means to verify, accountability provides the means to hold the public body to account. The mechanisms for accountability may include procedures for the review of decisions and the ability to set these aside if invalid. As with other regulatory mechanisms, this operates to ensure the goals of the system are achieved.

Other strategies may underlie regulatory design, for example systemic uniformity and standardisation,[87] normative decision-making procedures or layered organisational review structures for control. In general, the strategies are not universally applicable to all types of procurement. As discussed with the principle of transparency, the appropriate level of transparency must be determined for optimal regulatory design. The balance between the costs of competition in relation to the benefits of a competitive strategy must be also be reflected in regulation design. Determining the right regulatory balance may not only be informed by the goals for public procurement in a jurisdiction, but also the extent of specific threats and weaknesses in the environment to achieving such goals. [88]

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86 Turpin *Government Procurement and Contracts* (x). See also Soudry *Principal-Agent Analysis of Accountability* 433. Soudry explains the importance of accountability as an essential aspect of the broader "pillar" of integrity. Its importance is from an administrative law perspective and three dimensions of economic implications: (1) consequences of a lack of accountability will lead to additional cost by not selecting the best deal, (2) the best deals will not be solicited from the market; and (3) public interest demands "expenditures are made in the most economically rational way".

87 Watermeyer *Generic and systematic approach to procurement* 48.

88 Quinot and Arrowsmith Public Procurement Regulation 14-15. For example, in an environment with endemic corruption a high cost of regulatory counter-measures may still be in the best interests of achieving the procurement system's goals.

2.2.4 The dynamic nature of the regulatory response

While the need for regulation of public procurement has been established, extensive regulation may not necessarily promote all public procurement objectives. According to Schapper, Veiga Malta and Gilbert,[89] public procurement system objectives fall into the three elemental categories of: promoting public confidence; efficiency and effectiveness; as well as policy compliance and consistency. The policies underlying a particular jurisdiction's approach to regulation are hypothesised to arise not only from broad political ideals but also from past failures and "mobilised constituency" pressure.[90] The response to these factors may be to heighten the degree to which the environment is regulated but may also be found to focus on strategies of management and centralisation.[91] A focused regulatory response will generally promote public confidence, but such a response may place it in conflict with efficiency and effectiveness.[92] The implementation of regulation has consequences, and possibly unintended consequences. Especially in the domain of complex decision-making, attempts through regulation "to minimise discretion or maximise efficiency or effectiveness is fraught with difficulty".[93] Other effects of an extensive regulatory response may be diminishing skills, lack of professionalism and high procedural cost generally reducing effectiveness and efficiency. This tension between the need to regulate the public procurement environment and the inherent penalties of regulation is not only reflected in changing priorities in the domestic environment but may lead to cycles of regulatory reform within a jurisdiction both increasing and decreasing the level of regulation in response to observations of performance, public pressure or political intervention.[94] Schooner,[95] referring to the cycles of regulatory reform in the US, states:

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89 Schapper, Veiga Malta and Gilbert *Framework* 5. The authors observe that they are "unsurprisingly … consistent with generic public management". Public confidence includes accountability, transparency, equity and fair dealing. Efficiency and effectiveness includes value for money. Policy compliance may include horizontal objectives and international obligations.

90 Prier and Csáki *Decision making framework* 414.

91 Schapper, Veiga Malta and Gilbert *Framework* 5.

92 Schapper, Veiga Malta and Gilbert Framework 6.

93 Prier and Csáki *Decision making framework* 415.

94 Schapper, Veiga Malta and Gilbert Framework 14.

95 Schooner *Objectives* 104, quoting from Stillman *American Bureaucracy* 360-94.

> From time to time, the stress has been placed on promoting the values of administrative efficacy... at other times, accountability to the general public has predominated; and at still other times, responding to diverse interest group demands has clearly been an overriding priority. Yet, within any single historic period where one value has held sway over the other two, the others have never been entirely neglected or ignored.

It should be emphasised that regulation is not the only response to environmental weaknesses and threats or, more generally, ensuring that the desired outcomes of public procurement are met. Taking the view of public procurement regulation as defining a system, it is only one component of the broader system as the legal authority is not the only determiner of outcomes. Prier, in putting forward a comprehensive definition of public procurement, highlights the importance of all components of the system in meeting the desired outcomes including the organisational matrix and functional procurement activities.[96]

2.2.5 The design of public procurement regulation

At the highest level, public procurement regulation can be considered to be in the form of "instructions, directives, or procedures that … limit the discretion of the individual actors" in the decision-making processes of public procurement.[97] The execution of decision-making in a public procurement environment is argued by Prier and Csáki[98] to be derived either from rules or principles or those that rest on established practices. Principles rely on *ex post* accountability measures to govern discretion whereas rules prescribe behaviour *ex ante*. Established practices are generally repeated behavioural or professional norms, examples of which could be found in established procedural techniques.

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96 Prier and McCue *Definition of Public Procurement* 335-336. The definition put forward by the authors encompasses the systems perspective of public procurement. At 329 "Public procurement is the designated legal authority to advise, plan, obtain, deliver, and evaluate a government's expenditures on goods and services that are used to [fulfil] stated objectives, obligations, and activities in [pursuance] of desired policy outcomes."

97 Prier and Csáki *Decision making framework* 412. See also Kidd *Procurement's Value* 419.

98 Prier and Csáki *Decision making framework* 422. Braithwaite *Rules and Principles* 48. General rules that are vaguer and less specific are termed standards or principles. Braithwaite distinguishes the connotation of the term "standards" given in the business context as "norms written in a way to measure performance". Given references to standards in the public procurement context with the latter meaning, "principles" is preferred as the term used for vaguer and less specific rules in this study.

The extent to which regulation limits discretion in procurement decision-making by rules and principles, as discussed above, is primarily driven by the focus on the goals of public confidence and policy compliance.

A detailed discussion on the principles underlying regulatory design and development is beyond the scope of this study, however, it is relevant to highlight one aspect. While the policy choices of regulators to use specific rules or to rely on specified standards, their harmonisation with the norms of professional practices is important in order not to distort procurement decision-making in terms of its fundamental goals. For example, the public procurement environment is noted for its broad range of transactional complexity, from the procurement of small quantities of homogenous goods to the complex long-term procurement of services. A regulator's preference for a rule-bound procedure *ex ante* may not necessarily serve the complex as well as the simple.[99] The state has requirements for a wide variety of goods and services and hence regulatory design should exhibit flexibility in catering for diverse transaction types to avoid distortion or absurdities in the application of generic regulation.

This requires balance in the regulatory approach. The inefficiencies and cost of weighty rule set has to be balanced with the aims of the rules. The benefits of adopting rules and procedures designed for generalised procurement should accommodate, or balance, the need for procedures for specific and specialised classes of procurement.

2.2.6 The form and structure of legal regulation

The form of legal public procurement regulation has developed and been constructed in accordance with existing legal traditions.[100] Civil law tradition, for example, treats state contracts as a separate class of contract as opposed to common law traditions

99 Prier and Csáki *Decision making framework* 423. Rules are theorised to produce more consistent results in the regulation of simple phenomena whereas standards, whereas standards deliver more consistent results for complex phenomena. Trepte *Regulating Procurement* 127. In the case of complex procurement transactions, the effects of regulation may lead to suboptimal results.

100 Trepte *Regulating Procurement* 37.

which treat state contracts under the purview of private law.[101] Such considerations have implications for the way public procurement is legally regulated. The constitutional structure and the administrative organisation of a particular state will determine the form and structure for legal regulation of public procurement. The presence of binding extra-domestic agreements may require the adoption of the provisions of such agreements into the legal system.

The legal regulation of public procurement can be determined at various levels: from international law,[102] federal or community law,[103] national law, state law,[104] to provincial and local municipal law.[105] The form of legal regulation may be imposed by the presence of binding international, federal and state frameworks that may restrict regulatory choice in subordinate jurisdictions. Legislative instruments may directly regulate public procurement, enable subordinate legislation,[106] or generally complement or cooperate with the regulation of public procurement.[107] Common law constructs may also support the framework of public procurement law, for example the private law of contract.

The sources of public procurement regulation may be inherited from other sources of law. For example, as organisational policies and procedures have legal consequences from an administrative law perspective, these may also be regarded as part of the legal framework regulating public procurement.

2.2.7 Regulation of the phases of the public procurement life cycle

From a transactional perspective, the achievement of the goals of public procurement is dependent on the outcomes determined by the life cycle of public procurement: the planning phase, procurement phase and the contract management phase. The rules and procedures for the procurement phase specify crucial decision-making steps for

101 Trepte *Regulating Procurement* 38.
102 For example, the GPA or the provisions of the UNCAC.
103 For example, the directives regulating public procurement in the *EU*.
104 For example, in the *US*.
105 Such as those regulating the provincial and local sphere of government in South Africa.
106 Typically the authority in executive government to issue regulations.
107 For example, administrative law statutes or legislation criminalising corrupt practices.

the outcomes, from decisions regarding the content of the contract to determining the identity of the contracting party. For this reason - and because the state's conduct directly affects, involves and is monitored by external parties - it is the phase most susceptible to disputes and therefore receives significant regulatory attention.

Procurement procedures can be classed as being either competitive or non-competitive in nature.[108] Competitive procurement procedures can take many different forms[109] but, by definition, a requirement for competition is that there is more than one competitor. A competitive process, even if the competition is limited, implies that a method must exist (the evaluation method) for determining the winner (or winners) from the set of competitors. As it is this process, which determines with whom the public body will contract, the evaluation method and its execution are key to the achievement of the procurement objectives. The processes involved in evaluating and selecting a capable party on favourable terms must support the transactional goals, goals relating to the conduct of state and horizontal goals over the long term. The activities and decisions during this phase are key to the transactional outcomes as well as, from the viewpoint of the system, to all goals of public procurement. The need for appropriate regulation, as established above in general, is therefore particularly relevant in the procurement process.

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108 Bolton *Dispensing with Public Tender Procedures* 29-31. For the reasons set out in par 2.2.3, non-competitive procedures are regarded as exceptions although are justified in certain circumstances. Competitive procedures are considered the mainstream of regulated procedures. The influence of the competitive and non-competitive procedures on decision-making is considered in Chapter 4.

109 A competitive procurement process is generally referred to as a tender process. An in-depth investigation of the various forms of tenders is beyond the scope of this study. The various forms are briefly touched on where it is relevant to the main theme of the evaluation process.

2.2.8 Development of public procurement regulation

The significance of public procurement regulation can be noted by the increasing prominence of efforts directed at legal framework reform, standardisation and development.

On the international front, efforts directed at standardising and improving the legal regulation of national public procurement have been made with the overarching objective of promoting international trade. The plurilateral Government Procurement Agreement[110] (hereafter the "GPA") of the World Trade Organisation (hereafter the "WTO") sets out to eliminate inequitable public procurement practices that favour local suppliers by prescribing a regulatory framework for public procurement that accords no less favourable treatment to suppliers of other signatories to the *GPA*.[111] At present, there are 45 parties to the *GPA*, including the major world economies.[112] While the *GPA* sets out a framework for public procurement regulation that includes the goal of achieving value for money in a framework of probity, the primary aim of the framework is to open and encourage trade involving public procurement. Developing nations have thus been reluctant to accede to the *GPA* because of the potential impact on local industry of opening their markets to international competition.[113]

The United Nations Commission on International Trade Law (hereafter "UNCITRAL") commissioned the development of a model law for adoption by countries undertaking public procurement law reform.[114] The primary motivation for the development of the

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110 Government Procurement Agreement of the World Trade Organisation. The revised agreement was adopted in December 2011.

111 Articles III:1(a),III:1(b) and III:2 of the *GPA*.

112 WTO 2015 http://bit.ly/2j4g95K. The parties include the 28 member states of the European Union (hereafter the "EU"); the United States of America (hereafter the "US") and Japan. A further 10 members of the *WTO* are negotiating accession, including the world's largest economy, China. It is noted that as at time of writing South Africa is not a signatory to the *GPA*.

113 Yukins, Wallace and Marburg Goodman *International Procurement* 574.

114 United Nations 2013 http://bit.ly/2jjzfG7 UNCITRAL is a commission of 60 member states selected by the UN General Assembly. The 60 members are chosen to represent the different regions, economic and legal systems of the world. In 1993, UNCITRAL adopted the UNCITRAL Model Law on Procurement of Goods and Construction. In 1994, the UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted to include model law for the procurement of services and includes changes to the 1993 model law text. On 1 July 2011 the UNCITRAL Model

UNCITRAL Model Law on Public Procurement[115] (hereafter the "Model Law") was, similar to that of the *GPA*, to promote global trade. Unlike the *GPA*, however, the *Model Law* aims to achieve this by standardising national public procurement law in order to remove impediments to international trade caused by regulatory disparity among nations.[116] Although standardisation may be the immediate aim, the collaborative efforts of *UNCITRAL* have been applied to developing the *Model Law* along best practice lines and therefore the *Model Law* is an important benchmark for the development of national procurement law.[117] The *Model Law* is, as its title suggests, a model, and its text may be freely used without binding obligations. The *Model Law* has thus had a relatively wide influence in the development of procurement law in the implementation and reform of national public procurement regimes.[118] There are even further calls for its use in influencing the advancement of relatively mature procurement legal systems such as those in the *US* and the *EU*.[119] The importance to international trade of standardising national procurement regimes and the elimination of discriminatory provisions has therefore been recognised at an international level. The relevance of these international developments in public procurement regulation to South Africa however lies primarily in the compliance of the local regime to what is regarded as good governance in the international view.[120]

The background and relevance of a particular foreign regulatory framework for public procurement, the public procurement directives of the *EU*, is briefly discussed.

Law on Public Procurement was adopted which contains significant revisions to the earlier two texts.

115 United Nations 2011 http://bit.ly/2iI33xo.

116 Arrowsmith *UNCITRAL Model Law* 19. The disparities the *Model Law* aimed to address include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods. See also United Nations 2013 *A Guide to UNCITRAL* www.uncitral.org.

117 Nicholas *Development of International Standards* 87-88. The author notes the risks of dis-unification in the development of *UNCITRAL* in the current economic climate.

118 Arrowsmith *UNCITRAL Model Law* 20.

119 Yukins *Case Study* 484; Arrowsmith *UNCITRAL Model Law* 20.

120 De la Harpe *Public Procurement Law* 11.

The *EU* has a regulatory framework for public procurement supporting, among other treaty objectives, free trade between member states.[121] Public procurement principles, while not directly addressed in the founding documents of the *EU*, are addressed in the Treaty of the Functioning of the European Union[122] (hereafter the "TFEU") and by directives adopted by the European Commission and of the European Parliament.[123] The *EU Procurement Directives* establish the regulatory framework for public procurement in the *EU* and the transposition of these directives into national law by the member states is required. The framework's objectives are to eliminate discriminatory public procurement practices by ensuring transparency of the procurement processes, equal treatment and removing disproportionate barriers to entry.[124] Value for money has also been argued to be a goal of the regulations in that these are designed to ensure procurement decisions are made on a sound economic basis. It is also argued that the goal of value for money simply establishes an objective basis for evaluation toward eliminating discrimination.[125] The significance of public procurement in the achievement of the goals of the *EU* has seen the strengthening of the regulatory framework - through a series of revisions - to what are the currently applicable directives.[126]

While the *EU* regulatory framework is not direct applicable to, or relevant in, the South African context, the member states of *EU* form South Africa's largest trading partner.

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121 Article 28 and Article 49 of the Consolidated Version of the Treaty on European Union (2010) OJ C83/13.

122 Mainly, Articles 101 and 102 of Part 1 of the Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C326/88.

123 Directive 2014/23/EC of the European Parliament and of the Council of 26 February 2014 on the awarding of concession contracts OJ L 94/1 (hereafter the "EU Concessions Directive"). Directive 2014/24/EC of the European Parliament and of the Council of 26 February 2014 and repealing Directive 2004/18/EC L OJ 94/65 dealing with public procurement to public works contracts, public supply contracts and public service contracts (hereafter the "EUCD"). Directive 2014/25/EC of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L 94/243 applicable to the procurements of public entities operating in the utilities, transport and postal sectors (hereafter the "EU Utilities Directive"). Together the *EU Concessions Directive, EUCD* and the *EU Utilities Directive* are hereafter referred to as the "EU Procurement Directives".

124 The principles are discussed in more detail in Chapter 8.

125 Arrowsmith *EC Regime on Public Procurement* 259.

126 The *EU Procurement Directives* have been revised in several iterations culminating in the latest regulations of 2014. See footnote 123 above.

South Africa has free trade agreements with the *EU*.[127] As a foreign supranational framework, the *EU Procurement Directives* embody the collective experience of its member states and of decided judgements of the European courts. The implementation of the *EU Procurement Directives* as transposed into national law by its member states are functioning regulatory frameworks. National regulatory frameworks may provide insight into the general operation of regulatory systems even though there is no direct applicability to South Africa. The use of an international or foreign framework as a comparator regime must be tempered with considerations of the dissimilarities in the goals of such framework from a subject framework. For example, the *EU* framework's overarching goal of supporting free trade among its member nations has no relevance in the South African context.[128]

2.3 Summary and key observations

The acquisition of goods and services by the state is an established and significant phenomenon in mixed economies. While public procurement activities are fundamentally driven to achieve economic goals, its goals extend to meet those required of state conduct and to achieve horizontal goals of public policy. The goals of public procurement were observed to be neither universal nor static. Fundamental goals - such as effectiveness, efficiency, value for money, equal treatment and equal opportunity - can be said to exist in all systems, the degree and balance are driven by factors attaching to a particular environment, for example, matters of policy, development, skills, external community commitments, or the sourcing of funds. As these factors may change so too may the goals of public procurement for the environment.

The observation that the state is not a unitary body is relevant for public procurement as actions and decisions regarding public procurement are made by procurement agencies within the bureaucracy of state. Internal control by the political arm of state and from within the hierarchy of the bureaucracy over the public procurement activities

127 DTI Date unknown www.dti.gov.org/trade_investment.
128 Arrowsmith *EC Regime on Public Procurement* 259.

is required to ensure alignment and achievement of goals. The legal form of this control is termed public procurement regulation.

The public procurement environment is susceptible to a number of characteristic weaknesses and threats: informational asymmetries, corruption, bias and inefficiency. Various strategies, instruments and principles have evolved in the regulation of public procurement in response to the weaknesses and threats to the achievement of its goals.

The challenge, or meta-goal, for public procurement regulation is to define and achieve an overall equilibrium in the system that balances:

(a) goals by favouring the achievement of one by limiting others appropriately; [129]
(b) short-term outputs with aggregated long-term outcomes;[130]
(c) the limitation of discretion with allowance for necessary discretion; and[131]
(d) standardisation with the effects of generalised rules over a wide variety of transactional complexities and features,[132]

in a way that is appropriate for the level of development[133] and particular environmental dynamics.[134]

The mechanism of regulatory control allows the compliance of procurement to be assessed in terms of its adherence to the regulation without the need to assess individual outcomes in term of systemic goals.[135]

The achievement of public procurement goals is dependent on the outcomes determined by the life cycle of public procurement: the planning phase, procurement phase and the contract management phase. The procurement phase of the life cycle

129 Par 2.2.1.
130 Par 2.2.1.
131 Par 2.2.4.
132 Par 2.2.5.
133 Par 2.1.2.
134 Par 2.2.3.
135 Para 2.1.4 and footnote 36 above.

receives the most regulatory attention. As the state's conduct affects external parties and is open to monitoring in this phase, it is the subject of most disputes. The activities and decisions during this phase are key to the outcomes of the instant transaction as well as, from the viewpoint of the system, to the overall outcomes of public procurement.

The development of international and foreign procurement regulation has relevance to regulation in South Africa beyond compliance with established standards of good governance. In terms of their principles, strategies and instruments, foreign and international systems may be useful for improving the South African regulatory system provided account is taken of the dissimilar objectives in adapting provisions for the South African environment and particular balance of public procurement goals.

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3 The constitutional framework for public procurement

3.1 Introduction

This chapter sets out to investigate the constitutional requirements for the public procurement system in South Africa. These constitutional requirements for the system are primarily contained in section 217 of the *Constitution*.[1] By the public and administrative nature of public procurement activities, the constitutional requirements for the broader activities of public procurement in terms of the system extend to other provisions - among others, the rights to just administrative action, access to information, and equality - have direct relevance.[2] The constitutional provisions setting out the values for public administration, the powers of central executive control and review are also relevant to the system for public procurement and its operation.[3] Further constitutional provisions may underline the need for effective public procurement but are not directly relevant to the system of public procurement itself.[4]

The primary purpose of the investigation in this chapter is to establish the constitutional context for the requirements for a procurement system of which cost-effectiveness, the focus of this study, forms part. The requirement of cost-effectiveness is but one aspect of the constitutional context. Therefore, a broad investigation is undertaken at this stage with regard to the make-up of the system, the requirements of the system, and the constitutional provisions governing the system in its execution. The following chapter examines the meaning and content of each of the requirements and examines the interrelationships between these requirements at a detailed level.

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1 Section 217 of the *Constitution.* Hereafter "Section 217".

2 Sections 33, 32 and 8 of the *Constitution* respectively. The constitutional provisions regarding each of these rights require the national legislation to give content to the rights. While this chapter examines the constitutional context, the provisions of their legislative implementations will be referenced.

3 Sections 195, 216, 182 and 188 of the *Constitution.*

4 Quinot *Institutional Legal Structure 2014* 13. Quinot cites various constitutional rights as being dependant on effective public procurement processes in that these place obligations on the state to "take reasonable … measures, within its available resources, to achieve the progressive realisation" of these rights. These are considered in the following chapter as providing constitutional weight to the requirements of the system, in particular the requirement for cost-effectiveness.

The procurement provisions of the *Constitution* have been analysed in some depth in numerous local works.[5] The interpretations and conclusions of these works, as well as recent court decisions thereon, will be referenced in this investigation. The requirements of *Section 217* bear many similarities to the principles, instruments and strategies present in general, foreign and international regulatory frameworks. Hence the analysis of requirements of the system is performed with reference to relevant conclusions from the previous chapter.[6]

3.2 Constitutional provisions relating to public procurement

3.2.1 Background

Prior to the constitutional era, public procurement in the national and provincial spheres was regulated by the *State Tender Board Act* 86 of 1968. In the municipal or local government sphere, it was regulated by provincial ordinances.[7] Procurement of goods and services by the state could only be performed in terms of this statute through the central State Tender Board. In 1994, the promulgation of the *Constitution of the Republic of South Africa 200 of 1993,*[8] (hereafter the "Interim Constitution") first saw recognition of public procurement at constitutional level in the Republic.[9] Section 187 of the *Interim Constitution* required national and provincial legislation to regulate the procurement of goods and services in the respective spheres of government and required such legislation to appoint tender boards to oversee such procurement.[10] Furthermore, the provisions of section 187 set out the basic requirements for the procurement system: to be fair, public and competitive; non-interference in the envisaged tender boards; the recording of decisions; and the reasons for such decisions to be given to interested parties.[11] The procurement provisions of the *Interim Constitution*, although elevating procurement to a constitutional level, envisaged a

5 Generally see Bolton *Law of Government Procurement*; Penfold and Reyburn *Public Procurement;* and De la Harpe *Public Procurement Law*.
6 Par 2.1.2.
7 Penfold and Reyburn *Public Procurement* 25-2.
8 Act 200 of 1993.
9 S187 of the *Interim Constitution*.
10 S187(1) of the *Interim Constitution*.
11 Subsections 187(2)-(4) of the *Interim Constitution*.

procurement system with strong similarities in organisation to the pre-existing system, one of centralised procurement authorities in the form of tender boards.[12] The requirement for the system to be competitive appeared to be limited to one such procurement method, that of tendering.[13] Three years later, the *Interim Constitution's* narrow public procurement provisions were significantly broadened to those adopted in *Section 217*, titled "Procurement", of the final *Constitution* and the procedural focus of the procurement provisions of the *Interim Constitution* was replaced with principle-based requirements for a decentralised system of procurement. Among the explicit requirements under the provisions of the *Constitution* is that the procurement system must be cost effective, a requirement absent from the *Interim Constitution* provisions.

3.2.2 Constitutional provisions

Although principally directed by *Section 217*, other provisions of the *Constitution* have important bearings on the system for regulating public procurement. Of these, the fundamental rights to equality, just administrative action and access to information have relevance.[14] Other basic constitutional values and principles for public administration,[15] and the provisions setting out responsibility for expenditure controls are also directly relevant to the regulation of public procurement.

3.3 Section 217: Procurement

3.3.1 Provisions of Section 217

Section 217 of the *Constitution* provides as follows:[16]

> 217. Procurement
> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

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12 Subsection 187(1) of the *Interim Constitution*.
13 The inference drawn from section 187(2) of the *Interim Constitution* is that 'the tendering system' provides only for tenders. See Bolton *Public Procurement* 37-38.
14 Sections 8, 33 and 32 of the *Constitution* respectively. Their relevance is established in the execution of the system as opposed to the assembly of the system.
15 S195 of the *Constitution.*
16 S217 of the *Constitution.*

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
   (a) categories of preference in the allocation of contracts; and
   (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.[17]

Subsection 217(1) sets out the application and scope of the constitutional procurement requirements. In terms of the general principles and objectives of public procurement in the Republic, subsection 217(1) can be regarded as setting out the fundamental requirements. Subsections 217(2) and (3) provide for policies implementing preferential mechanisms, and the particular objectives of protection and advancement of groups that exert a level of precedence over the provisions of subsection 217(1), thereby entrenching the use of specific horizontal mechanisms and objectives for public procurement in the Republic.

3.3.2 Application

The provisions of subsection 217(1) define the procurement provisions to be applicable to "an organ of state in the national, provincial or local sphere of government" or "any other institution identified in national legislation". This definition identifies two groups of institutions. If an institution falls within the bounds of either group, the provisions of *Section 217* will apply.

The first group - defined as being organs of state in the national, provincial or local sphere of government - identifies all organs of state with the additional qualifier of being in the national, provincial or local sphere of government. An "organ of state" is defined in the *Constitution* to be any department of state or administration in the national, provincial or local sphere of government; any functionary or institution

[17] S217 of the *Constitution*. Note that the original text of subsection 217(3) was "National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented" (own emphasis). This was amended by the *Constitution of the Republic of South Africa, Second Amendment Act* 61 of 2001 to that appearing in provided text.

exercising a power or function in terms of the *Constitution* or a provincial constitution; or any functionary or institution exercising a public power or performing a public function in terms of any legislation, excluding a court or judicial officer.[18] Therefore, a department of state or administration in the national, provincial or local sphere of government meets the criterion of being an organ of state in the national, provincial or local sphere of government. Functionaries or institutions exercising a power or function in terms of the *Constitution* or provincial constitution would be defined as organs of state but may not necessarily be in the national, provincial or local sphere of government.[19] Such organs of state not in the national, provincial or local sphere of government would therefore not fall into this first group. The same argument applies, *mutatis mutandis*, to functionaries or institutions exercising a public power, or performing a public function in terms of any legislation, that are not in the national, provincial or local sphere of government.[20]

The second group is defined as being institutions which may not fall into the first group, but which have been "identified in national legislation". The identification of institutions in national legislation has been interpreted to mean institutions that are identified by national legislation to which *Section 217* has application rather than simply being identified in national legislation regardless of the purpose of such legislation.[21] *Section 217* would therefore apply to institutions identified in national legislative instruments such as the legislation contemplated in subsection 217(3) or other legislation having application to procurement.[22]

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18 S239 of the *Constitution.*

19 Penfold and Reyburn *Public Procurement* 25-6. The example is cited of the Independent Electoral Commission being decided as an organ of state not in the national, provincial or local sphere of government in *Independent Electoral Commission v Langeberg Municipality* 2001 SA 925 (CC) 35.

20 Note this is a literal interpretation of the constitutional provisions supported by Penfold and Reyburn and De la Harpe. Penfold and Reyburn *Public Procurement* 25-6; De la Harpe *Public Procurement Law* 512-513. Bolton applies a purposive interpretation of the s217 provisions to conclude that the inclusion by the drafters of the limitation "in the national, provincial or local sphere of government" is to avoid confusion and that "entities that exercise public powers or functions will be regarded as organs of state", and therefore will be subject to the provisions of s217. Bolton *Public Procurement* 64-65. It is submitted that the presumption that the legislature would not enact invalid or purposeless provisions is better served by the literal interpretation.

21 Penfold and Reyburn *Public Procurement* 25-7.

22 Bolton *Public Procurement* 65. The current legislative framework would appear to have defined this second group to subsume the institutions defined in the first group. See Chapter 7.

The group of institutions to which *Section 217* apply is therefore wide and inclusive. In terms of the second part of the definition of institutions to which the procurement provisions apply, those identified by the current legislative framework include those in the first group and cast the applicability of *Section 217* wider to include all organs of state; constitutional institutions, public entities as well as national and provincial government business enterprises.

3.3.3 Scope

Subsection 217(1) states that whenever an organ of state, to which the section is applicable, "contracts for goods and services", the provisions of *Section 217* must be adhered to. This definition of the scope requires two enquiries, namely: what is the scope of "contracts for" and secondly what is meant by "goods and services". These will be dealt with separately in this section.

The phrase "contracts for" is capable of a narrow interpretation that would include only those activities relevant to the making of a legal agreement. Bolton[23] rejects this narrow interpretation as it would mean that the constitutional principles would only apply to the concluding of the contract, something to which the constitutional principles have little or no application. Therefore, the only sensible interpretation would be that the phrase "contracts for" has a wider application consisting of the process culminating in a contract, as well as the activities of managing the contract, and therefore includes activities undertaken during the whole procurement life cycle. In practice, the judicial interpretation of this wider application has presented little difficulty.[24] It is therefore concluded that there is no reason for the provisions not to apply to the whole procurement life cycle: the planning phase, procurement phase and contract management phase.

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23 Bolton *Law of Government Procurement* 66.

24 See for example *Millennium Waste Management v Chairperson Tender Board* 2008 2 SA 481 (SCA); *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 3 SA 121 (CC). The courts have assumed the scope of "contracts for" to include the procurement process without further enquiry. See also De la Harpe *Public Procurement Law* 26.

A further question relates to the nature of the contract. Bolton argues for an interpretation not including a wider class of contracts, for example including sale and lease.[25] It would appear that there is reasonable consensus to apply a wide interpretation to the phrase and, with due regard for the title of *Section 217*, may extend to contracts of procurement from a public body.

The contracts that are subject to the provisions of *Section 217* are defined to be those that have as their performance "goods and services". Definitions of public procurement generally classify the objects of such contracts into goods, services or construction works.[26] Despite the omission of an explicit reference to construction works from the object of contracts to which *Section 217* may apply, the term "services" is capable of a broad interpretation to include works and construction works.[27] Bolton's[28] literal interpretation of these terms is that goods are tangible and generally not consumed at the same time as they are produced whereas services are intangible and usually consumed concurrently with their production. This supports a wide interpretation of "goods and services" to include all forms of goods and services and, in particular, for services to include works and construction works. De la Harpe[29] notes the distinction between different objects of public procurement drawn by systems in other jurisdictions and concludes that such distinction in the categories of procurements are for the purpose of classification and the application of different provisions to each and not for limiting the scope of public procurement.

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25 Bolton *Law of Government Procurement* 66-71. Bolton considers other possible limitations of the meaning of "contracts for" and possible exclusions from the provisions of s217 of the *Constitution*. She concludes that the meaning of the phrase would include contracts entered into on behalf of others and it would include contracts of the sale and lease to other parties; however, it would not include contracts with other organs of state. See also Bolton *Regulatory framework* 190-191. Bolton argues that because of the heading "Procurement" for s217, it is not clear as to the application beyond acquisition, but should apply to contracts for sale and lease. See also the discussion in Anthony *Construction Procurement Regulation* 40. Although some of the principles, by extension, may be relevant to other forms of contract, this question is not pursued further as this study is limited to public procurement by organs of state.

26 Par 2.1.1.

27 De la Harpe *Public Procurement Law* 14, 27.

28 Bolton *Law of Government Procurement* 65-66. For a contrary view, see Ancarani *Service Sourcing* 189-190. Ancarani sets outs a continuum of tangibility in both goods and services.

29 De la Harpe *Public Procurement Law* 23-24. See also Trepte *Regulating Procurement* 32. In the context of domestic public procurement systems, there is generally no reason to limit the scope of public procurement regulation.

3.3.4 The requirement for a procurement system

The second part of subsection 217(1) requires that, where it has application, procurements must be undertaken "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". The elements of this provision and the importance and positioning of a "system" were underlined in *Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd*:[30]

> This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of section 217(1), the question whether any procurement is "valid" must be answered with reference to the mentioned legislation or regulation.

Under this interpretation, subsection 217(1) therefore requires that: (i) a system must be established; (ii) the system must be fair, equitable, transparent, competitive and cost effective; and (iii) the organ of state must execute procurements in accordance with such system. These three elements will be discussed individually in the paragraphs that follow.

3.3.5 ... "a system"

The word "system" in this context can be defined to mean an "organised or established procedure, a way or work or method",[31] or "a set of principles or procedures according to which something is done; an organized scheme or method".[32] The requirement for a system therefore implies that an organised set of principles, procedures, rules and guidelines must be defined and established *ex ante* for an organ of state to procure.[33] The use of the indefinite article in the phrase "a system" is interpreted not to constrain

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30 2013 2 All SA 501 (SCA) 15.

31 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary. See also Watermeyer *Regulating Public Procurement in South Africa* 1 "A system is an established way of doing things and provides order and a platform for the methodical planning of a way of proceeding."

32 Oxford Dictionaries 2017 https://en.oxforddictionaries.com/definition.

33 Watermeyer *Regulating Public Procurement in South Africa* 1-2. The components of a system may be considered to extend to documents, templates and policies covering a variety of organisational aspects. For simplicity, the list in the text is deemed to encompass the detailed elements of the system.

this to a single system applicable to all organs of state and all types of procurement but rather that a system must be in place for an organ of state to conduct a procurement.

The use of the words "a system" does not constrain the system to be of a certain type or class other than generally to conform to the principle-level requirements of a system.[34] From a legal viewpoint, the system should be defined by legislation and regulation,[35] but there is no reason why other controls - such as organisational policies, procedures and standards - should be excluded from the construction of a system. If deemed as quasi-legal controls, they may have an indirect legal effect from an administrative law perspective in any event.

As the scope of *Section 217* was concluded to apply to the entire procurement life cycle, the envisaged "system" is likewise not limited to any phase and therefore should be interpreted to be a requirement for all phases where practicable. The identification and definition of a public body's needs; the solicitation and selection of suppliers to satisfy the needs; the award, contract negotiation and conclusion; and the administration and management of the contract to termination, should therefore each take place within organised or established procedures and methods. The nature of a particular phase of the procurement life cycle may however limit the relevance and application of a predetermined system.[36]

The concept of a "system" is obviously capable of broader meaning than one limited to the regulatory system of procurement perspective. The "system" within which an organ of state contracts, in its broadest sense, could be seen to be the economic or market system. This may be of importance for perspectives and application of cost-effectiveness in that cost-effectiveness from the perspective of the public body may

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34 This is in contrast to the s187 of the *Interim Constitution*, which specified the use of a system of tendering. See par 3.2.1.

35 Pars 2.2.1 and 3.3.4.

36 The question of the practical relevance and application to the planning and contract management phases is further discussed in paragraph 3.3.7. The relevance of the requirements of the system to each of the stages in the procurement life cycle is set out in the detailed discussion of each of the principles in the following chapter.

not necessarily coincide with broader cost-effectiveness from the viewpoint of the economy as a whole.[37] However the requirement that the system, is fair, equitable, transparent, competitive and cost effective does not support this wider interpretation, as such requirements cannot reasonably be interpreted to be requirements for a wider economic system even if the wider system is to be considered only in the context of public procurement. The extent of the "system" is therefore, for the purposes of this study, interpreted to be limited to a system of procurement only.

The "system", as contemplated by the Supreme Court of Appeals, "is put in place by means of legislation or other regulation".[38] In the case of open procurement procedures, a lower-order system is also present, that being the set of rules and procedures governing a specific procurement transaction.[39] This lower-order system (the "transactional system") must be defined by the organ of state in terms of the legislation and other regulation forming the higher order system (the "regulatory system"). The form of the rules and principles of the *regulatory system* should therefore contain rules and principles about the rules and procedures that form the *transactional system*.[40] The *transactional* system would therefore embody and include the provisions of the *regulatory system*. If not explicitly, it would do so implicitly. This raises a question, relevant to this study, regarding the constitutional scope of the "system" contemplated by section 217: does the system consist only the legislation

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37 Dekel *Legal Theory of Competitive Bidding* 243-246. Dekel observes the achievement of the first does not necessarily imply the achievement of the second. Dekel describes economic efficiency as having two components, one being from the viewpoint of the public procurer only and the second being from the viewpoint of the economy as a whole and not merely from the utility that might be gained from one side or the other. The first viewpoint supports contracting with a bidder that yields the maximum utility for the procurer. The second viewpoint, which includes considerations of the aggregate of economic factors, may find accommodation of considerations of certain horizontal objectives. Horizontal criteria promoting the local industry, for example, can be directly linked to the utility for the national economy.

38 Par 3.3.4.

39 *Allpay* 38. "The Circular and the Request for Proposals, read together with the constitutional and legislative procurement provisions, thus constituted the legally binding and enforceable framework within which tenders had to be submitted, evaluated and awarded".

40 An example would the rules and principles regarding the criteria and weighting of criteria in the *regulatory system*. These would manifest as the specific transactional rules in accordance with which tenders are to be evaluated for the specific transaction. Further examples would be the specific rules about qualification criteria, submission times, attendance at briefings, format of the tenders or even the rules about required functional attributes of the solution.

and regulation, as considered by the Supreme Court of Appeals, or does the "system" also include the rules and procedures put in place by an organ of state for a specific transaction? The relevance is whether the requirements of fairness, equitableness, transparency, competitiveness and cost-effectiveness of the system extend directly to the *transactional system*.

(a) As the *regulatory system* cannot anticipate the specific nature of every procurement transaction, detailed rules of a *transactional system* would be necessary to give complete and specific contextual direction in terms of rules and procedures for the participation, evaluation and award for the transaction.[41] If the system required by subsection 217(1) were only to encompass the *regulatory system*, it would only be setting requirements for a part of the system in operation. The requirement of subsection 217(1) is that when an organ of state conducts procurement that it must do so in accordance with a system that meets the five requirements. Subsection 217(1) therefore requires that every transaction must be conducted in accordance with a system that meets the requirements, and cannot reasonably be interpreted to apply only to a part of the system in operation. This would support the view that the system required by *Section 217* includes the *transactional system*.

(b) On the other hand, the *transactional system* could also be seen as being demanded and defined by the *regulatory system*, and that the *transactional system* is simply the product of the *regulatory system* in execution. If the *regulatory system* will necessarily produce a compliant *transactional system,* the compliance of the *regulatory system* would be sufficient to meet the constitutional requirement.

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41 See par 2.2.5. The argument advanced placed in this context is that the *regulatory system* should not constrain the *transactional system* to the degree that it would unnecessarily limit the achievement of transactional objectives. However, the *regulatory system* should constrain the *transactional system* to the degree necessary with regard to the achievement of long-term or systemic objectives.

The answer to the question therefore lies in the degree of completeness of the *regulatory system*. A *regulatory system* that leaves wide discretion to the organ of state to determine the content of a *transactional system* would demand that the *transactional system* should be subject to inspection for constitutional compliance with subsection 217(1). Hypothetically, where the *regulatory system* is complete and compliant the product *transactional system* should be completely constrained and therefore compliant itself. As argued above, the *regulatory system* will invariably require an organ of state to make discretionary decisions regarding the assembly of *transactional system* that are not covered by rules of the *regulatory system*. It is therefore submitted that the *transactional system* must be subject to the requirements of, *Section 217*.[42]

Just as the *regulatory system* cannot anticipate every transactional circumstance, the actors responsible for the assembly of individual *transactional systems* may not consistently apprehend the import of systemic or long-term outcomes.[43] The *regulatory system* should therefore be complete with regard to the definition of mechanisms directed at the achievement of systemic objectives through successive applications of such mechanisms. It should provide a framework for the assembly of *transactional systems* in a way that both permits and compels the achievement of direct transactional objectives in compliance with the requirements of *Section 217*.

The import of the conclusions above is that the compliance of the system would ultimately be tested in the compliance of the *transactional system* with the requirements of *Section 217*. However, the *regulatory system* could be judged non-compliant if its provisions prevented the *transactional system* from being compliant, but it could not be inferred from the failure of the *regulatory system* to compel the compliance of *transactional systems* that it was non-compliant.

3.3.6 ... "that is fair, equitable, transparent, competitive and cost-effective"

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42 The question of how this discretion is tested is discussed in paragraph 3.4.3 on just administrative action.

43 Par 2.2.2.

The five requirements of the contemplated system - that it must be fair, equitable, transparent, competitive and cost effective - are stated as a logical conjunctive. Even though section 217, under a literal interpretation, specifies that the system must meet all five requirements, it may not be possible to achieve each one individually without regard for its effect on the others. This statement is motivated, in general, by the conclusions in the Chapter 2[44] that depending on the circumstances, these particular requirements may variously support or place limitations on each other. For this reason, the constitutional requirements for a procurement system are termed principles or standards in most literary works on the subject.[45] As concluded in Chapter 2, the nature and application of certain of these particular requirements may be principles, instruments, strategies, or even outcomes. Therefore for purposes of this study and in this context, the weaker term "requirements" will be retained, although noting their treatment as principles in general.

Bolton[46] applies the word "system" in the sense of "a group of interrelated, interdependent or interacting elements forming a collective entity" to explain the interrelatedness and interdependency of the five requirements acting as a whole. The conjunctive phrasing of the five requirements, each of which may limit the extent to which another may be applied, implies that a weighing and balancing of the requirements would be inevitable.[47] Conceptually, this interpretation of the presence of the word "system" is sound, and may add content to the idea of a meta-requirement for the five requirements to act collectively and as a whole. However, while this proposition is congruent with the notion of a system, the phrasing of the provision lends more weight to the existence of a system that has these five properties, rather than a system being a characteristic of their collective operation.

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44 Par 2.2.1, par 2.3. See also *Millennium Waste Management v Chairperson Tender Board* 2008 2 SA 481 (SCA) 25.

45 Bolton *Law of Government Procurement* 56. Bolton discusses how principles are to be considered in balance as opposed to outright requirements (rules) from a philosophical viewpoint. See also De la Harpe *Public Procurement Law* 4; and Penfold and Reyburn *Public Procurement* 25-8.

46 Collins *English Dictionary*, 1637 as quoted in Bolton *Law of Government Procurement* 56.

47 Bolton *Law of Government Procurement* 56. The balance of the five principles would depend on the circumstances of a particular transaction. This view is supported by Penfold and Reyburn *Public Procurement* 25-12.

At a constitutional level, the phenomenon of rivalry between matters of principle is neither unusual, nor are limitations to matters of principle exceptional as a means for resolving such tension. A primary example is the constitutional provision for the test of legislative limitations to fundamental rights.[48] As unachievable as a literal conjunction of the five requirements may be, the *Section 217* obliges the system to meet all five requirements and therefore requires limits to the absolute achievement of any one requirement to be established to reach a balanced achievement across all. The role of the *regulatory system* in determining the balance of objectives was anticipated above and described as a meta-goal of procurement regulatory systems.[49]

Bolton[50] suggests that this balance would depend on the circumstances of a particular case. Different transactional circumstances and events will undoubtedly force shifts in the balance. The difficulty is that the *Constitution* obliges the system to meet the five requirements and that in general, a pre-defined system cannot anticipate circumstances and events as they may unfold. The question arises as to what extent the balance should be determined by the *regulatory system* or, conversely, to what extent can the balance be left to be determined during the execution of a particular transaction, either in the assembly of the *transactional system* or during the execution thereof.

A characteristic of a system is that it establishes a scheme or method. A technical argument could be made for a scheme to provide explicitly for a level of discretion in determining the balance. However, procurement officials operating in the transactional context could not be expected to have a system-wide perspective, and if left with wide discretion to do so, may make inconsistent decisions relating to the balance of

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48 The limitations clause, section 36 of the *Constitution*, provides the framework for enquiry to resolve the boundaries of limitations.

49 Par 2.3.

50 Bolton *Law of Government Procurement* 56. "It is submitted that all the principles in subsection 217(1) always find application when organs of state contract, but that the weight attached to each principle will differ depending on the circumstances of each particular case". This view is supported by Penfold and Reyburn *Public Procurement* 25-12.

fundamental requirements.[51] Of greater detriment, such discretion may expose transactional decisions to the inherent vulnerabilities of the public procurement environment.[52] For the *regulatory system*, this may constitute weakness and inconsistency and therefore it would be doubtful that any significant handoff of the question of balance could constitute substantive compliance with the constitutional requirements. The *regulatory system* should therefore attempt to anticipate generalised circumstances to address the question of balance systematically. Bearing in mind the penalties of over-regulation, the extent to which the broadness of circumstances can be anticipated and addressed by the *regulatory system* may be limited.[53] It is therefore submitted that from this principles-based argument, that the constitutional demand would be for the *regulatory system* to determine the balance of its five requirements insofar as the achievement of long-term, system-wide objectives is concerned. In the event of circumstances not being contemplated by the *regulatory system*, decisions involving balance may have to be made outside the mechanisms of the *regulatory system*.[54] If it is accepted that the *regulatory system* should establish the balance of the requirements for long-term, system-wide perspectives, then the *regulatory system* should be supplemented and enhanced appropriately in line with the general principles of procurement regulation or policy to address common circumstances requiring systemic attention. Such supplementation should then take place on discovery through judicial development of the law or other means of awareness in order to maintain consistency with the constitutional provisions.

How the *regulatory system* is to ensure both the requirements and balancing of the requirements is through the mechanisms of rules and principles. The observations and conclusions above are carried forward to the subsequent chapters investigating the content of the rules and principles of the *regulatory system* and how these determine the balancing of the requirements.

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51 Par 2.2.2.
52 Par 2.2.2.
53 Par 2.2.4. The regulatory system should respond to, among other factors, past failures.
54 The position governing such discretion is explored further under administrative legal principles in paragraph 3.4.3.

3.3.7 "... in accordance with …"

When an organ of state undertakes to contract for goods and services, it will do so to achieve an outcome that must satisfy a particular identified need or set of needs.[55] A system, as a system of procurement regulation, cannot anticipate the direct outcomes of every transaction, but through compliance with such system the execution of individual transactions should be directed toward the achievement the broader goals of the system without the actors necessarily being aware of such goals of the system.[56] In theory, by conducting procurement in accordance with the system, the broader goals should be automatically achieved.

However, the performance of a procurement transaction will inevitably require decisions on the part of the public body that are not specifically covered by the rules and procedures of the system. For example, these could be decisions in the execution relating to dealing with unexpected events or in dealing with 'in flight' process corrections to imperfections discovered by the public body during execution. These may also arise because of incompleteness in the *transactional* system. Over and above the requirement to contract in accordance with the system anticipated by *Section 217*, the question arises as to whether the five requirements of the system extend to decisions made during the execution of a transaction that fall outside the prescripts of the system and that necessarily appeal to the discretion of the organ of state. A general answer to this question has been provided by the Constitutional Court in *Allpay* regarding the application of the prescripts of administrative law to the procurement phase, which is discussed in a later paragraph.[57]

Whereas a system was concluded, in principle, to be required in the entire procurement life cycle,[58] its implementation in the planning and contract management

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55 Procurement may be undertaken by a public body on behalf of a number of public bodies, for example transversal contracting. This can be seen as a proactive response to an anticipated aggregated demand for goods and services by a public body charged with an oversight role. See Bolton *Regulatory framework* 192-193.

56 Par 2.1.4. See also footnote 36 in Chapter 2.

57 Par 3.4.3.

58 Par 3.3.5.

phases is possibly less clear in the legal sense. Decisions in the planning phase generally lie within the ambit of the organ of state's discretion or governed by specific legislation or regulation applicable to the organ of state.[59] While these may affect the outcomes of a consequent procurement, these would probably not be considered part of the general system for procurement.[60] The instrument governing the contract management phase is the contract between the organ of state and its counterpart. The possibility of a role for a system in governing contract management is therefore limited. The approach taken in this study is to limit the examination of decisions in the planning and contract management phases insofar as these may affect, or be affected by the operation of the system in the procurement phase, either prospectively in the case of the planning phase, or retrospectively in the case of the contract management phase.

3.3.8 Subsections 217(2) and 217(3) of the Constitution

While the provisions of subsection 217(1) set out the fundamental constitutional principles for a public procurement system, subsections 217(2) and 217(3) of the *Constitution* entrench the ability for organs of state to implement certain policies:

> 217(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
>
> (a) categories of preference in the allocation of contracts; and
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> 217(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

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59 The specific legislation and regulations that apply to the different organs of state to beyond the scope of this study, but would include provisions, for example those required for the planning for energy, where a systematic approach is required for the analysis, review, adoption and authorisation of the plan.

60 This statement is not meant in any way to diminish the role for planning in the outcome of procurement, but only to note its place outside procurement regulation. Although deserving of in depth research, the analysis of the legislation and regulation in this phase falls outside the focus of this study.

The choice of the wording in subsection 217(2), that "subsection 217(1) does not prevent" public bodies from implementing preferential policies[61] implies that the implementation of such policies is permissible but not mandatory. Subsection 217(3) further sets out the requirement that if such a policy is to be implemented by a public body, it must be implemented within a framework prescribed by national legislation. A framework is thus mandated by the *Constitution* and the legislature is obligated to promulgate legislation for its implementation. Organs of state thus, from a constitutional standpoint, have the freedom to implement preferential policies but only within a nationally legislated framework.[62] From the perspective of general procurement principles, this entrenches central political control over procurement goals of a horizontal nature within the scope envisaged in subsection 217(2).[63] A further implicit requirement is that if these goals are to be pursued, the organ of state must define and implement a policy that is consistent with the national political framework for its application in the transactional or organisational setting.

Subject to the requirements of subsection 217(3), subsection 217(2) provides for the implementation of specific mechanisms and a class of horizontal goals that may be pursued.[64] These are discussed separately below.

3.3.8.1 Subsection 217(2)(a): Categories of preference

Subsection 217(2)(a) permits policies that provide for "categories of preference in the allocation of contracts" to be implemented. The categories of preference - or in other words, types of advantages that are given to some parties and not to others -[65] are not

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61 The term "preferential policies" is used here broadly to indicate a policy that promotes horizontal objectives. The preferential mechanisms are discussed in more detail below.

62 Bolton *Law of Government Procurement* 61-62. Prior to the amendment of subsection 217(3) of *Constitution,* an organ of state could decide without such restriction. Bolton notes the motivation of attaining uniformity by constraining the implementation of policies within a national framework. See also footnote 17 above.

63 Par 2.1.4. This entrenches consistency with the general principles of public procurement regulation.

64 De la Harpe *Public Procurement Law* 336. De le Harpe motivates that the interpretation of the word "and" between the provisions of subsections 217(2)(a) and 217(2)(b) of the *Constitution* should not be interpreted to mean they should be read conjunctively.

65 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary defines "preference" to be "an advantage that is given to some people of things and not to others.

specified in subsection 217(2) and therefore provides generally for the implementation of preferential mechanisms. Neither objectives sought therefrom nor parties to be accorded advantages are not specified and therefore, in principle, subsection 217(2) is not restricted in this regard. With regard to the unrestricted phrasing of the subsection in all three of these aspects, general constitutional consistency and validity would be an inherent and overarching requirement.

The definition of "allocation" in the phrase "in the allocation of contracts" bears out two meanings that have relevance: the one is the "apportion[ing] for a specific purpose or to particular persons or objectives" or distribution and the other "set[ting] apart or earmark[ing]" or designation.[66] In the first sense, a party or objective would be accorded an advantage in the distribution of contracts, meaning that there could be an advantage in the method of allocation or that there would be an advantage gained by obtaining a greater share than would have been distributed otherwise. In the second sense, that of designating contracts, intends an advantage by setting aside specified contracts for particular parties to achieve valid objectives. Both of these mechanisms would therefore be accommodated by subsection 217(2)(a) in terms of this definitional interpretation.[67]

In summary, subsection 217(2)(a) permits preference mechanisms in principle but would rely on other provisions of the *Constitution* for the constitutional validity of the objectives pursued in their implementation.[68]

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66 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary. Definition of "allocate".

67 Arrowsmith *Horizontal Policies* 175. Preferences and setting asides are distinguished. See also Watermeyer *Facilitating sustainable development 30, 43.* The argument presented above views preferences in degrees, where the set-aside mechanism is an extreme version of preference.

68 For example, see De la Harpe *Green Public Procurement* 68. The author argues that given the meaning of categories of preference is not altogether clear but the mechanism would be broad enough to include the promotion of constitutional rights. The author provides the example of environmental rights of section 24 of the *Constitution* and how subsection 217(2)(a) could provide preference to the promotion of these rights if so included in the legislation required for the implementation of s217(2). The author also notes that it cannot be read into the provisions of current legislation.

3.3.8.2 Subsection 217(2)(b) Protections and advancement

Subsection 217(2)(b) permits policies to be implemented that provide for "the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination". Unlike the provisions of subsection 217(2)(a), in this provision the *Constitution* specifies the criteria for objectives and targeted categories. The goals are protection and advancement of disadvantaged groups and the further criterion is specified that the cause of the disadvantage must have been unfair discrimination. Given South Africa's history, this could provide for a wide range of persons or groups, for example, those unfairly disadvantaged by disenfranchisement, racial or gender discrimination, or disability.[69] A policy providing for the goals of "protection or advancement" is not, in principle, limited by particular mechanisms or the extent to which such methods could be implemented in policy. The unrestricted nature of this aspect of the provision may limit the provisions of subsection 217(1) but would remain subject to the requirement of being consistent with other constitutional prescripts.[70]

3.3.8.3 Mechanisms available for implementing subsection 217(2)(b)

Arrowsmith[71] distinguishes nine different classes of mechanisms for implementing horizontal policies: the "decision to purchase or not to purchase"; the "decision on what to purchase; contract conditions laid down by the purchaser"; "packaging and timing of the order"; "set-asides"; "exclusion for non-compliance with government policies"; "preferences in the invitation"; "award criteria" and "measures for improving access to government contracts". The categories of preference contemplated by subsection 217(2)(a) suggest that mechanisms falling into the classes of *preferences in the*

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69 De la Harpe *Public Procurement Law* 340. This constitutional provision for horizontal objectives of public procurement narrows the more general constitutional requirement for equality to those disadvantaged by unfair discrimination, to the potential exclusion of other forms of disadvantage.

70 The wording of subsection 217(2)(b) mirrors the wording of s9(2) of the *Constitution* and therefore would not be counter to the general provisions for equality in the *Constitution* in principle.

71 Arrowsmith *Horizontal Policies* 166-182 (hereafter "Arrowsmith's taxonomy". The classes of horizontal implementation mechanisms are hereafter referred to as "horizontal mechanisms"). Hereafter the classes: the decision to purchase or not to purchase, the decision on what to purchase, contract conditions of the purchaser, packaging and timing of the order, set-asides, exclusion for non-compliance with government policies, preferences in the invitation, award criteria and measures for improving access to government contracts are referred to in italics when used within the context of *Arrowsmith's taxonomy*. See also Watermeyer *Facilitating sustainable development* 42-46.

invitation and *award criteria* are permitted. A detailed analysis of whether each of the *horizontal mechanisms* may find application under the broad objectives of subsection 217(2)(b) is beyond the scope of this study but it is submitted that the following *horizontal mechanisms* would find ready accommodation: *contract conditions of the purchaser*, *packaging and timing of the order*, *set-asides*; *preferences in the invitation*; *award criteria* and *measures for improving access to government contracts*. The remaining classes - the *decision to purchase or not to purchase*; and the *decision on what to purchase* - can also be argued to be included by their indirect effect on the distribution or designation of contracts. The *horizontal mechanisms* in *Arrowsmith's taxonomy* are also observed to span the life cycle of public procurement establishing the potential role for horizontal mechanisms contemplated by subsection 217(2) throughout the life cycle of public procurement.

From the discussion on the inclusion of categories of preference in subsection 217(2)(a), the range of objectives was concluded not to be limited. De la Harpe[72] supports this conclusion and suggests the objectives intended by the provision may be interpreted in the wider constitutional context to give substantive effect to any object of the *Constitution*, such as the promotion of environmental rights.[73] Objectives may be included that do not directly support specific constitutional objects, for example labour-intensive methods or promotion of local product content. Classes of people or parties may also be advantaged under this provision While preferences given to classes of people disadvantaged by unfair discrimination are dealt with specifically in subsection 217(2)(b), they could theoretically also be accommodated under the provisions of subsection 217(2)(a). Examples of preferences that could be applied to classes of people or parties that would not necessarily fall within the ambit of subsection 271(2)(b) could include preferences given to the employment of regional labour, local product content requirements or the use of small, medium and micro enterprise contractors.[74]

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72 De la Harpe *Public Procurement Law* 336. See footnote 68 above.
73 Generally any rights accorded by Chapter 2 of the *Constitution.*
74 Hereafter "SMME".

3.3.8.4 Predominance of the provisions of subsections 217(2) and 217(3)

The construct of the phrasing that subsection 217(1) "does not prevent" organs of state from implementing the policies contemplated in 217(2) appears to grant the organs of state discretion in this regard. However, subsection 217(3) obliges organs of state to implement such policies within a legislated framework. The effect is therefore that where such a framework defines and compels organs of state to implement a policy, it must do so within the *minima* and *maxima* of the defined framework. If the *minima* of the framework require the implementation of a policy, the element of discretion would exclude whether or not a policy may be implemented.

The more pressing question regarding the phrase "does not prevent" is that of its effect on the system required by subsection 217(1). From a constitutional standpoint, it implies that the provisions and requirements of subsection 217(1) cannot be used to test the constitutionality of legislation envisaged by subsection 217(3) or the policies provided for by such legislation, provided they fall within the scope of subsection 217(2). Subsection 217(2) only provides that subsection 217(1) cannot prevent such policies and therefore consistency with all other constitutional provisions remains a requirement to the extent that they do not prevent such policies. Further, given the specific nature of the scope of 217(2), procurement policies falling outside the scope of 217(2) must be consistent with the provisions of subsection 217(1).

In practical terms, once the subsection 217(3) framework is determined, and its provisions remain within the scope of subsection 217(2), the applicability of the subsection 217(1) requirements must be interpreted to remain and apply to the extent possible within the constraints imposed by policies implemented within such legislated framework. The extent of their application in the presence of a putative subsection 217(2) policy in principle, and at a high level, can be determined by enquiring in what way the provisions of subsection 217(1) could prevent the implementation of such policies. The elements of subsection 217(1) are examined in this light below: the application, scope, the requirement for a system, the requirement to contract in accordance with a system and the requirements of the system:

(a) Although subsection 217(1) was determined to have a wide application,[75] the purpose of implementing constitutional procurement policies may be served by application to a wider set of bodies. However, the widening of application is in any event contemplated by the inclusion of "institutions identified in national legislation".[76] Conversely, it would be difficult to see how legislation narrowing the applicability of subsection 217(1) would serve the purpose of policy implementation. This aspect of subsection 217(1) could not reasonably be viewed to have the potential of preventing policies under 217(2).

(b) The scope of contracts under subsection 217(1) was likewise determined to be wide. Policies widening the scope of contracts to which the provision applies could advance the objects of the allowable policies. However, again it would be difficult to find an argument for a reduction in the scope to do so. This aspect of subsection 217(1) could also not reasonably be viewed to have the potential of preventing policies under 217(2).

(c) Subsection 217(1) requires that a system must be implemented. As determined above,[77] the basic requirement for a system is simply for the existence of an organised scheme or method but agnostic to the desired outcomes of the system. If the mere requirement that horizontal policies be implemented in accordance with an organised scheme could prevent their implementation, this would imply that a tenet of the policy depends on the lack of organisation, standardisation or method. In a similar vein, if the requirement to conduct procurement in accordance with a system would prevent the implementation of policies, this would mean such a policy depends on unsystematic operation even in the presence of a defined system. The wide accommodation of systematic methods for the achievement of horizontal objectives makes it unlikely that a policy could be prevented by the requirement that it must be implemented within a system. Neither of the propositions above could therefore be regarded as consistent with

75 Par 3.3.2.
76 Par 3.3.2.
77 Par 3.3.5.

the most basic principles of public procurement regulation. The interpretation of "does not prevent" is therefore that: a system, as contemplated in subsection 217(1), must accommodate the implementation of specific policies rather than the subordination of the basic requirement for a system to be put in place or for the requirement to conduct procurement in accordance with such a system.

(d) The requirements of a system to be "fair, equitable, transparent, competitive and cost-effective" may individually produce impediments to the implementation of the policies contemplated by subsection 217(2) if these requirements of the system were to hold sway. For example, the requirement that the system is fair, in the sense that everyone is to be treated equally, may be incompatible with the notion of certain preferences.[78] Horizontal policies cannot be argued not to carry the potential for additional cost, or potential loss of efficiency or quality.[79] A system's achievement of cost-effectiveness, in the sense of transactional value for money, could therefore carry the potential to be at odds with policy objectives.

Conversely, policy requirements may amplify a requirement, for example the specific objects of subsection 217(2)(b) could be seen to give particular content to the requirement of equity, in the sense of substantive equality.

Transparency on the other hand could be argued to be a higher-order requirement and, as a requirement that is supported by other constitutional provisions, would impose an embedded requirement of transparency in any horizontal policy implementation.[80] A policy that could be prevented by the requirement of transparency would, in all likelihood, fail other constitutional tests.[81]

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78 See the discussion in Chapter 4 for an in-depth discussion specifically relating to fairness, substantive fairness and equity.

79 Bolton *Law of Government Procurement* 257-259.

80 The requirement of transparency in horizontal policy formulation and implementation would arise, not from the transparency requirements of subsection 217(1) but from the more general constitutional requirements for transparency. These may coincide with the subsection 217(1) system requirement for transparency in practice.

81 For example, the requirement for transparency in section 195.

> Furthermore, certain policies that could be accommodated under subsection 217(2)(a) may have little or no effect on any of the five requirements in the domestic setting, for example a policy providing preference for local production,
>
> The effect of the contemplated constitutional policies on each of the five requirements is discussed in more detail in the following chapter but the point made from the examples above is that the phrase "does not prevent" can be understood as having the effect of forcing a particular definition of balance between the requirements.

Under the interpretation and arguments above, the construct of *Section 217* therefore constitutionally reinforces the principle that a system of public procurement regulation must balance the requirements to accommodate constitutionally permissible policies, and importantly legitimises and mandates the presence of certain horizontal policies in defining the balance.

3.4 Section 33: Just administrative action

3.4.1 Provisions of section 33

Section 33 of the *Constitution* sets out the fundamental right to just administrative action.[82]

> 33. Just administrative action
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration.

[82] S33 of the *Constitution.*

The effect given to section 33 by the promulgation of the PAJA, as obligated by subsection 33(3), gives specificity and content to the right and hence the justiciability of the constitutional provision is generally considered in terms of the legislative provisions.[83]

Administrative action, as defined in the PAJA[84] is not limited to action taken only by public bodies and covers decisions taken in a general administrative context. The activities undertaken as part of public procurement involve decisions taken in the exercise of a public power or in the performance of a public function, which places them generally within the ambit of administrative action.[85]

Decisions, particularly during the procurement phase of the life cycle, have been well established as constituting administrative action giving rise to the right to just administrative action, for example: the call for and adjudication of tenders,[86] the decision to award a tender[87] and the decision not to award a tender.[88] Decisions that lie in the contract management phase, such as cancellation of a contract arising from a tender, have also been considered in terms of just administrative action.[89] The validity of related decisions - such as restricting a contractor from participating in future

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83 Quinot *Administrative Law 2010* 41. The principle of subsidiarity should place reliance first on the legislation enacted to give effect to a right, unless the legislation is itself in question. Quinot notes that the method of first determining the applicability of PAJA with reference to s33 "seems to be gaining in popularity" although the alternative of using PAJA as the starting point is more common.

84 S1 of PAJA.

85 The application of administrative law is broader than the activities of public procurement and in terms of the entities whose activities may be considered administrative in nature broader than those to which *Section 217* applies. See Hoexter *Administrative Law* 207-209.

86 *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) 43. *Millennium Waste Management v Chairperson Tender Board* 2008 2 SA 481 (SCA) 21.

87 *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (A) 552j–553a.

88 *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) 5.

89 Hoexter *Administrative law* 185-187. The circumstances of the cancellation will determine the application of administrative law or whether purely from the aspect of private of contract. This is only remarked upon to point out the potential of its broad applicability and it is not necessary to pursue this question further. See also Quinot *Administrative Law 2011* 51.

tenders[90] - which do not fall within a transactional view of the procurement life cycle have also been deemed to be administrative action.

More generally, the Constitutional Court has clarified the position for the public tender process in *Allpay* by setting out the administrative law construct for the process:[91]

> In the context of a tender process, the tender documents give notice of the proposed administrative action, while the responding bids in effect constitute representations before the decision is made. Adequate notice would require sufficient information to enable prospective tenderers to make bids that cover all the requirements expected for the successful award of the tender.

This construct accords with the view that the notice of the tender, the tender documentation and each further notice in a multistage transaction, constitute notice of administrative action culminating in the award decision.[92]

This study is centred on the constitutional requirements of the procurement system rather than all actions and decisions made in the course of public procurement. Therefore, the general application of the section 33 right and of the PAJA to public procurement is a topic too broad for scope of this study. The following discussion therefore focuses more narrowly on the application of the right to just administrative action in the context of a procurement system, as it may apply to defining a procurement system and to its application in the execution of such system.

3.4.2 Requirements of section 33 in a system of procurement

The thrust of administrative law is directed at the grounds for review of administrative action, or the detection and remediation of maladministration. The other side of the

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90 Quinot *Administrative Law 2011* 60. This is to illustrate the broadness of application to decisions relating to public procurement, aside from the question of when the decision to exclude would become ripe for challenge.

91 *Allpay* 90. While this is a general construct, see also *Viking Pony Africa Pumps (Pty) Ltd v Hydro-Tech Systems (Pty)* Ltd and Another 2011 (2) BCLR 207 (CC) 37. The application of administrative law cannot be determined in the abstract and must always be confirmed by the facts of each case considered.

92 Hoexter *Administrative Law* 372.

coin, more in line with the phrasing of the s33 right, is that everyone has the right to just administrative action and not only the detection and remediation thereof. In the context of a procurement system, proactive cognisance of the requirements of lawfulness, reasonableness and procedural fairness in the system would operate toward the promotion of the validity of administrative action.[93]

The right to just administrative action is a fundamental right and therefore any action or legislated system encroaching on the right may be constitutionally challenged or would have to be justified in terms of the limitations clause.[94] Given that public procurement will invariably involve administrative action, the *regulatory system* for public procurement must specify rules and procedures that are consistent with the right. Section 33 thus inherently places fundamental requirements on the system and, as argued above, the system for the regulation of public procurement must not only be consistent with the fundamental right but should further proactively promote the values of lawful and effective administration in its execution. Section 33 will therefore inform the rules of the system, for example for the incorporation of regulatory mechanisms to promote the rule against bias.

While administrative action takes place in the execution of decision-making, the making of regulations and the lawfulness of regulations are also subject to administrative review. From the point of view of establishing a system of procurement, a requirement of just administrative action, that it is lawful, requires that the regulator is authorised and empowered to make regulations constituting the system.[95] This provides for consistency in the system, that subordinate legislation, and that organisational policies and procedures are only made and carried out within the powers conferred by superordinate legislative provisions.

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93 Farina *Administrative law as regulation* 507. Farina argues for the objective of generally working to promote the validity of administrative action rather than "struggling to prevent its invalidity".

94 See footnote 48 above.

95 Hoexter *Administrative Law 256-258.* Bringing subordinate legislation into force is administrative action and subject to the authority granted by legislation. Of specific relevance to public procurement, *Sizabonke Civils 9-11.*

3.4.3 Requirements of section 33 in the execution of the system

From the viewpoint of establishing the constitutional requirements for public procurement, while *Section 217* founds the requirement for, and basic requirements of, a system of procurement, section 33 and the PAJA set out requirements for decision-making and procedure for the execution of administrative action in general, including those involved in public procurement. An overlap in the scope in these constitutional provisions can be found in, for example, the *Section 217* requirement to contract in accordance with the system and the section 33 right to lawful administrative action. The PAJA also provides for specific and relevant procedural requirements, for example, procedures for making reasons known for action affecting persons adversely, which could from a systemic viewpoint, supplement, or set minimum standards for regulatory procedure.[96]

As argued above,[97] a system cannot anticipate the circumstances and events of every transaction and the discretion of the public body will be called for in decision-making. This would arise both in cases of the *regulatory system* or the *transactional system* being incomplete. Incompleteness in the *regulatory system* will require discretion in the assembly of the *transactional system*, and incompleteness in the *transactional system* will require discretion to be applied in the execution of the *transactional system*. The fundaments of the right to just administrative action establish generalised principles for decisions and procedures in such situations and thus provide the underlying check for limiting what otherwise may be construed as unfettered discretion either through the system expressly granting discretion or by its silence. The compliance of a transaction with the *regulatory system* is therefore insufficient to establish its validity and the lawfulness, reasonableness and procedural fairness of decisions made during the transaction must still pass muster in terms of just administrative action.

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96 A concrete procurement example would be the principles of administrative law informing regulatory procedures for rejecting a tender for its abnormally low price.

97 Par 3.3.7.

The conclusion above, that the *transactional system* must comply with the requirements of *Section 217*, is supported by administrative decision-making being informed by the requirements of *Section* 217 in the assembly of the *transactional* system. The standards for administrative decision-making during the assembly of the *transactional system* and the compliance of the product *transactional system* can be considered equivalent requirements.

The other possibility is that decisions during the execution of a transaction depart from the rules and procedures of the *transactional system*. The context provided by the Constitutional Court in *Allpay* - of the interaction between *Section 217* and the legislative effect given to section 33 - is instructive:[98]

> Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.
>
> The [legislative framework for procurement policy under section 217] thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

The judgment squarely places compliance with the procurement system as an initial test, but would only constitute grounds for review if these "lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA". While this context is provided in the setting of grounds for judicial review, it nevertheless places the system-related requirements of *Section 217* within the requirements for the right to just administrative action in execution. It would therefore appear that non-compliance with the system is not, on its own, a sufficient ground for

98 *Allpay* 40 and 43.

review of a procurement transaction and for the determination of the invalidity of a transaction. In practice, this means that non-compliance with the system would be viewed within the context of just administrative action for its invalidity.

The relevance of the five system requirements in terms of their direct justiciability in matters relating to the execution of procurement appears now to be relegated to informing the grounds for administrative review. The effect of this position is that the test of balance in the five requirements may be judged in the context of the circumstances of the transaction and the reasonableness of decisions made by the public body, rather than in the wider context of their systemic operation. The positive side to this stance is that it may have the effect of softening the hard edges of the *regulatory system* and may inform the refinement of the system, but on the negative side, it may reduce consistency in the application of the system.[99]

In summary, the constitutional right to just administrative action, as is to be expected, operates at a more fundamental and universal level than the *Section 217* provisions for a procurement system. While the *Constitution* requires a procurement system to be fair, equitable, transparent, competitive and cost effective, the operation of such a system must be seen in the light of the right to just administrative action as enhanced by the system's requirements in context. It is submitted that given the requirements of just administrative action in its execution, where these requirements can be proactively promoted by procedures and rules, they should inform such mechanisms in the system contemplated by subsection 217(1).[100]

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99 The effect on public confidence in the system may be increased by avoiding absurd results, but may equally be reduced by loss of trust in its consistency.

100 The feedback loop would be casuistic and not necessarily guarantee the compliance of the system with s217.

3.5 Section 32: Access to information

Section 32 of the *Constitution*, provides as follows:[101]

> 32. Access to information
> (1) Everyone has the right of access to - (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The effect given to section 32 by the promulgation of the PAIA, as obligated by subsection 32(3), gives content to the right and, as with the PAJA, the justiciability of the constitutional provision and the assertion of the right are generally considered in terms of its legislative provisions.[102]

Access to information held by the state in the operation of the procurement system is generally provided for in terms of the principle of transparency and by the procedural requirements of the right to just administrative action. There are occasions when these provisions may be insufficient for a party to decide whether to take action or not. For example, access to information, further than reasons that may have been furnished, may be necessary to establish the foundations of the reasoning.[103]

The PAIA is important not only for the protection of the right but also in terms of establishing limitations to the right through the content given by its legislative implementation. In the procurement context, exceptions to the right of access to information held by the state may include grounds for refusal including commercial information or confidential information of third parties;[104] defence, security and

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101 S33 of the *Constitution.*

102 Hoexter *Administrative Law* 97. Direct reliance on the constitutional provision is only to be sought in exceptional circumstances, for example, when the PAIA itself is constitutionally in question.

103 Bolton *Law of Government Procurement* 242. *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1997 (10) BCLR 1429 (W). An unsuccessful tenderer required information beyond the reasons given to it to establish whether a right to just administrative action had been infringed.

104 S36 of PAIA. A public body must refuse access if the request is for a record that contains: (a) trade secrets of a third party; (b) financial, commercial, scientific or technical information, other than

international relations,[105] economic interests and welfare of the state; commercial activities of organs of state.[106]

While the PAIA may set certain minimum standards for transparency, it does not deny the existence of other rights. In the context of transparency in a procurement system, the timeframes specified by the PAIA cannot be relied upon by the organ of state to relax obligations, for example, timeframes that have been specified by the *regulatory* or *transactional system*.[107]

The relevance of the PAIA to a system of procurement is therefore that it establishes markers for transparency, both as to what information must be made transparent and what limitations may exist to transparency. As argued in respect of the right to just administrative action,[108] the relevance to a procurement system lies in its observance of the right to access to information, and in a proactive sense, its inclusion of provisions supporting the right.

3.6 Section 9: Equality

Section 9 of the *Constitution* provides, in pertinent part, as follows:[109]

> 9. Equality
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or (c) information supplied in confidence by a third party the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations; or to prejudice that third party in commercial competition.

105 S41 of PAIA.

106 S42 of PAIA.

107 See for example *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & others* 2007 JOL 20719 (SCA) 13.

108 Par 3.4.2.

109 S9 of the *Constitution.*

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
…
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The *Promotion of Equality and Prevention of Unfair Discrimination Act*[110] was promulgated to give effect to section 9 of the *Constitution*. The relevance of the right to equality includes not only the 'negative' rights to equality[111] but also the positive provisions for measures to 'protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.[112] The constitutional provision for the positive measures in section 9, though intended in the wider context, are restated verbatim in the *Section 217*, indicating public procurement as a constitutionally intended target for such positive action.

The grounds for unfair discrimination may include the exclusionary effects of decisions made in terms of the requirements of the procurement system.[113] A consideration of section 9 in the procurement system in the South African context is the potential for the long-term effect that systematic operation of rules may have in maintaining the *status quo* of an unfair supply environment and of it preventing the advancement of the goal of substantive equality.

3.7 Other relevant constitutional provisions

Beyond the constitutional provisions for which direct relevance can be established as discussed above, there are various provisions of peripheral relevance. It is not necessary for the purpose of this study to discuss these to any greater level of detail than that set out below.

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110 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

111 The statement of rights in the form, for example, that the state may not unfairly discriminate against anyone on various grounds.

112 S9(2) of the *Constitution.*

113 *Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport & Others 2009 (6) SA 589 (SCA)* 90.

3.7.1 Section 195: Basic values and principles governing public administration

The provisions of Section 195 of the *Constitution* require certain values and principles to govern the public administration, *inter alia*: (a) efficient, economic and effective use of resources; (b) services must be provided fairly and without bias; (c) public administration must be accountable; and (d) transparency.[114] These principles apply to every sphere of government, all organs of state and public enterprises.[115] The values and principles of Section 195 provide 'valuable interpretive assistance'[116] to other provisions regarding the public service. While they may not necessarily found directly enforceable rights, there have been situations where the principles have been used to establish the enforceability of other rights.[117] The Public Service Commission, established in accordance with the provisions of Section 196, has investigated and produced a number of reports of specific relevance in guiding public procurement.[118]

3.7.2 Section 216: Treasury control

Section 216 of the *Constitution* requires legislation to establish a National Treasury that is constitutionally mandated to enforce compliance with measures to ensure transparency and control of expenditure. The relevance to the public procurement system is the assignment of broad central executive control over these measures to the National Treasury in all spheres of government.

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114 Subsections 195(1)(b), (d), (f) and (g) of the *Constitution* respectively.

115 Subsection 195(2) of the *Constitution*.

116 *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 3 SA 121 (CC) 33. The tendering system devised by an organ of state " must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)".

117 Hoexter *Administrative Law* 19. Hoexter quotes the example of using the s195 principles to establish a right enforceable under the PAJA.

118 Public Service Commission *Evaluation of Supply Management Practices within the R200 000 Threshold* 2009; Public Service Commission *Profiling and Analysis of the most Common Manifestations of Corruption and its Related Risks in the Public Service* 2011; Public Service Commission *Report on the Evaluation of the Batho Pele Principle of Value for Money in the Public Service* 2007.

3.7.3 Chapter 9 institutions

Various independent state institutions are established by Chapter 9 of the *Constitution* to support the constitutional democracy. Of relevance to the strengthening of the constitutional procurement system are the Public Protector[119] and the Auditor-General.[120] Both these institutions have a significant role as a check on public procurement activities. Although their functioning is essentially reactive and remedial in nature, their findings and recommendations are binding and promote accountability in the procurement system.[121]

3.8 Summary and conclusions

The principles for public procurement are constitutionally entrenched in *Section 217* and are applicable to public bodies in the widest sense.[122] The scope of the provisions of *Section 217* covers contracting for goods, services and construction works and could have wider application than procurement of goods and services by public bodies save for the title of the section.[123]

Section 217 requires that whenever a public body conducts procurement activities, a system must exist, the system must be fair, equitable, transparent, competitive and cost effective, and the public body must procure in accordance with such system. The provisions of *Section 217* reinforce the principle that a system of public procurement regulation must balance the requirements to accommodate constitutionally permissible policies, and importantly legitimises and mandates the presence of certain horizontal policies in defining the balance.[124]

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119 Section 182 of the *Constitution.*
120 Section 188 of the *Constitution.*
121 Par 2.1.4. In terms of the general principles of public procurement, these institutions form part of the reactive control system for public procurement.
122 Par 3.3.2.
123 Par 3.3.3.
124 Par 3.3.4.

The application and execution of the system of procurement must take place within the broader constitutional principles of just administrative action. The lawfulness, reasonableness and procedural fairness of the execution of public procurement is informed by its compliance with the system of procurement and by the requirements of the public procurement system.[125] It was concluded that the right to just administrative action should equally shape elements of the system in the proactive sense.[126]

The constitutional right of access to information held by the state has application to public procurement and the legislative interpretation of the right defines relevant procedural content and limitations to the principle of transparency.[127] In addition to the provisions of the right to information in the application and execution of public procurement, it should proactively influence the definition of the system of procurement.[128]

The right to equality, by the restatement of the positive substantive equality measures of section 9 in *Section 217*, indicates public procurement as a specific constitutional target for the implementation of such measures.[129] The right to equality may also be relevant to the procurement system as a guard against the negative effects of the system of maintaining the status quo as it might be an impediment to substantive equality.[130]

3.8.1 Conceptual summary schematic

The conceptual picture that emerges of the constitutional framework for public procurement is that the constitutional provisions have two broad categories of application to the assembly of the *regulatory system* and to the execution of the *regulatory system*.[131]

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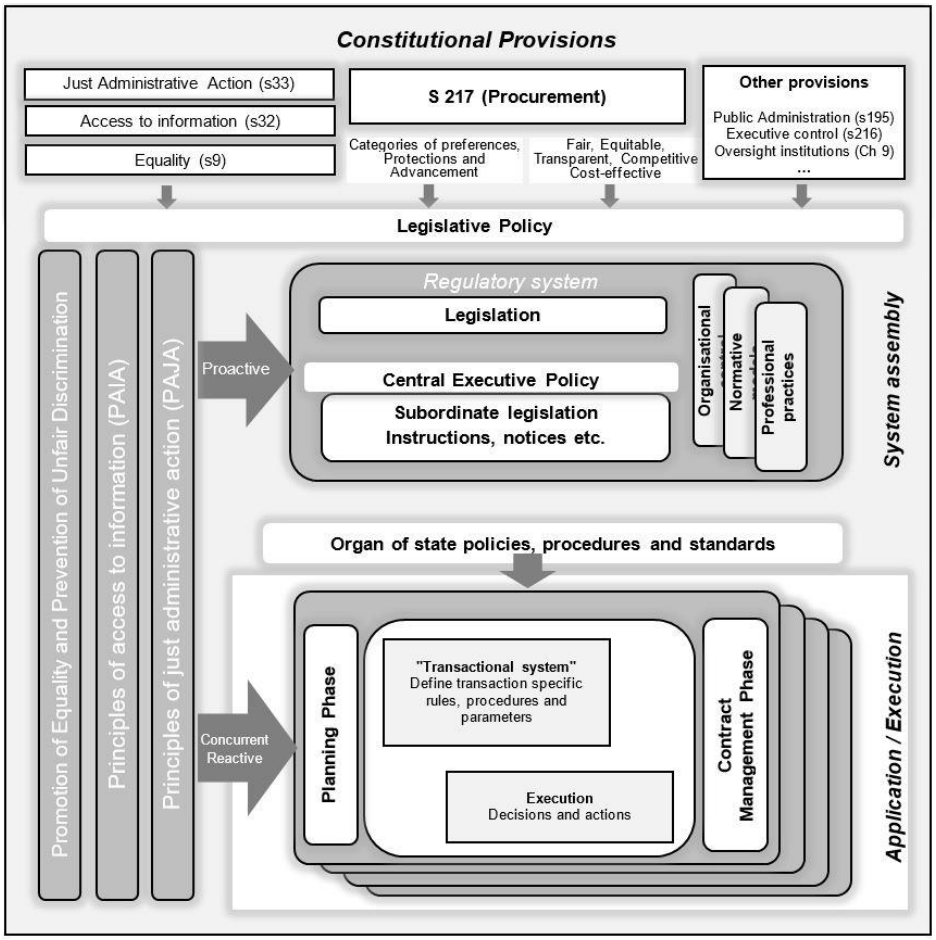
125 Par 3.4.3.
126 Par 3.4.2.
127 Par 3.5.
128 Par 3.5.
129 Par 3.6.
130 Par 3.6.
131 Par 3.3.5.

Figure 1: Constitutional Framework for public procurement



The application of the *regulatory system* in execution of an open procurement procedure has - as its initial product - the *transactional system* which embeds and includes the *regulatory system* and which forms the system for a procurement transaction. If the *regulatory system* is complete and compliant, the *transactional system* should automatically meet the requirements. It was observed that the *regulatory system* will necessarily not be complete and that discretion will be required on the part of the public body in the assembly of the *transactional system*. It was concluded that the *regulatory system* should completely define the mechanisms for the achievement of long-term systemic objectives and should provide a framework for the assembly of *transactional systems* in way that both permits and compels the achievement of direct transactional objectives.[132]

132 Par 3.3.5.

The constitutional requirements for a system were concluded to apply to both the *regulatory system* and the *transactional system*. This conclusion was supported by the requirements of administrative decision-making in the assembly of the *transactional system* that are informed and enriched by the *Section 217* requirements. Ultimately, the compliance of the system with the requirements of *Section 217* can be established by the compliance of the *transactional system* as it embeds the provisions of the *regulatory system*. Non-compliance of the *regulatory system* with *Section 217* can only be tested in respect of provisions that prevent the compliance of the *transactional system*. It could be inferred that failure of the *regulatory system* to compel the compliance of the *transactional system* represents a weak system but not that it would necessarily be non-compliant.

The second product of the system is the actual execution of the *transactional system*. The constitutional provisions that apply to the execution apply to both the assembly of the *transactional system* and the execution of the *transactional system*.

Although the assembly of the *regulatory system* and its application in execution are clearly different activities, as argued above, no hard line should be regarded to exist between the application of the constitutional provisions to one or the other. The distinction reduces to one of being whether a provision's application is proactive or reactive in nature. As argued, the *regulatory system* should be reinforced and supplemented to promote proactive and complete regulation.[133]

3.8.2 Constitutional context of the requirement of cost-effectiveness

Cost-effectiveness is a fundamental requirement of the required system. Cost-effectiveness is required of the system to the extent that it does not prevent nationally legislated policy requirements and to the extent determined by the balance among the fundamental requirements of the system. The determination of the balance of the achievement of cost-effectiveness in relation to the other requirements should be defined by the *regulatory system* to the extent possible. Where questions of balance

[133] Par 3.3.6.

are not compelled by the *regulatory system*, the application of discretion must be made, from a constitutional viewpoint, in a way consistent with administrative provisions relating to the execution of the system as these may be informed by the constitutional requirements of the *regulatory system* in either the assembly, or execution of the *transactional system.*

The content of cost-effectiveness, and other requirements of the system, may be assisted by values and principles established by other constitutional provisions, among others, Section 195 for governing public administration. The content of the constitutional requirements of the *regulatory system* and the balance between the requirements is investigated more fully in the following chapter within the framework established in this chapter.

4 The constitutional requirements of the procurement system

This chapter investigates the requirements for the constitutional system for public procurement to be fair, equitable, transparent, competitive and cost effective. The approach to the investigation is to examine each of the requirements with specific focus on their definitional meaning, their meaning in context, perspectives of their application in the system and aspects of the interplay between the requirements. The investigation commences and centres on the requirement of cost-effectiveness as the focus of the study.

4.1 The requirement of cost-effectiveness

"Cost effective" is a term freely used without specific reference to technical aspects of its meaning and is used interchangeably with similar concepts, such as value for money.[1]

4.1.1 Definitions of cost effective

Dictionary definitions of the term "cost effective" vary considerably. It is defined in a sample of prominent dictionaries to mean variously:

> "economical in terms of tangible benefits produced by money spent";[2]
> "effective or productive in relation to its cost";[3]
> "giving acceptable financial return in relation to the initial outlay";[4] and
> "providing adequate financial return in relation to outlay"[5]

What is common to all the above definitions is the notion of the achievement of a certain standard in the relationship between outcomes and cost. However, the nature of the cost, the nature of the outcomes and the nature of the relationship between the two are expressed in varying terms.

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1 See par 4.1.3.5 for a detailed discussion on cost-effectiveness and value for money.
2 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary.
3 Oxford Dictionaries 2017 https://en.oxforddictionaries.com/definition.
4 Chambers 21st Century Dictionary 2017 http://www.chambers.co.uk.
5 Collins 2017 https://www.collinsdictionary.com/dictionary/english/cost-effective.

The nature of the cost is expressed as the "money spent" in the first definition. The second expresses it more broadly as the outcomes' "cost". The third definition limits the cost to the "initial outlay" and the fourth references outlay but does not limit cost to the initial outlay. The definitions of the outcome also differ: the first describes the outcome as being the "tangible benefit", the second describes the outcome indirectly as being a "result that is wanted or the intended effect",[6] whereas the third and fourth describe it simply as the "financial return". The second definition expresses both objects of cost and outcome in broad terms whereas the others appear to place limitations on the types of cost and outcomes to be considered.

The nature of the relationship also differs between the definitions: the first definition requires the relationship between outcomes and cost to be "economical" or "giving good value or return in relation to the money, time, or effort expended".[7] The second requires the relationship to be that the outcome is what was intended or the result is significant in relation to its cost.[8] The third and fourth describe something as being cost effective if there was an "acceptable" or "adequate" relationship between its outcome and the cost.[9] The notion of a comparative relationship underlies all the definitions thereby exposing two inherent requirements: that a basis must exist for the comparison of cost and outcomes and that a certain standard must be achieved in order to be cost effective. By narrowing the outcome to be the financial returns, the last two definitions ensure a comparative basis. However, in general, the susceptibility of broader outcomes to financial valuation is not assured, leaving the question of a general comparative basis open. The descriptive standard for the comparison is similarly open ended, being variously described as "adequate" or "acceptable".

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6 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary defines "effective" in these terms.

7 Oxford Dictionaries 2017 https://en.oxforddictionaries.com/definition.

8 Oxford Dictionaries 2017 https://en.oxforddictionaries.com/definition. Definitions of "effective" or "productive".

9 Chambers 21st Century Dictionary 2017 http://www.chambers.co.uk. The word "acceptable" is defined by the same dictionary as being "suitable", "good enough, but usually only just".

It can be concluded from the definitions of the term "cost effective" - while there is broad conceptual alignment - there are differences in the elemental details and that further investigation would be required to establish the appropriate meanings for its application in context.

The related abstract noun "cost-effectiveness" has established and concrete meanings that are used in the fields of cost-effectiveness analyses and performance measurement.[10] This form of analysis is commonplace in diverse disciplines, for example in evaluating health care, education, defence and environmental strategies.[11] The meaning and application of cost-effectiveness are briefly investigated in these contexts for its potential to resolve the open-endedness of the dictionary definitions.

4.1.2 Application and measurement of cost-effectiveness

The term "cost-effectiveness analysis" in a loose sense can be used to refer generally to any economic evaluation.[12] In its more precise sense, such an analysis evaluates procedures or programmes in terms of cost and measures of effectiveness.[13] Diamond[14] explains a measure of cost-effectiveness as the end comparison between costs and outcomes, with intermediate measures relating to the processes making up an overall programme diagrammatically summarised below in *Figure 2: Simple production* model.[15]

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10 The usage of the term "cost effective" in its adjectival form and the abstract noun "cost-effectiveness" should be distinguished. The adjective "cost-effective" as applied to course(s) of action, as discussed above, implies an inherent and satisfactory comparison between the outcome(s) and cost. "Cost-effectiveness" is a measure expressing the quality of being, or the extent to which, a course of action is cost effective.

11 For example the discussions on cost-effectiveness as an economic evaluation technique in Levin *Cost-effectiveness Analysis* 381-383. Sher and Punglia *Decision Analysis* 19-21. Cropper *et al Getting cars off the road* 134-139.

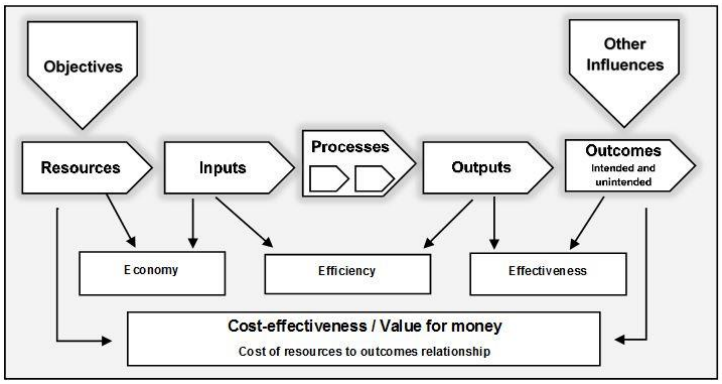
12 See for example Robinson *Cost-effectiveness Analysis* 795.

13 Described as 'natural units' Robinson *Cost-effectiveness Analysis* 795. Also described as 'units of effectiveness' Cellini and Kee *Cost-effectiveness* 493

14 Diamond *Performance management framework* 162.

15 Adapted from Diamond *Performance management framework* 162. National Audit Office (UK) Date unknown Assessing value for money. Note that "cost-effectiveness" and "value for money" are used interchangeably by Diamond and the National Audit Office (UK). See also Public Service Commission 2007 *Report on the Evaluation of the Batho Pele Principle of Value for Money in the Public Service* 14.The equivalence of the term 'value for money' and cost-effectiveness is dealt with in detail in par 4.1.3.5.

Figure 2: Simple production model



Cellini and Kee[16] distinguish a measure of cost-effectiveness by requiring cost to be compared with quantifiable measures of outcomes, where such measures need not necessarily be expressed in financial terms. In this context, it distinguishes a cost-effectiveness measure from a measure of "cost benefit", the latter requiring outcomes to be expressed as a financial quantification. A key reason cited for using cost-effectiveness analysis techniques is that it provides a means for determining a better, or the best, course of action to achieve outcomes that are difficult to monetise.[17] In a cost-effectiveness analysis, a direct comparison of the cost and outcomes is not made, but rather a measure composed of effectiveness units and cost is assessed against the value of the metric determined for comparator systems.[18] This elevates the objects of comparison to being different programmes, systems or courses of action and provides the basis for their comparison. While this avoids the problem of finding a basis for direct comparability between units of cost and units of effectiveness, if it is to be used as a decision-making criterion, it requires external comparators, systems, programmes or courses of action.

16 Cellini and Kee *Cost-effectiveness* 493.

17 Cellini and Kee *Cost-effectiveness* 493. The measure of cost-effectiveness is expressed as the relationship between cost and units of effectiveness as opposed to, for example, a cost-benefit analysis, which require outcomes to be expressed in monetary units. For example, in a healthcare setting, the value of increased life expectancy is not capable of being monetised in an objectively quantitative manner although can be objectively be expressed in units of effectiveness.

18 The quotient of an outcome metric and units of cost is a common comparative basis for the comparison. Alternative methods for deriving the expression of cost-effectiveness are available, or may be embedded in the derivation of the outcome metric itself. Not that this prevents the measures of effectiveness being expressed in financial terms.

Cost-effectiveness measures can be constructed for multiple outcomes, either by combining units of effectiveness by weighting different outcomes or, in the analysis context, individually analysing outcome dimensions.[19] It should be noted that the measure of cost-effectiveness for multiple outcomes does not provide a means for determining the optimal balance of outcomes, only the optimality of the allocation of cost in terms of a given balance of outcomes.[20] While the normative techniques to perform the balancing based on the value or utility of outcomes are beyond the scope of this study, it is relevant that techniques exist for establishing cost-effectiveness measures in the presence of multiple outcomes.[21]

While the make-up of the measure of cost-effectiveness aligns closely with the definitional components of cost-effective, cost-effectiveness does not inherently disclose a direct standard for the state of being cost-effective.[22] The state of being cost effective can however be asserted indirectly in practice from measures of cost-effectiveness: for example, in the comparative, where no available alternative yields better results,[23] or conjecturally where it can be shown that no another approach would yield better results.[24] A stronger assertion may be made given a wide set of alternatives but could still not determine whether the best course of action so determined is worthwhile in absolute terms.[25]

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19 Robinson *Cost-effectiveness Analysis* 794. Combining measures of effectiveness may conceal variations in the aggregation whereas the analysis of single dimensions of outcome may complicate the analysis process.

20 Csáki *Decision Making Practice* 879. This relates to decisions involving the conflict of goals. Normative decision models exist for this the conflict of goals, for example, multi-attribute utility theory.

21 This topic to some extent is indirectly covered by the discussion on the difficulties of establishing value of certain outcomes in par 4.1.3.3 on the comparative basis and standard for the cost-outcome relationship.

22 Levin and McEwan *Cost-effectiveness Analysis* 11. A cost-effectiveness measure cannot produce an absolute determination of whether a programme is 'worthwhile'.

23 Bouckaert and Halligan *Managing Performance* 23. The authors arrive at the conclusion at the macro-level that, with respect to an educational measure of cost-effectiveness, a country is cost effective where there is no other country that has a better cost-effectiveness measure, although they make the observation that this does not mean it has reached an optimal position, simply that there is no better achievements.

24 IEG-World Bank *Sourcebook for Evaluating Programs* 65. "Shortcomings in cost-effectiveness occur when the program is not the least-cost alternative or approach to achieving the same or similar outputs and outcomes".

25 Levin and McEwan *Cost-effectiveness Analysis* 20. Such a direct determination would require a direct comparative standard, such used in a cost-benefit analysis.

While the simple production model serves its purpose as a high-level conceptual aid, as a practical model it does not represent the complexities of more general public sector performance chains. Bouckaert and Halligan describe two dimensions of the performance measurement of complex performance chains, span and depth. Cost-effectiveness as a cost-outcome measure is a broad measure spanning narrower measures of performance – economy, efficiency or productivity, and effectiveness - thus aggregating the effects of each of these measures. The depth of performance measurement acknowledges the possibility and relevance of measures for outcomes, for example, at the (1) micro-level: outcomes relating to the individual public sector organisation interface with citizenry or other organisations; (2) the meso-level: outcomes related to a specific policy field; and (3) the macro-level: where performance is measured government-wide.[26] While the concepts and approach are similar, the scope of costs and outcomes considered for a particular measurement or view of cost-effectiveness would be dependent on the depth of the context from which conclusions are sought.[27]

From this cursory investigation into the application and measurement of cost-effectiveness, the following conclusions can be drawn, sufficient for the purpose of the ensuing discussion:

(a) Cost-effectiveness measures do not depend on the monetisation of the value of outcomes.
(b) Cost-effectiveness measures can be determined in the presence of multiple outcomes. While it provides a means for determining the optimality of the allocation of resources for a balance of outcomes, it cannot determine the optimality of the balance between the outcomes.
(c) Cost-effectiveness has meaning in various contexts of span or depth, for example: micro-, meso- and macro-contexts; and

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26 Bouckaert and Halligan *Managing Performance* 18

27 Cellini and Kee *Cost-effectiveness* 494. The authors distinguish a 'social' context (where the costs and benefits of outcomes must be considered from the aspect of everyone in society) from a financial viewpoint (which would consider cost and benefits from an organisation's viewpoint to the exclusion of others).

(d) Cost-effectiveness measures only establish a basis for ranking alternative courses of action with the same goals. However, it is possible to assert that a course of action is cost effective based on its optimality among a set of alternatives or putative alternatives in terms of cost-effectiveness measures. The strength of the assertion that a course of action is cost effective will depend on the wideness of the set of alternatives considered but even in the universe of possible alternatives, it cannot determine whether it is worthwhile.

4.1.3 'Cost effective' in the public procurement context

The activities undertaken to achieve the direct outcome of fulfilling the procurement needs of the state from the market define the scope of public procurement activities in the life cycle of a procurement transaction.[28] These activities were determined to include a variety of limitations, constraints, requirements and activities directed at the achievement of long-term outcomes over and above the direct transactional outcomes.[29] Cost, outcomes and how a comparative standard could be applied would have meanings in various contexts of depth: from the macro context of system-wide outcomes down to the micro or transactional level.

4.1.3.1 Cost

Given the comparative nature of the term, a basic premise for the integrity of comparison would be that the cost side of the relationship must include all elements of cost that are applied to the achievement of outcomes under consideration and, conversely, any cost elements not directed at achieving the outcomes under consideration must be excluded. The argument, in principle, is therefore made that for that set of outcomes under consideration all, and only, elements of cost directed at achieving such outcomes should be included in an assessment of cost-effectiveness.[30]

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28 Par 2.1.3.

29 Pars 2.1.2 and 2.2.1. These set out the general objectives of public procurement and goals of the public procurement system.

30 Barnett *et al Impact and Value for Money* 10. This is also expressed as the contribution/attribution requirement for value-for-money assessments. See also Faustino *Award Criteria* 127 for an

Following this line of argument, limiting considerations of cost to the initial outlay[31] does not seem plausible, even at the transactional level, as ongoing costs flowing from a procurement beyond acquisition could not reasonably be excluded if necessary for the achievement of outcomes.[32] By extension, considerations of cost should include all aspects of the activities that attract cost including effort, internal or external; time; as well as the initial and ongoing direct expenses. The methods of life cycle costing, a common requirement for procurement decision-making, would be a suitable approach to obtaining a complete assessment of cost for transactional outcomes.[33]

There are several perspectives of the burden of cost attaching to a public procurement transaction: the cost incurred by the procuring public body; the costs borne by participants in the process, both by successful and unsuccessful participants;[34] as well as costs related to externalities borne by third parties.

interpretation of cost in the *EU Directives.* Any cost-effectiveness approach may take into consideration internal and/or external costs … including non-price elements which are likely to bear an economic impact".

31 As per the third definition above. This definition would appear only to consider the term cost effective in the context of a financial investment.

32 De la Harpe *Public Procurement Law* 287. De la Harpe cites an example relevant to requirement of cost-effectiveness "One needs, for instance, to look at the life cycle of the product or service. To put it simply, a more expensive product might last longer than a less expensive one. Although the initial outlay may be more expensive, it may be more cost-effective, and therefore cheaper in the long run, to procure the more expensive product because of its longer lifespan." See also Turpin *Government Procurement and Contracts* 66.

33 Life cycle costing is a 'methodology for the systematic economic evaluation of life cycle costs over a period of analysis, as defined in the agreed scope' British Standards Institute *BS ISO 15686-5* 3.1.1.8. A wider concept is whole life costing defined as a 'methodology for the systematic economic consideration of all whole life costs and benefits over a period of analysis, as defined in the agreed scope'. British Standards Institute *BS ISO 15686-5* 3.1.1.15. See also Gluch and Baumann *Life cycle costing approach* 573. The authors set out a table of comparable and similar terms to that of life cycle costing. The costs included in the various approaches include cost externalities and costs beyond the life of the activity or product. An important feature noted in the definitions of both life cycle costing and whole life costing is that the inclusion or exclusion of cost elements is defined by the scope agreed.

34 See discussion in par 4.1.6.2 for examples and considerations of the process efficiencies. See also PWC 2011 *http://bit.ly/2aH8asB.* In the 2011 report on European public procurement effectiveness, it was reported that suppliers bear up to 75% of the process costs. The process costs are reported as being significant: as high as 25-30% for low-value contract values but decline to less than 5% for high contract values.

Trepte[35] argues that the costs of participating in the process from a supplier perspective are simply seen as the "cost of doing business". While having a bearing on general economic efficiency these costs should not be seen to be attaching to a particular procurement transaction. It can be assumed that market success is premised on a positive profit and therefore all costs, including process costs, are built into the price paid to the successful participant. By this argument, the costs of unsuccessful participants would indirectly be recovered from other transactions in which they were successful. As the process costs are significant, they cannot be ignored as a driver of cost, but to include process costs borne by suppliers in addition to the procurement cost burden of the public body effectively would double count this aspect of cost.[36] It would therefore be necessary to exclude costs from the supplier perspective.[37]

Procurement costs can be borne by third parties, for example, in the case of outsourced public services, where the public bears a portion of cost directly. In these cases, the public body shifts the burden of cost it may otherwise have borne. It is therefore argued, in cases such as these, that third party costs must be included in the assessment of cost provided they are necessary for the achievement of the outcomes.[38]

Two particular categories of cost are worth distinguishing for the purpose of later discussions: the cost relating to the execution of the procurement procedure, or procedural cost; and the cost of the goods and services in terms of the procurement contract, or transactional cost. While both of these categories of cost are included in the macro and life cycle view of cost, it is useful to distinguish the categories for the purposes of discussing different levels of decision-making in the procurement lifecycle.

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35 Trepte *Regulating Procurement* 124.

36 This argument to exclude supplier process costs in the determination of cost in no way diminishes the potential of these indirect process costs to influence the resultant quantum of cost.

37 This is from the point of view assessing cost-effectiveness. The proposition that, for example, process costs will ultimately find their way back as cost to the procuring body implies that lowering such costs may reduce the cost to the procuring public body in the long term.

38 A ready example would be the procurement of public call centre services with or without a toll-free call facility. The outcome may be the same, but the costs would not be comparable without consideration of the public burden of cost.

Outside the transactional context, costs may arise from the establishment, maintenance and administration of procurement systems or, more generally, costs incurred in the pursuit of macro-level outcomes. The requirement for comparative integrity would demand that the cost associated with such outcomes, must be excluded from determinations of cost-effectiveness of a narrower scope of outcomes, or, conversely if included, the value of such outcomes must be included. In summary, the scope of outcomes considered could be regarded as determining the scope of costs to be considered.[39]

4.1.3.2 Outcomes

Outcomes in the procurement context cannot necessarily be equated with the outcomes intended to satisfy the original need that resulted in a need for procurement.[40] While wider outcomes could validly be considered in general assessments of cost-effectiveness, they may include effort and cost directed at their achievement that fall outside those related to procurement activities. Therefore, outcomes should be limited to procurement outcomes if only considering the procurement context.[41]

In establishing the outcomes-to-cost relationship in the public procurement context, it would not seem reasonable to limit the value of outcomes to financial benefits only.[42] The goals of public procurement were observed to include intangible outcomes, for example those motivated by their social value. Given that cost and effort incurred as part of procurement activities are directed at the achievement of such macro-level outcomes, in principle this motivates the possibility of macro-level measures of cost-effectiveness. While a range of outcomes wider than the direct outcome of fulfilling the

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39 Although the scope of cost could be said to determine the scope of outcomes to be considered for cost-effectiveness, the pursuit of outcomes will usually direct the investment of effort, hence conventionally, the outcomes will be said to determine the scope of a determination of cost-effectiveness.

40 Par 2.1.3.

41 For example, the evaluation of the cost-effectiveness of different solutions fulfilling the need that may exclude procurement.

42 As per the third and fourth definitions of cost effective.

original procurement need may be sought, it is submitted that the direct outcome can never be excluded from the range of outcomes and the direct outcome must always occupy some weight in the balance of outcomes.[43]

A further consideration would be of outcomes not intended by, but resulting from, the activities of public procurement. The relationship between cost and all outcomes would differ from the picture presented by limiting outcomes to only those outcomes that were intended. In practice, this uncertainty could conceivably be the reason for an *ex post* assessment of outcomes in relationship to the cost.[44] Side effects, if these arise from the activities of public procurement whether of a positive or negative nature, therefore should not be ignored.[45]

The perspectives of "value", "benefit" or "returns" of outcomes, pose an interesting problem in the public procurement context. The activities of public procurement exist in the context of satisfying a need for goods and services.[46] While the need may be identified by the procuring public body, the need arises from a public need. The procuring body's perspective may not be sufficient to assess the value, benefit or return of the fulfilment of the need. The value of long-term or horizontal outcomes sought through public procurement is even less likely to be susceptible to a proper assessment by the procuring body. This is not only for the reason that such outcomes, by definition, are not related to the need but also that their achievement generally depends on an aggregate of transactional iterations. The only viable viewpoint for assessing the value, benefits or returns of such macro outcomes would be from the macro systemic viewpoint. It can be concluded that value should be assessed from the perspective of those who stand to benefit from it, including the procuring public body and - where applicable - the viewpoint of the body politic.

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43 See below in this paragraph.

44 By way of example, see footnote 32 above. A low cost purchase may have side effect outcomes other than those that manifest as cost.

45 The consideration of unintended consequences turns on the foreseeability of such, rather than whether they are intended or not. If these are foreseeable, they should simply be included in the set of outcomes both from prospective and retrospective assessments of cost-effectiveness. For obvious reasons, unforeseen outcomes could only be relevant in retrospective assessments of cost-effectiveness.

46 Par 2.2.1.

The observation that public procurement only exists in the context of the need to procure has further consequences for the analysis of outcomes sought. The direct outcome - the fulfilment of goods, services or works - will always be present as an outcome and must carry substantial weight in the balance of outcomes sought. If the direct outcome were excluded from the balance of outcomes sought, it would suggest the transaction is a simulated transaction, carried out for purposes other than public procurement.

Proximate outcomes of interposed or ancillary decision-making, such as decisions relating to the procedures of decision-making, only have relevance in respect of the ultimate outcomes sought. Therefore cost directly associated with such proximate outcomes should be aggregated in the overall cost to end-outcomes relationship.

Together with the conclusions regarding the cost element, different views of cost-effectiveness can be formed to cover particular spans or depth relating to subsets of outcomes, provided comparative integrity is maintained. Given the stated aims and goals of public procurement, these could range from the micro transactional level and views of organisational policy outcomes to macro system outcomes.

4.1.3.3 The comparative basis and standard for the cost-outcome relationship

The definitions of cost effective variously suggest that the relationship between outcomes' value to cost must be "economical", "effective", "productive", "acceptable" or "adequate".[47] What can be drawn from these definitions is that these all use words to express what could be described as a satisfactory relationship. Two approaches to the question - of what could be considered as satisfactory - are considered: first, an endogenous approach - more literally aligned to the definitions of cost-effective - and second an exogenous approach relying on external reference points.

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47 Par 4.1.1.

In order to make an endogenous determination of whether a course of action is cost-effective, a pre-requisite would be that a common basis exists for relating the outcomes to the costs of the course of action. In the investigation into the nature of public procurement objectives, the value of fundamental public procurement outcomes were concluded to be of a nature that may not be susceptible to monetisation.[48] The difficulty of determining the value of socio-economic outcomes is well documented. Mulgan[49] terms it "an elusive quarry", citing four unavoidable complexities: (1) the unpredictability of cause-effect relationships in the social field, (2) lack of agreement about the target outcomes, (3) metrics of social value are inherently unreliable and (4) the uncertainty of time over which the return is ascertained. The benefits or value of such outcomes therefore may only exist as notional and subjective equivalents to financial value. Contingent valuations could be used to establish the perceived value or 'willingness to pay'.[50] Effectiveness measures of social value, for example incremental value indicators, would be more accessible and objectively determinable, but they could not determine objective monetised value.[51]

Certain of the definitions of cost effective find their way around this general problem by limiting the scope of outcomes to financial returns.[52] If outcomes are limited only to those for which returns are susceptible to financial quantification then the requirement for comparative integrity demands that costs directed at other outcomes must be excluded.[53] However, even if it is assumed that the value of transactional outcomes can be financially quantified, contributory cost will include procedural costs and direct contracting costs. Unless the process costs directed at other outcomes can be separated, full inclusion would negate comparative integrity. Given the complex and interrelatedness of procurement procedures toward the balance of outcomes, the clean separability of costs to those exclusively directed at particular outcomes would

48 The problem is complicated by the likely presence of multiple outcomes. While multiple sources of cost should not present a problem in their aggregation, a common expression of value for outcomes would have to be found to express the weighted value of the outcomes. See the discussion in par 4.1.2 where effectiveness measures are combined.

49 Mulgan *Measuring Social Value* 40-41.

50 Cellini and Kee *Cost-effectiveness* 514.

51 While these would not serve the purpose of establishing value *per se*, they would find use in an exogenous approach to determining cost-effectiveness.

52 The third and fourth definitions.

53 Par 4.1.3.1.

constrain the application of the requirement to be cost effective to limited micro-level transactional circumstances.

The endogenous determination of cost-effectiveness presented in terms of the definitions above is thus argued to provide an approach that is viable for limited views in the general public procurement context. However, its limitations should not be taken to define the extent of the requirement to be cost effective. The principle-level expression of the cost-outcomes relationship may nevertheless have meaning in policy dialogue at a non-determinative conceptual level.[54]

The underlying problem limiting the determination of what is cost effective, identified in the argument above, is the common basis for comparison between cost and outcome. The application of cost-effectiveness measures was shown to retain the conceptual foundations of the meaning of cost effective while avoiding the problem of a comparative basis directly between cost and outcome.[55] The factors complicating the determination of social value can be avoided by finding measures of effectiveness that do not reference value, for example objective measures of outcome effectiveness.[56] While this approach offers a determinative method for establishing cost-effectiveness without relying on a common basis for comparison, it relies on external reference points to have significance for decision-making, and remains a relative measure.[57]

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54 The potential of this value is again considered in the discussion on prospective assessments of cost-effectiveness. See par 4.1.3.4. See also the implicit assessment in situations where it may be patently clear that costs exceed the value. For an example see the commentary on *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (Ck) in par 4.4.2.

55 Par 4.1.2.

56 In the simplest of examples, a binary metric - representing whether the outcome is achieved or not - is always assumed available. Incremental measures are also generally available without referring to the base. If these cannot be determined, the issue of cost-effectiveness could be argued to be moot in any event. For a concrete example, see Sher and Punglia *Decision Analysis* 20. The authors discuss the benchmark of quality-adjusted life years (QALY) in the healthcare context and further the cost-effectiveness benchmark of $50 000 per QALY to determine whether a treatment programme is cost-effective.

57 Par 4.1.2.

This exogenous approach to determining cost-effectiveness offers a solution to the comparative standard in the public procurement context. Given a course of action, if a different course of action could improve the relationship between costs and outcomes, it would be pertinent to enquire whether a decision to adopt the original course of action could be said to be satisfactory in terms of its cost-effectiveness.[58] In the public procurement context, every item of public expenditure is expenditure that has the potential to be applied to a different public purpose or conversely, every outcome can be assessed in terms of the extent to which it has fulfilled the public need. As argued above,[59] from the citizenry's perspective of the procurement, if a course of action that was superior in terms of its cost-effectiveness was available, the original course of action could be argued to be unsatisfactory as the citizenry's benefits would be diminished or their burden ultimately increased. From the state's perspective, in the enduring circumstances of needs exceeding delivery and limited available resources, the choice of an inferior course of action could similarly be motivated as unsatisfactory.[60] Following this argument, *reductio ad absurdum*, a satisfactory cost-outcome relationship in the public procurement context could only be achieved by pursuing the optimal available course of action.[61]

Conceptually, an available course of action would mean any course of action that the procuring public body is free to choose. In practical terms, the set of available courses of action may be constrained by factors including regulatory rules, procedural design, or external factors such as the dependency on external parties to participate. Any imposed constraint would influence the strength of the assertion of optimality among all courses of action otherwise available. For the present purpose of establishing the meaning of cost-effectiveness, the set of available courses of action should

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58 The question assumes there exists a basis for comparing costs and outcomes between the courses of action.

59 Par 2.2.3.

60 Quinot *State Commercial Activity* 192. Quinot describes factors particular to the South African situation that heighten the case for optimal utilisation of available resources.

61 This implicitly discloses two dependencies for cost-effectiveness: (1) the selection of the optimal course of action and (2) the wideness of set of courses of action from which the choice is made. See discussion of case law in par 4.1.6.2.5 supporting the optimality of the choice in order to be cost-effective. See also De la Harpe *Green Public Procurement* 66. "After taking all relevant aspects into account, [cost-effective] means that the most meritorious tender, offering the best value for money, should be the successful tender".

conceptually be the set of all possible courses of action and constraints limiting the available set can be assessed for their effect on the assertion of optimality.

From the procuring public body's perspective, different external reference points may also be considered in practice. From the cost side, allocated budgets, or from the outcome perspective, scorecards of past performance could be used to set a standard. In terms of an exogenous determination of cost-effectiveness, these could serve as markers for a sufficiency of the relationship to secure a satisfactory assessment of procuring agents' performance. In effect, this utilises the measure of a past course of action as a relative benchmark. While these may serve as available and convenient markers, they may be insufficient to assert a cost-effective state. Reliance on such benchmarks may only serve to propagate cost-ineffectiveness in successive applications.[62]

The exogenous approach permits a further simplification in the factors making up cost-effectiveness. The requirement of comparative integrity between cost and outcomes for determination of endogenous cost-effectiveness is no longer an absolute requirement. Costs or outcomes that are equivalent or common between courses of action may validly be excluded from consideration in deciding optimality between the courses of action.[63]

As concluded above,[64] the exogenous approach cannot determine that a course of action is worthwhile in the absolute sense. The strength of the assertion that a course of action is worthwhile from an exogenous enquiry would depend on the context and wideness of the set of alternatives considered. Therefore, the endogenous enquiry into cost-effectiveness would still have relevance, if it can be determined. Both the

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62 See also *Grinaker LTA Ltd and another v Tender Board (Mpumalanga)* 2002 3 All SA 336 (T) 70 where the budget was decided to be irrelevant where a better course of action, in terms of price, was available.

63 For example, when evaluating tenders for cost-effectiveness it would not change the optimal available choice by either including or excluding the tender evaluation process costs, as it would simply add the same cost to all tenders.

64 Par 4.1.2.

endogenous and exogenous enquiries would therefore be relevant in determining the cost-effectiveness of a course of action.

4.1.3.4 The meaning of cost effective in the prospective context

Assumed in all the arguments regarding a basis for comparison is that the cost and outcomes are in fact known. In the public procurement context, retrospective assessments of cost-effectiveness would be useful to the extent that they could inform future procurement activities. In particular, it could be argued that the construction of the regulatory scheme and practitioner decision-making should be informed by such assessments. Aside from the usefulness of retrospective assessments as feedback into the broader system, the means for prospective achievement of cost-effectiveness in the performance of public procurement activities would hold more interest in its application for regulatory mechanisms and criteria for decision-making.

From a legal perspective, the relevance of retrospective assessments of cost-effectiveness would be of limited or no value as a means for control of public procurement. The extent to which decision-making conforms to the requirements of administrative law could only be assessed based on information available to the decision-maker at the time.[65] Furthermore, a retrospective assessment of cost-effectiveness would only become possible at the same time as a related dispute would become a moot issue [66]

Prospectively, cost-effectiveness would relate to *projected* costs and *intended* outcomes of a course of action. A cost-effective course of action could therefore be

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65 See for example, *Total Computer Services v Municipal Manager Potchefstroom and Others* 2007 JOL 20884 (T) 55 "the action was not rationally connected to the information that was before the adjudication committee or the municipal manager".

66 This can be argued from the angle that after completion, a legal challenge to a procurement transaction would be a moot issue. For example, see *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* 2003 2 All SA 340 (T). Kirk-Cohen J decided that should an order be made "it would be meaningless and have no practical effect for the simple reason that the contract in question has not only been awarded but completed. A court will not decide abstract, academic or hypothetical questions unrelated to a right". From a different perspective, as the most likely source of challenge would be from an unsuccessful competitor, it would still present difficulty for the reason that while the costs and outcomes may be known for the actual performance, a challenger's proposed performance could only be assessed prospectively.

decided endogenously on whether it was worthwhile in terms of the projected cost-to outcomes value and exogenously on its optimality amongst available alternatives. Prospectively the achievement of cost-effectiveness could therefore be determined by the basis upon which decisions are made in the procurement life cycle.

At the lowest level, the courses of actions available for decision-making in the execution of the *transactional system* could be regarded as corresponding to the offers made from the market. The projected costs of the transaction would relate to the offered prices and the intended outcomes to the offered delivery, or the quality of the offered deliverables. Available courses of action for decision-making during the assembly of the *transactional system* may relate to the selection of the procedure allowed by the *regulatory system*, specifications as well as permitted criteria and methods for evaluation. At the highest level, the courses of action available to the regulators would be the set of constitutionally allowable rules and principles. In all cases, the selection of optimal and worthwhile courses of action in terms of their projected cost-outcome relationships would be required to meet the requirement to be cost effective.

Decisions based on prospective cost-effectiveness relying on projected costs and intended outcomes are clearly not the equivalent of actual cost or actual outcomes. The element of uncertainty between projection and actual, despite perhaps the legal comfort of contractual enforcement of the offer, introduces factors of risk into an assessment of cost-effectiveness.[67] The risk of variation to the price and the risk to the future delivery are therefore additional and critical factors for consideration in decision-making for the achievement of prospective cost-effectiveness.[68]

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67 Fuentes-Bargues and González-Gaya *Determination of disproportionate tenders in public procurement* 1-2. The authors discuss the risk of disproportionately low pricing and the associated risk in the Spanish regulatory scheme. They further note that in a private sector environment the risk is considered to lie with the offeror, however a more conservative approach is taken in the public sector.

68 Assessment, avoidance and management of risk are elements for consideration in the evaluation and contract management phases of the life cycle. See for example De la Harpe *Public Procurement Law* 293. At a more theoretical level, see Csáki *Decision Making Practice* 879. Uncertainty from a lack of information or understanding is the source of all risk. The way in which

Cost-effectiveness, as a requirement informing the lawfulness and rationality of administrative procurement decisions,[69] implicitly requires a prospective assessment of cost-effectiveness. Legal arguments made for the compliance of decisions with the requirement of cost-effectiveness therefore rely on the predictive rationality of decisions made based on information available at the time, for example, the offered prices and risks to the achievement of the desired outcomes. In *Rainbow Civils*, where the offered prices, or costs, were evaluated to be equivalent, in order for the adjudication decision to be cost-effective, it was judged that objectively measurable criteria that could provide a relative measure of the prospective delivery were required.[70] In judicial interpretation of the requirement for an administrative procurement decision to be cost-effective, it has therefore been sufficient to rely on indicators of future costs and outcomes in terms of offered price and measures of prospective performance.

4.1.3.5 Value for money

'Value for money' is generally cited as an objective of public procurement and is a term in common use in the context of procurement regulation.[71] Value for money is generally analysed in terms of three elemental concepts: economy, efficiency and effectiveness.[72] *Figure 3: Value for Money* below expands the simple production model set out earlier,[73] and summarises the definition of the elements and their relationship in the make-up of value for money:[74]

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risk is addressed leads to the conflict of resources in the time spent or cost in versus the gains in decreasing uncertainty.

69 Par 3.4.3.

70 *Rainbow Civils* 109.

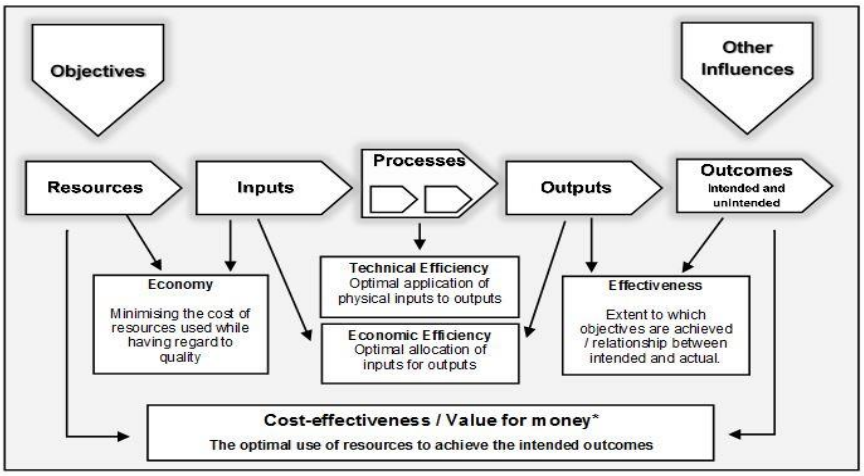
71 Par 2.1.2.

72 Diamond *Performance management framework* 161. There would appear to be consensus with regard the adoption of these concepts in the public procurement context. See Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 31. For a detailed analysis of the elements, see Burger and Hawkesworth *Value for Money* 51. See also Trepte *Regulating Procurement* 390.

73 Par 4.1.2.

74 Adapted from Diamond *Performance management framework* 162. National Audit Office (UK) Date unknown *Assessing value for money*. Note that "cost-effectiveness" and "value for money" are used interchangeably by Diamond and the National Audit Office (UK). See also Public Service Commission 2007 *Report on the Evaluation of the Batho Pele Principle of Value for Money in the Public Service* 14

Figure 3: Value for Money



* The terms "cost-effectiveness" and "value for money" are used in the same context in the graphic See Diamond *Establishing a performance management framework* 161, National Audit Office (UK) Date unknown *Assessing value for money*.

A fourth element, equity, incorporating the concept of value being assessed from a social perspective may be used as an additional consideration in assessing outcomes, for example the distribution of benefits among different groups of people.[75]

The definition of value for money contains marked similarities to the concepts making up cost-effectiveness and, in many contexts, the two terms are used interchangeably.[76] In conceptual terms, as cost-effectiveness may be seen as an equivalent to value for money, "cost-effective" can be seen as the "achievement of value for money".

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75 National Audit Office (UK) Date unknown *Assessing value for money*. The application of equity in the assessment of value for money is explained to apply only in certain cases. This does not appear to align with mainstream consensus but it does align with the inclusive definitions offered by Trepte and Burger and Hawkesworth.

76 Diamond *Performance management framework* 161. Diamond equates the meaning of cost-effectiveness, or "cost to final outcomes", to a "value for money indicator". While the terms are used interchangeably in general use, technical distinctions are drawn in some contexts. See for example IEG-World Bank *Sourcebook for Evaluating Programs* 65. A distinction is drawn between cost-effectiveness and value for money. Cost-effectiveness is defined as the "extent to which the program has achieved or is expected to achieve its results at a lower cost compared with alternatives". Value for money is regarded as the "extent to which the program has obtained the maximum benefit from the outputs and outcomes it has produced within the resources available to it". The distinction can be reduced to fixing one or other side of the relationship: the outcome in the case of cost-effectiveness, and cost in the case of value for money.

In defining the objectives of public procurement, Arrowsmith, Linarelli and Wallace[77] equate the achievement of best value for money to "successfully acquire the goods, works or services, needed by government on the best available terms". In terms of the elements of economy, efficiency and effectiveness, the achievement of value for money is explained as ensuring the suitability of the goods, services and works, concluding the contract on the best available terms and ensuring the contractor can perform. Consideration of macro-level value is explicitly excluded from their definition of value for money[78] as well as the efficiency of the procurement process.[79] However, this view of value for money is commonly interpreted as an equivalent to cost-effectiveness in legal procurement literature,[80] local statutes,[81] and in judgments of local courts.[82]

Trepte[83] explains value for money from an economic utility perspective as being the reason a purchaser will make a certain choice: that the "value that a consumer attaches to the benefits to be gained from the purchase of a given product justifies the price paid". Noting that such an assessment is generally not simple,[84] where government is the purchaser, the consideration of "non-economic secondary policies" in the account of value further complicates the notion. Burger and Hawkesworth[85]

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77 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 28. The use of the superlative in in the public procurement context aligns with the conclusion that cost effective requires the selection of the optimal course of action in terms of cost-effectiveness.

78 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 29-31. In the authors' description of horizontal objectives, they propose that value for money would be 'sacrificed' to pursue other goals.

79 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 31-32.

80 See for example Bolton *Law of Government Procurement* 44; Penfold and Reyburn *Public Procurement* 25-11; and De la Harpe *Public Procurement Law* 371.

81 For example, see section 112(1)(h) of the MFMA.

82 For example, *JFE Sapela Electronics (Pty) Ltd & another v Chairperson, Standing Tender Committee* 2004 JOL 12848 (C) 37; *Vuna Healthcare Logistics (Mpumalanga) v MEC of Health and Social Development, Mpumalanga Provincial Government and Others* 2012 (5948/2011) ZAGPPHC 126 (GNP) 7; *Rainbow Civils* 109.

83 Trepte *Regulating Procurement* 390. Perspective is an important element of Trepte's explanation as it necessarily subjective from the defined perspective. See also Schooner *Objectives* 113. Schooner quoting from the Code of Federal Regulations explains 'best value' as the expected outcome of a procurement that, in a government's view, provides the greatest overall benefit as a response to the need.

84 Trepte *Regulating Procurement* 390. The assessment needs to "take into account a variety of factors which balance the features of the product on offer with the cost of the purchasing them".

85 Burger and Hawkesworth *Value for Money* 51. Burger and Hawkesworth define value for money in the context of evaluating public private partnerships.

define value for money in similar terms: "what a government judges to be an optimal combination of quantity, quality, features and price (i.e. cost), expected (sometimes, but not always, calculated) over the whole of the project's lifetime". Their account of value for money stresses the subjective nature of value, the whole-life costing approach and the inclusion of secondary value citing distributive policies as an example of complicating factors in the determination of value.[86]

While similar in concept, the explications of value for money differ in the span and depth of outcomes and costs under consideration. Arrowsmith, Linarelli and Wallace's view limits consideration of value for money in the public procurement context to the consideration of contractual outcomes and directly associated costs. In their definitions, Trepte, Burger and Hawkesworth include the potential of considering a wider set of outcomes and whole-life costs, generally including procurement process costs.

The conclusion drawn regarding exogenous determinations of cost-effectiveness supports the validity of conclusions drawn regarding subsets of scope.[87] Arrowsmith, Linarelli and Wallace's exclusion of process efficiency and horizontal outcomes in their value-for-money objective can be argued to be analogous to examining the cost-effectiveness of the contractual cost to contractual outcomes, or the relationship between expected contractual performance and counter-performance. While process costs are excluded, the view has merit as the process costs would be common between the available courses of action. The wider view of value for money, in cost-effectiveness terms, expands the scope to consider the relationship between macro outcomes and the costs directed at their achievement.

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86 Burger and Hawkesworth *Value for Money* 51. Distributive policies are addressed at a more technical level as part of demand-side allocative efficiency rather than a separate element. Whole-life costing is the approach that in principle includes all costs relating to the procurement. See footnote 33 above.

87 Par 4.1.3.3. This is provided the excluded costs and outcomes are equivalent between the courses of action under consideration.

The merit of limiting the consideration of value for money to direct contractual considerations can be argued to be that the balance between this narrow view of value for money and other outcomes can be investigated without the suggestion that all outcomes should have an attached notional value. An argument for the wider view[88] of value for money is that the value, or notional value, versus cost provides a basis for assessing the balance in terms of cost to outcome and cost to the balance of outcomes.[89] These views are therefore each useful, given clarity in the context and application.

The different views of value for money in the procurement context are helpful for the interpretation of cost-effectiveness. The understanding of the elemental technical and economic make-up of value for money similarly offers content for analysing cost-effectiveness. In particular, the elemental analysis offered by Arrowsmith, Linarelli and Wallace, establishes direct and applicable criteria for the prospective achievement of transactional cost-effectiveness.

4.1.3.6 Economically advantageous

Terms, other than value for money, are used in procurement systems to describe the objectives and requirements that bear obvious similarities to "cost-effective". For example, 'most economically advantageous'[90], 'best value'[91] and 'maximising economy and efficiency'.[92] For the purposes of this study, the meaning of the term economically advantageous is investigated for aspects of correlation with, and distinction from, the concept of cost-effectiveness as established above.

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88 The view expressed by Trepte and Burger and Hawkesworth.

89 If the argument requiring optimality in the course of action for cost-effectiveness were accepted, this would imply the optimal course of action would be determined by the relationship between the weighted value of outcomes and the costs directed at their achievement.

90 Used as the requirement for award criteria in the *EU Directives*.

91 Section 1.102 of Federal Acquisition Regulations 2005. The vision for the Federal Acquisition System is to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives".

92 Expressed as an objective in the preamble to the *Model Law.*

"Most economically advantageous" is the basis required by the *EU Directives* upon which contracts must be awarded and has thus been accorded a specific definition in this context. At the core of its general meaning is economic advantage, which according to De Gouveia [93] has a subjective attitude even to the extent of excluding cost:

> It might consider environmental or social issues to be of such public interest that it is willing to sacrifice its resources to purchase certain goods or services that fulfill them, no matter what the price.

The *EU Directives* accord a more specific meaning to economically advantageous forcing the consideration of either cost or price only or a balance of quality and cost.[94] The direction of the *EU Directives* is to emphasise the inclusion of, although stops short of mandating, consideration of quality and the consideration of cost as opposed to price.[95] The inclusion of social externalities is limited by the *EU Directives* to those linked to the goods or services with the additional proviso that they can be determined.[96]

Most economically advantageous in the EU regulatory context can be concluded to correspond to the meaning of cost effective in the consideration of the cost element, consideration of the achievement of the outcome and that decision-making must identify the optimal course of action. The EU regulatory context narrows the scope of factors that may be considered to elements of cost and quality that are linked, directly or indirectly, to the content of the contract.

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93 De Gouveia *Price Factor* 685. The extent of disregard for cost would be limited by the contracting authority's budget. This may be considered in particular cases of strategic necessity in the general public interest.

94 Par 7.6.4.2. This is with the exception of the case where a price for goods is fixed, and would serve no purpose in an evaluation.

95 Faustino *Award Criteria* 126. Faustino describes cost as being placed "side by side" with price as a criterion.

96 Faustino *Award Criteria* 127. The regulatory requirement qualifies economically advantageous from the contracting authority's point of view, excluding macro system-wide outcomes.

4.1.3.7 Summary and proposed models

The meaning of cost effective in the public procurement context can be generally summarised by the broad definition of the term: "effective or productive in relation to its cost".[97] In pursuing a more determinative definition of the term, two approaches were concluded to have meaning and have referenceable examples in the public procurement context. A course of action could be determined to be cost effective if the relationship between the values of outcomes to the cost of actions taken directed toward their achievement was satisfactory or worthwhile. Alternatively, using an exogenous approach, a course of action would be cost effective if it represented the choice among available courses of action that was optimal in terms of a measure of their respective cost-outcome relationships. The strength of the assertion of being cost effective depends on the wideness of choices made available but optimality does not imply it is worthwhile.

The scope of courses of action in public procurement that would be susceptible to a determination of being cost effective is not limited in terms of the concept. The depth and span of courses of action for which measures of cost-effectiveness could be applied could be found at the micro, or transactional, level through to macro, or system-wide level, provided cost-outcome comparative integrity is maintained.

Retrospective determinations of cost-effectiveness were concluded to be relevant to the improvement of regulatory design and practice. Decisions determining cost-effective courses of action prospectively were established to rest on the same principles with additional considerations of risk. In practice, and accepted as a basis for legal argument, actual cost-effectiveness need not be determined and indicators of future costs and quality of outcomes are sufficient to found legal argument regarding cost-effectiveness as a criterion for administrative decisions taken to select a course of action.

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97 Par 4.1.1. The second definition is the least restrictive. Oxford Dictionaries 2017 https://en.oxforddictionaries.com/definition.

A general model incorporating the required elements - as concluded above - is therefore proposed for the public procurement context: A course of action is cost effective if it is:

(a) worthwhile in terms of its cost and the value of its outcomes; and/or[98]
(b) the optimal choice from available courses of action in terms of their cost-intended outcome relationships.

In the prospective sense, the cost-effectiveness of a course of action relates to the basis for the decision to adopt a course of action and the following model is therefore proposed:

The decision to select a course of action can be said to be cost effective if:

(a) the intended outcomes of the course of action and criteria for its achievement are defined and relevant risks to its achievement are identified; and
(b) a projection of the costs of the course of action is made and relevant risks to its variation are identified; and
(c) taking into account the relevant risks, the course of action is:
    i. worthwhile in terms of its projected cost and the value of its intended outcome; and/or [99]
    ii. the optimal choice from available courses of action in terms of their projected cost-intended outcome relationships.

These two models are logically independent and their application would relate to the context of the enquiry. The fact that a course of action is cost effective is neither necessary nor sufficient to establish whether the decision adopting the course of action was cost effective.[100] Legal arguments relating to the requirement for cost-

98 The test should include both endogenous and exogenous conditions to be cost effective. The assertion that the course of action is cost effective will also depend on the wideness of the set of possible courses of action made available for selection.
99 See footnote 98 above.
100 This is to be differentiated from independence in the statistical sense. A decision meeting the prospective test would intend to improve the probability of the resultant course of action being determined to be cost effective retrospectively.

effectiveness in public procurement have centred on administrative decision-making at various levels. The latter test proposes a normative construct for analysing cost-effective decision-making.

4.1.4 The requirement that the system is cost effective

The models developed in the previous paragraph were advanced through the definitional origins of 'cost effective' regarding the relationship between costs and outcomes of courses of action. The requirement of subsection 217(1) is broader, in that the procurement *system* is required *inter alia* to be cost effective. Considering this requirement in isolation, this literally specifies a meta-requirement: that the rules and principles of the system must define procedures that enable and compel cost-effective decisions in terms of the intended outcomes of the system.

The objectives of a public procurement system can be expressed as a range of outcomes, for example: value for money,[101] control,[102] public trust,[103] accountability,[104] supplier trust[105] and socio-economic outcomes. At this level, from a cost-effectiveness perspective the merits of the outcomes of the procurement system are not relevant. Individually, the rules and principles of the procurement system must direct procurement processes through the specification of procedures and decision-making criteria toward the achievement of the intended outcomes. Procedures have costs associated with their execution. Given adherence to the cost attribution/contribution requirement a cost-effective system will be required to contain rules and principles that are worthwhile and optimal in terms of cost-to-procedural outcomes relationships and in terms of the decision-making in execution of such rules and principles.[106] As it is not particular decisions that are being tested but the rules and principles enabling or

101 In the narrow sense or transactional cost-effectiveness.
102 Par 2.1.4.
103 Par 2.1.2.
104 Par 2.2.3.
105 Par 2.2.1.
106 In terms of the model developed in par 4.1.3.7, this would be the requirement defining the outcome, projecting the costs, and establishing that no better procedures are available in terms of the cost-outcome relationship.

compelling such decisions, this would require a meta-application of the models developed above.[107]

The intended outcomes of a procurement system were explained, in general, not to be complementary in what was expressed as one of the fundamental challenges of public procurement regulation: the achievement of a balance between competing objectives.[108] Conceptually, cost-effectiveness is not limited to the context of a unitary outcome, and the weighting of multiple outcomes provides an approach to determining macro-level cost-effectiveness in terms of multiple and competing outcomes.[109]

The literal interpretation of subsection 217(1) thus motivates that a requirement for macro-level cost-effectiveness is apposite. Although the most common views emerging from the perspectives of cost-effectiveness during the procurement life cycle are at the micro-level - cost-effectiveness of contract performance and the cost-effectiveness of the transaction - cost-effectiveness can be considered from various views as established above.[110] This proposition is addressed in detail in the paragraph below considering the span and depth of the requirement of the system to be cost effective in the full context of *Section 217.*

The courses of action resulting from the application of the system can either be compelled by rules, principles or standards, or involve decision-making on the part of the organ of state outside the system. If cost-effective decision-making depends on such discretion, then decisions are effectively taken outside the system, which raises the question as to whether a system involving discretion could be said to be cost effective at all. Following this line of argument, it would not be sufficient to show that a system is cost effective if it has cost-effective results, nor from an administrative law decision perspective would it be necessary. Therefore, it is submitted that a cost-

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107 The system was further concluded to exist at two levels, the *regulatory system* and the *transactional system*. The rules and principles of the *regulatory system* are further removed by one step.

108 Par 2.3.

109 Par 4.1.2.

110 Par 4.1.2.

effective system should simply compel prospective cost-effective decision-making. The paragraph below advances this argument by considering the degree of completeness required of the system with regard to the requirement for it to be cost-effective.[111]

4.1.4.1 Span and depth of the system's requirement to be cost effective

The observation made that cost-effectiveness is a requirement of the system as opposed to being a requirement directed at the individual transactions suggests that the requirement applies to all outcomes of the system, macro-level outcomes as well as direct transactional outcomes undertaken in accordance with the system.

Interpretations of the requirement of the system to be cost effective appear to have readily included the transactional view of cost-effectiveness.[112] The *transactional system* was concluded to define the rules and principles for the micro-level, or transactional outcomes, and would be required to compel cost-effective decision-making in the pursuance of these outcomes. The system envisaged by *Section 217* consists of both the *regulatory system* and *transactional systems*. It was concluded that the rules and principles for the achievement of macro-level outcomes must be defined by the *regulatory system* and therefore as part of the general requirement of the system to be cost effective, macro outcomes should be subject to this requirement. These macro-level outcomes may include specific long-term horizontal outcomes, or possibly outcomes supporting other fundamental objectives, such as accountability. It is therefore proposed that, in principle, the requirement of the system to be cost effective should consider outcomes at any depth in the system. Two possible limitations to this conclusion are the provisions of subsection 217(2) and the concomitant requirements of the system to be fair, equitable, transparent and competitive. The potential of the subsection 217(2) provisions to limit the requirement of the system to be cost effective is considered below, while potential limitations

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111 Par 4.1.4.2.

112 Generally, interpretations in case law of "cost-effective" have not found it necessary to explain the term further in prospective evaluations of cost-effectiveness in the transactional setting. These relate to decisions selecting a bid in terms of its price and projected delivery. See footnote 82 above.

imposed by the four parallel requirements are specifically addressed as part of the individual analyses of the requirements in this chapter.

In the previous chapter, the requirement that procurement must be conducted in accordance with a system was concluded not to prevent the specific horizontal mechanisms and outcomes. The implementation of such horizontal policies should be implemented as part of the system.[113] This was supported by the requirement of subsection 217(3) for a legislative framework for their implementation. Strictly, the implementation of such policies is contemplated in terms of organ of states' policies, rather than the legislative policy, but the effect of subsection 217(3) - depending on the latitude granted by the framework - in effect implements it in terms of legislative policy.[114] It was noted at the time that the requirement that the system is cost effective could be interpreted to prevent the implementation of such policies, and to the extent that it did, would not apply as a requirement of the system.[115] It was also noted that cost-effectiveness makes no demand regarding the merit of outcomes, nor how the values of outcomes are calculated or weighted. They should only be susceptible to measurement and measures should exist.[116] Applying the meaning of cost effective as set out in this chapter, if the requirement to be cost effective with respect to an intended horizontal outcome could prevent its implementation, it would imply the value of a horizontal outcome could be permitted not to be worthwhile or not optimal in terms of the cost directed toward its achievement. In order not to confuse this proposition with an economic justification for a horizontal policy outcome if, in terms of the exogenous test, a waiver of cost-effectiveness were necessary for its implementation, it would imply that the system would be permitted to compel suboptimal courses of

113 Par 3.3.8.4(c).

114 This issue is discussed in par 3.3.8.3. Strictly, this introduces an intermediate, or meso, layer of outcomes between the macro-level and micro-level in the constitutional scheme. This is not pursued further in this study as the effect of the current legislative framework implementing subsection 217(3) permits little discretion on the part of the organ of state in this regard. However, for completeness this is included in Figure 4: Cost-effectiveness depth in the constitutional scheme on page 148.

115 Par 3.3.8.4(d).

116 See par 4.1.2 regarding the weighting of outcomes in the presence of multiple intended outcomes.

action for its achievement.[117] In principle, both of these arguments for the possibility of macro-level cost-effectiveness preventing such policies should be rejected by the reasoning either that they could permit courses of action that are not worthwhile in terms of their cost, or allow systemically suboptimal use of limited resources where better courses of action were available. Neither of which would be sustainable. This emphasises the distinction between the value of the outcome and the manner in which a system sets about its achievement.

An argument could be made that social outcomes tend to be broad and expressed at a high level and that determination and measurement of their outcomes is not readily accessible.[118] If this is accepted, the requirement of cost-effectiveness could be argued to prevent such indeterminable policy outcomes. On the contrary, if there were no means to determine whether such outcomes were in fact achieved or to what extent they were achieved, how the rules of the system directed at their achievement were devised could be questioned. Notwithstanding the difficulties in defining outcomes, it must be presumed that policy goals should be of sufficient import to warrant some knowledge of their progress, success or failure, and that deployment of limited resources would demand some measure of constructive direction toward their success.[119] The argument that difficulty in measuring outcomes therefore, in principle, should not be accepted as grounds for waiving considerations of cost-effectiveness. However, in the event that it is impossible to determine a measure of the achievement of constitutionally valid policy goals, it would be accepted that subsection 217(2) would

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117 Discretion in decision-making regarding macro-level horizontal outcomes by the procuring entity was established not to accord with general public procurement principles for the reasons set out in par 2.2.2. The *regulatory system* should be complete with regard to the achievement of macro-level outcomes and therefore would not prevent the achievement of cost-effectiveness within the scope of discretion allowed.

118 For an example of the propositions for specific outcomes sought by preferential procurement in South Africa, see Helmrich *Equality-oriented horizontal policies* 74-80. Helmrich proposes and examines two goals of B-BBBEE public procurement policies citing both the importance of identifying specific goals, or outcomes, and the measurement thereof. Nicholas and Fruhmann *Small and Medium-sized Enterprises Policies* 351. The commonly held view that promotion of SMMEs is a worthwhile goal in and of itself is challenged by proposing that a more empirical approach to goal definition and their associated costs should precede policy.

119 See also Bolton *Law of Government Procurement* 253. Bolton asserts, among other conditions, "procurement as a policy tool has measurable targets … it can contribute to the development of growing enterprises".

then provide for the implementation of such policy-determined mechanisms regardless of the requirement for this aspect of cost-effectiveness.

A view of cost-effectiveness that could be argued to prevent the pursuit of macro outcomes would be the interpretation that the system's cost-effectiveness requires transactional cost-effectiveness. The most common approach adopted in literary sources places horizontal goals 'in tension' with the achievement of transactional value for money.[120] The interpretation that the requirement of cost-effectiveness operates at various levels advances this understanding in that in terms of the macro-level outcomes intended by the system, general transactional cost-effectiveness is simply one of the intended macro outcomes. The tension between this particular macro outcome and others, in cost-effectiveness terms would be expressed in the weighting of the various macro outcomes.

Quinot[121] observes that the degree of tension lies in the particular mechanisms used in implementing horizontal objectives rather than the objectives themselves. The approach taken to resolving this tension is generally to define a balance through regulation as a matter of policy. The finer point to this is whether the outcomes sought are matters of policy or whether the determination of a mechanism is a policy matter. The proposition that the macro-level cost-effectiveness applies to the achievement of macro outcomes in a cost-effective system may be defeated by policy-determined mechanisms but can be embraced by policies defining the desired outcomes or the balance of such outcomes. Cost-effectiveness would require that the mechanisms of the system are optimal in achieving the policy-determined balance of outcomes whereas a policy-decided mechanism may simply override cost-effective decision-making. If all macro outcomes are within the scope of the requirement for the system to be cost effective, then the mechanisms of the system must compel the selection of the optimal and worthwhile courses of action toward achieving the weighted or

120 For example, see Quinot *Promotion of social policy* 377. More generally, this is an instance of the conflict of goals in decision-making and problem-solving, and the normative resolution to establishing the balance would be achieved through formal regulatory weighting.

121 Quinot *Promotion of social policy* 377.

balanced set of outcomes.[122] Given the potential for implementing mechanisms without formal regard for the identification of macro-level outcomes and potential for resources to be applied toward their achievement sub-optimally or in manner that is not worthwhile, it is submitted that the requirement of the system to be cost effective should remain an overarching requirement.[123] The conclusion is that mechanisms of the system should generally be subject to the constitutional requirement to be cost effective, whereas the weighting of goals and outcomes would remain a matter of policy subject to other tests of constitutionality.

4.1.4.2 Completeness of the system and the requirement to be cost-effective

In the previous chapter, the system contemplated by *Section 217* was concluded to operate at two levels: the *regulatory system* establishing a blueprint for the assembly of individual *transactional systems*, which in turn establishes the rules and procedures for the execution of the procurement process for individual transactions. The constitutional requirements of the system were argued to apply to both the *regulatory* and *transactional systems*. In terms of the contextual implications set out above, a cost-effective system must therefore compel the selection of optimal and worthwhile courses of action for the cost-outcome relationship at the transactional as well as system level.

As the *regulatory system* establishes common requirements for decisions across *transactional systems* it follows that, if the *regulatory system* is to be cost effective, it should establish the blueprint for decision-making directed toward the achievement of macro-level outcomes that are worthwhile and optimal in terms of the cost-outcome

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122 Nicholas and Fruhmann *Small and Medium-sized Enterprises Policies* 351. Nicholas and Fruhmann propose that SMME policies should not be exempt from such requirements. See also De la Harpe *Green Public Procurement* 66.

123 See footnote 118 above. The types of mechanisms and their effects are discussed in more detail in par 4.1.5.

relationship.[124] As was argued above,[125] the *regulatory system* should be complete in its specification for the achievement of macro-level objectives where reliance cannot be placed on the apprehension of the balance of outcomes in the assembly of *transactional systems*. Reliance on an incomplete apprehension of outcomes cannot be argued to compel cost-effective decision-making.[126]

A cost-effective system was distinguished from a system that has value for money, or transactional cost-effectiveness, as one of the macro-level outcomes. The macro-outcome of transactional cost-effectiveness can be apprehended at the level of the public body wishing to fulfil its need and, as argued above, the *transactional system* must take into account the specific needs and circumstances of the transaction. The *regulatory system* therefore cannot be complete in this regard and the discretion of procuring bodies will be relied upon to take account of specific transactional content and circumstances in the assembly of *transactional systems*.[127] The question of the extent to which the *regulatory system* can be incomplete while compelling rules for the selection of worthwhile and optimal courses of action in *transactional systems* returns to one of the fundamental challenges identified underlying *regulatory systems*.[128] A higher level of incompleteness would rely on discretion whereas a *regulatory system* tending toward completeness may enforce generalised constraints not appropriate for all transactional contexts, potentially excluding optimal choices.[129] The requirement that the system is cost effective must therefore contemplate a level of discretion in the assembly of *transactional systems*. Negatively, the *regulatory system* should not contain rules or principles preventing discretionary decision-making that is required for transactional cost-effectiveness aside from constraints ensuring the cost-effective achievement of the balance of all macro-level outcomes. Positively, the rules and procedures of the system should assert at least a framework for cost-effective

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124 This ties the requirement of the system to be cost effective for system-wide outcomes that are not necessarily apprehended at the transactional level. This statement is subject to the proposition that cost-effectiveness, as a requirement of the system, should apply to all system-wide outcomes. Even if cost-effectiveness were not accepted as a requirement of all outcomes, this statement would remain true for any system-wide outcomes that are subject to the requirement.

125 Par 3.3.5.

126 This conclusion is consistent with the constitutional requirement of subsection 217(3).

127 Par 3.3.5.

128 Par 2.3.

129 Par 2.2.5.

decision-making. In the absence of positive regulation, the interpretation that the constitutional requirements of the procurement system inform the standard of administrative decisions made outside the *regulatory system* provides a means for *ex post* control of the requirement to be cost effective taking into account the specific circumstances of the transaction facing the decision-maker in the assembly of the *transactional system*.

Incompleteness of the *transactional system* would imply reliance on discretionary decision-making during the execution of the process as defined by the system. A level of incompleteness could similarly be argued to favour transactional cost-effectiveness over completely rule-based decision-making processes in execution. While this argument for discretionary decision-making outside a system to achieve cost-effectiveness may be sustainable for general decision-making processes, the requirement for completeness of rules in the *transactional system* is also driven by other requirements of the system.[130] When circumstances require decision-making outside the prescripts of the system, the observation regarding administrative decision-making with regard to the assembly of the *transactional system* above is equally applicable.

In summary, completeness of the system is appreciated at two levels. With regard to macro-level outcomes independent of transactional conditions, the *regulatory system* should be complete to meet the requirement of cost-effectiveness. With regard to decisions taken to assemble the *transactional system* and other decisions taken without direction from the *regulatory system*, cost-effectiveness will be assured as a factor informing the rationality of decision-making within the prescripts of administrative law in their execution. A further observation is that the application of the *regulatory system* precedes the assembly of the *transactional system* and therefore the rules and principles of the *regulatory system* assuring the achievement of macro-level outcomes will precede the application of any discretion thus affirming the balance among macro outcomes. The rules and principles of the *regulatory system* that compel

[130] For example, competitiveness and fairness dictate rules for decision-making that will exclude unchecked discretion by the lower level decision-makers in execution.

cost-effectiveness with respect to macro-level outcomes can therefore simply be regarded as constraints to achievement of cost-effectiveness of lower order outcomes affecting either the choices available or the decision-making criteria.

4.1.4.3 Conclusion: a model for the cost-effectiveness of the system

The question of justiciability of the requirement for a cost-effective system is not without example in the assembly and execution of a *transactional system*.[131] The *regulatory system*, aside from issues of lawfulness, has not been directly challenged and not in terms of cost-effectiveness.[132] Case law in this regard is therefore of limited assistance.

The question could validly be asked as to whether a hypothetical variant of the system could attain a more favourable determination of cost-effectiveness in principle. If the variant could be argued to offer rules and procedures superior to those of the system, then in principle it could dispel the hypothesis that the original system was cost-effective. This would neither be simple nor determinative, and justiciability of such an assertion would be doubtful,[133] but it could nevertheless provide motivation for regulatory refinement. Variants of systemic rules and procedures can viably be identified in other jurisdictions with implementation history to supplement such test enquiries.[134]

Using the arguments regarding the span, depth and completeness of the system, a model for system cost-effectiveness is proposed, with regard for the meta-nature of the system:

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131 Par 1.3.4.

132 Although systemic issues were raised regarding the *regulatory system* regarding cost-effectiveness in *Rainbow Civils*. See par 1.3.4.

133 The justiciability of such an assertion would depend on the ripeness of the issue, and the instance of a dispute raising such issues. Principle-based argument would not support justiciability in isolation.

134 This augments the argument motivating the comparative approach taken in later in this study.

> A system is cost effective if the rules and principles of the system have the effect of compelling the selection of cost-effective courses of action with regard to the intended balance of outcomes of the system.

The proposed model for systemic cost-effectiveness would be applicable to both the *regulatory* and *transactional systems*.

The distinction between the model proposed above and the model proposed in the conclusion of paragraph 4.1.3.7 relates to the objects of decision-making. The earlier model proposed applies to the decision regarding a course of action taken in execution, whereas the latter model applies to the decision to adopt rules and principles governing such decisions in execution. The distinction is best understood by the example of the macro-outcome of value for money or transactional cost-effectiveness. The latter model for a cost-effective system examines rules and principles for their cost-effectiveness, whereas a particular decision would be tested in terms of the previous model.[135]

In the event that a shortcoming of the system in terms of the model for cost-effectiveness of the system is identified, the question could be asked whether the shortcoming was due to a policy mechanism - that the requirement of cost-effectiveness would otherwise prevent - or due to the balancing with another requirement, such as fairness. As argued above, policy objectives should not prevent macro-level cost-effectiveness, aside from cases where the achievement of such

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[135] For example, if a system is to be tested under the proposed model, it could be argued to fail the macro-level requirement of cost-effectiveness if it prevented fundamental considerations of cost-effectiveness, such as rules that had the effect of excluding considerations of prospective cost, risk or quality in downstream decision-making. If it were argued that the rule was to achieve a macro-level outcome, it would still fail the test as it would imply that there is the intention of achieving such macro outcome at any cost, risk or quality, therefore subverting a test of it being worthwhile or of it being optimal. From a different perspective, as procurement transactions were argued only to exist in the context of fulfilling a need, the direct outcome cannot be disregarded and therefore factors affecting the achievement of the direct outcome must always occupy some measure of weight in the balance of outcomes of the system. In such as case the system could not be said to be cost effective in terms of the proposed model.

objectives cannot be measured.[136] The shortcoming may or may not be constitutionally justified but the enquiry would nevertheless be useful in exposing the effects of the balance chosen by the regulatory design.

4.1.5 Perspectives of cost-effectiveness in systemic horizontal mechanisms

Although the classes of horizontal mechanisms contemplated by the provisions of subsection 217(2) are wide, they are limited to advancing constitutionally valid objectives. Mechanisms implemented in the *regulatory system* would be subject to an enquiry in terms of their compliance with subsection 217(2) and other provisions of the *Constitution*. Enquiry into the effect of a mechanism in terms of the model for a cost-effective system would establish the form of balancing it would impose in regulatory design.

The nature of the relationship between the provisions of subsections 217(2) and 217(3) and the requirement of cost-effectiveness, is a question of importance to this study and will be investigated with reference to specific mechanisms. *Arrowsmith's taxonomy* will be used to structure the analysis by considering the effect of types of *horizontal mechanisms*.

The *decision to purchase or not to purchase* is a consideration of horizontal policies prior to the commencement of the procurement life cycle.[137] If the *decision on what to purchase* is regulated, the direct effect would limit the available courses of action for the specification of solutions in the *transactional system* and for downstream decisions. The cost and value of a macro horizontal outcome sought would have to be projected in order for this to be determined as worthwhile. As optimal alternate courses of action may have been excluded from consideration, the strength of any assertion of optimality may be weak.

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136 Par 4.1.4.1. However, in the event that it is impossible to determine a measure of the achievement of constitutionally valid policy goals, subsection 217(2) would then provide for the implementation of policy-determined mechanisms.

137 These considerations may be taken as part of applicable planning regulation within a particular policy field.

Contract conditions laid down by the purchaser to achieve horizontal policy objectives will, in general, impose an additional burden on the contractor and therefore increase the cost of the performance of the contract. Arrowsmith[138] proposes a mechanism to expose the additional cost by providing for variants of the bids to include and exclude provisions for the contract conditions related to the horizontal objectives. In this way, the cost of achieving the horizontal outcome can be weighed against the value of such outcome during the execution of the procurement process and the set of available courses of action is not reduced. The implication of this mechanism is that while the cost is exposed, the value of the outcome would have to be apprehended by the procuring agent in order for such a weighing to support cost-effectiveness.

The *packaging and timing of orders* is performed to allow greater access to procurement opportunities to smaller firms. Arrowsmith[139] notes that if a comparison had to be made between a single transaction for the overall scope and the constituent packages making up the scope, then efficiencies may be lost in a fragmentation of scope. The value associated with the outcome of advancing of smaller firms would have to compensate for the associated cost of the inefficiencies in order for this mechanism to be cost effective. In other respects, the set of available courses of action is not reduced and may in fact be widened.

The *set-aside* mechanism reduces the size of the potential set of entrants to a competitive process and thus reduces the set of courses of action available for selection.[140] This method of reducing the available courses of action does not expose the cost of the horizontal outcome sought and therefore falls short of cost-effective decision-making. Direct outcomes were argued always to occupy some weight in the balance of outcomes and therefore measures to ensure macro-level cost-effectiveness in the presence of *set-aside mechanisms* should therefore include

138 Arrowsmith *Horizontal Policies* 171.
139 Arrowsmith *Horizontal Policies* 174.
140 Arrowsmith *Horizontal Policies* 176. This can either be achieved through entry being limited to a class of competitors or the invitation only being made to specific firms

checks and balances between the terms obtained from the reduced competition and generally available satisfactory commercial terms.[141] From the macro perspective, the differential between optimal commercial terms and those on offer could be established for comparison to the value of the outcome intended, provided the value of the outcome can be apprehended by the procuring body.

Exclusion from contracts for non-compliance with government policies is a mechanism with the goal of encouraging general compliance with government policies by the exclusion from future state contracts or simply of ensuring the lawfulness of courses of action available for selection. Actual exclusion may have a similar effect on cost-effectiveness to that discussed with regard to *set-asides* above. The threat of exclusion may nevertheless increase pricing if it induces participants to comply. The cost of implementing this mechanism would not be exposed, either from the perspective of the reduced set of courses of action available for selection or from the increased cost of all available courses of action. Arrowsmith[142] suggests that cost-effectiveness should be protected by invoking public interest exclusions where it is apparent that significant diminution would be experienced.

Preferences in inviting firms to tender are mechanisms used in conjunction with restricted tendering procedures where preferential criteria are used in the selection of the restricted set of participants. The use of restricted tendering is generally performed in the interests of procedural cost-effectiveness.[143] Arrowsmith[144] observes that the application of preferences in the invitation would not necessarily increase the cost of the transaction if the selected firms were "otherwise equal". Apart from this circumstance, the cost of the application of this preference is not visible and therefore the cost-effectiveness of implementing the preference cannot be determined.

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141 Arrowsmith *Horizontal Policies* 176.
142 Arrowsmith *Horizontal Policies* 177. It is difficult to see how this would be implemented during the execution of a procurement process, unless all participants failed to comply.
143 Par 4.1.6.2.
144 Arrowsmith *Horizontal Policies* 178.

The *award criteria* mechanism incorporates the relative merit of a tender toward achieving horizontal outcomes into the overall assessment of the merit of a bid. This mechanism can be broken down further into: fixed price preferences, variable price preferences and tiebreaker preferences.[145] In the first two subcategories, the weighting attached to the achievement of horizontal goals transparently exposes the balance of goals or the extent to which cost is directed toward the attainment of the intended horizontal outcomes. A blanket rule weighting the award criteria 'averages' the value to be gained across all transactions, as the same weighting is applied in circumstances where there is no value to be gained and in circumstances where there is greater potential for value in the horizontal outcome to be attained than the weighting allocated.[146] If the weighting is not determined by the circumstances of an individual transaction, the cost-effectiveness at the transaction level may be argued to be suboptimal. The mechanism in the third subcategory, the tiebreaker preference, does not diminish the cost-effectiveness of the transaction, as the preference is only applied to bids that otherwise have equal merit.[147]

Mechanisms for improving access to government contracts may carry additional overhead costs, for example training, advertising or conducting briefing sessions. If these measures are required by the system per transaction, they could affect procedural cost-effectiveness or, if conducted more generally, be carried as an overhead of the system and could be assessed for their cost-effectiveness at the macro-level. On the contrary, such measures may simplify procedures and reduce costs. A side benefit of the intended outcome of improving access would be increasing the set of available courses of action thereby improving the potential for both transactional and macro-level cost-effectiveness.[148]

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145 Arrowsmith *Horizontal Policies* 178-180. Fixed price preference points are added to the assessment of merit on a 'met-or-not-met' basis. Variable price preferences incrementally allocate points to the merit rating based on an incremental measure of outcome effectiveness. The tiebreaker preference only applies a preference to bids equal in other respects.

146 Arrowsmith *Horizontal Policies* 179-180.

147 Arrowsmith *Horizontal Policies* 180.

148 Arrowsmith *Horizontal Policies* 182.

As a requirement of the *regulatory system* to be cost effective, the mechanisms to achieve horizontal outcomes must not only be worthwhile in terms of their cost, but should also be optimal in terms of the available mechanisms. The mechanisms discussed above do not form a closed group and variants may represent superior options in terms of the cost-effectiveness of regulatory design.

4.1.6 Perspectives of cost-effectiveness in the procurement life cycle

In examining certain perspectives of cost-effectiveness in the procurement life cycle, macro-level, transactional and procedural cost-effectiveness are discussed. As shown above, they are interwoven as procedural cost-effectiveness considers different procedural courses of action directed at the same outcomes. Transactional cost-effectiveness is considered as a particular macro-outcome of the system.

4.1.6.1 The planning stage

In defining the procurement system life cycle, the planning stage was argued to commence at the point where the public body decides that the means of satisfying the need includes a role for public procurement. Planning activities are crucial to the end outcomes satisfying the initiating need. The arguments made for the application of cost-effectiveness, in the sense of defining the parameters for the optimal course of action, would be equally applicable to this pre-procurement planning stage.[149] In this context, the optimal course of action, in terms of the cost-outcome relationship may be determined by decisions wholly unrelated to procurement[150] or decisions about procurement, for example whether procurement should have a role to play.[151] If cost-

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149 The requirement for cost-effectiveness of the system by *Section 217* was argued not to be a requirement of this phase directly, but certain aspects could be reasoned to be necessary for the cost-effectiveness of the procurement system.

150 For example, planning for energy needs may deal with questions of sustainable energy sources, coal-fired or nuclear sources.

151 For example, whether the need would be met through in-house provision or by an external service provider. See par 2.1.3. Arrangements with other public bodies to satisfy a need are not considered subject to *Section 217* and therefore are not subject to the constitutional requirement to be cost effective. Legislative requirements, however, still require the consideration of cost-effectiveness in the decision to satisfy needs from other public bodies.

effectiveness forms part of a planning decision criterion, the end outcomes and costs in the widest sense should be considered in such an assessment.[152]

The elemental dissection in the value-for-money context is useful in analysing the requirement. Economy requires that the need be established not only as a genuine need but that the satisfaction of the particular need is appropriate in the priority of other needs within the constraint of limited resources and capacity to deliver.[153] Further, that the identification of the intended outcome is suitable to meeting the need within the constraints present. Efficiency requires that the optimal means for delivery be identified, including the application of resources to the procurement process. Effectiveness requires that the outcomes will be achieved and that the outcomes address the original need. Considerations of equity at this stage may apply to the prioritisation of needs; that the need is addressed equitably, for example in the distribution of benefits; and that the means for delivery contributes to the achievement of horizontal objectives.[154]

4.1.6.2 The procurement process stage

The procurement process stage in the procurement system's life cycle typically consists of decisions regarding the procurement procedures, specifications of the identified procurement need, solicitation of supplier bids, evaluation and selection of suppliers, award and contract conclusion.[155]

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152 De la Harpe *Public Procurement Law* 296. Satisfying the requirement of cost-effectiveness in the later procurement entails taking cost-effectiveness into account "when deciding on what is needed and how the needs will best be satisfied". The requirement for cost-effectiveness may be embedded in the provisions of statutory or other planning law, in the case of the example given above in footnote 150 above, section 6 of the *National Energy Act* 34 of 2008. The Integrated Energy Plan must deal with issues relating the supply of energy in a way that accounts for, among others, "economically available energy resources", "affordability"; and "universal accessibility and free basic electricity", reflecting the elements of economy and equity.

153 The allocation of resources toward satisfying lower-priority needs, within themselves, may achieve cost-effectiveness; however, from the citizenry's viewpoint, satisfying lower-priority needs could not be regarded as an effective allocation of resources if made at the expense of higher priority needs. The benefits of satisfying a need, even if correctly identified must also be weighed with considerations of cost and affordability. Considerations of affordability include the proper planning, budgeting and evaluation of projects. See section 215 of the *Constitution*.

154 Arrowsmith *Horizontal Policies* 169. For example the *decision on what to purchase*.

155 Par 2.1.3. The activities listed presume a competitive process is followed. In terms of the conceptual analysis of the procurement system in execution, the specification and design of the

4.1.6.2.1 Procurement procedures

After a decision has been taken to fulfil the identified need by way of procurement, the procedure for the procurement must be determined from those permitted by the *regulatory system*. This decision, from a cost-effectiveness viewpoint, must select the optimal procedure amongst those available in terms of their cost-outcome relationship. The selection of the procurement procedure will have a bearing, not only on the cost relating to the procedure itself, but also on the courses of action available to decision-makers during execution of the procedure. Optimality is therefore determined by the relationship between the costs of the procedure and the measure of the effectiveness of the outcomes. Competitive public procedures have a high cost but should produce the widest choice of set of courses of action available for decision-making. Restricted procedures have a lower procedural cost, but present a limited set of choices. The circumstances of any particular procurement will determine cost-effectiveness of this decision regarding the procedure to be embedded in the *transactional system*. Typical examples are situations where the value of the procurement is low, where the availability of solutions may be limited to a sole or limited number of suppliers,[156] or in situations of emergency.[157] Following a cost-effectiveness argument:

(a) Below a certain threshold, the potential gain through any attempt to make a wide set of choices available will always be defeated by the cost of doing so and therefore is not worthwhile.[158] Above this threshold, the cost of an open

procurement procedure are activities related to the assembly of the *transactional system* and the solicitation, evaluation and award are the activities corresponding to the execution of the *transactional system*. See the discussion in par 3.3.5.

156 For example where the intellectual property rights are held by a sole or limited number of suppliers. See Bolton *Dispensing with Public Tender Procedures* 23-24.

157 Bolton *Dispensing with Public Tender Procedures* 20-22.

158 Low-value commodities are typically of such a nature that any procedural effort expended will outweigh the benefit. It should be noted that endogenous and generalised considerations of cost-effectiveness for such circumstances could be effected in practice. Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 550.

procedure may still be outweighed by potential gains, but a simplified procedure is sufficient to present acceptable risk to the cost-outcome relationship.[159]

(b) In situations where the procurement outcome is known only to be obtainable from a single supplier or a restricted and closed group of suppliers, any procedural cost directed at widening choice would be fruitless and therefore not cost-effective.[160] Procedural cost directed at improving the set of available courses of action within this constraint may still be available but would depend on the particular circumstances.[161]

(c) Emergency situations would typically demand a choice of procedure that maximises the available courses of action with the time constraints determined by the emergency. If expedited procedures are not followed, the value of any course of action will reduce or, beyond a certain point, may be valueless or not worthwhile. Even under such circumstances, the requirement for the system to be cost effective should not be completely disregarded and the procurement procedure should still provide for an optimising the course of action within the constraints imposed.[162]

The decisions above would be made as part of the assembly of the *transactional system* and within the rules of the *regulatory system*. The rules limiting the discretion in the decision to select a particular procedure may be directed at the achievement of macro-outcomes such as public trust. The decision establishing the rules and principles of the *regulatory system* that constrain the choice of procedure from the set

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159 The three-quote procedure, for example, presents a level of choice in available courses of action and limits the risk of collusive behaviour.

160 Bolton *Law of Government Procurement* 44-45. Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 468-469. In such circumstances, limited bidding procedures or single source procedures should be followed. For example, the grounds for following such procedures in the *Model Law* are that the procedural time and cost would not be proportional to the value of the goods procured.

161 Through negotiation, for example, optimal terms may be sought through volume or term commitments or scope optimisation.

162 Bolton *Dispensing with Public Tender Procedures* 21-22.

of all available rules and principles would have to be optimal and worthwhile to be macro-level cost effective.[163]

4.1.6.2.2 Procurement specification

The direct outcomes intended from the procurement transaction must be defined in some form. The level of formality to which the definition of the desired outcome is specified depends on a number of factors, including the nature of the intended outcome; the market information available to the public body and the procedure being followed. In terms of transactional cost-effectiveness, the specification must ensure offers, from which the optimal solution can be chosen, will in fact deliver the outcome required.

At a formal level, the specification must sufficiently describe the desired outcome. Increasing the detail and complexity of the specification increases the procurement transaction costs, while a less-detailed specification may lower the bar in respect of the requirement for quality in the responses.[164] At a minimum, sufficient detail must be included for full understanding by suppliers to align the offers with the intended outcomes.[165] The requirements of economy and effectiveness demand that the content of the specification minimises the risk of making suboptimal courses of action available for later decisions in terms of unnecessary[166] or insufficient content. In line with the principles underlying cost-effectiveness, all projected cost directed at the achievement of the outcome must be considered thus should demand a life-cycle

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163 The term procedural cost-effectiveness will be used in the study when considering the outcome-cost relationship resulting from decisions relating to procedure.

164 Bergman and Lundberg *Tender evaluation* 73.

165 This is susceptible to an endogenous determination of cost-effectiveness. It is submitted that an optimal level of detail can be determined, beyond which incremental effort (cost) will not produce incremental value. See *Allpay* 78. Although the dispute centred on other issues, the vagueness of the specification was established to have resulted in reducing the number of the courses of action available to be chosen to one.

166 The specification of features of scope can go beyond what is actually required sometimes described as gold-plating the specification. Other examples may be that elements of scope are simply not required at all. For example, see *JFE Sapela Electronics (Pty) Ltd & another v Chairperson, Standing Tender Committee* 2004 JOL 12848 (C) 29 where the approach of the public body in allowing a duplication of scope across different tenders would not "serve the purpose of identifying best value for money".

approach to decisions regarding specification.[167] These two aspects align with the economy and effectiveness elements of cost-effectiveness respectively.

Rules within the *regulatory system* may limit the discretion that the procuring body has in the specification with a view to the achievement of other macro outcomes, for example, requirements for local content to promote the local economy or limiting the specification of standards to international standards bodies for fairness.[168]

4.1.6.2.3 Determining evaluation procedures, methods and criteria

Evaluation procedures will typically include qualification, compliance, shortlisting, ranking and award decision-making sub-procedures.[169] The determination of the criteria and other parameters of these sub-procedures are defined as part of the assembly of the *transactional system* as directed by the *regulatory system*.

Qualification and compliance criteria apprise potential tenderers of outright requirements for participation and therefore inform early decision-making by potential participants as to whether any effort should be expended in participating in the procurement process. Qualification and compliance criteria affect the narrowing or widening of the set of courses of action available for the later evaluation decision-making processes. The content of the qualification and compliance requirements are therefore important to the achievement of cost-effectiveness in respect of determining the set of available courses of action. As these criteria typically determine the level of

167 Life-cycle costing may just amount to consideration of including maintenance, support and disposal, but could include wider considerations such as prospects for green alternatives such as power, environmental or cost associated with other externalities. De la Harpe *Green Public Procurement* 66.

168 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 410.

169 The reasons for this breakdown of the evaluation process are discussed in detail in Chapter 5, including the contribution to cost-effectiveness. The treatment in this chapter covers only necessary conceptual detail from the constitutional requirement perspective. Note that the term compliance process used in this study relates to the application of what are termed responsibility or responsiveness criteria in other works and jurisdictions. See par 5.4.1.

risk the public body is prepared to absorb in their later choices, these criteria should neither be set too low nor, for the reason set out above, too high.[170]

The parameters for shortlisting, ranking and award processes are determined as part of the assembly of the *transactional system*. Although not to the outright extent of qualification and compliance criteria, they may affect the solicitation process for similar reasons. The primary function of the criteria, as part of the *transactional system* procedures, is to establish how the merit of tenders is determined. As the execution of the evaluation process must adhere to the *transactional system*, this aspect of its assembly is crucial for the achievement of transactional cost-effectiveness.[171]

The *regulatory system* may limit the discretion of the public body in determining the qualification, compliance, shortlisting, ranking and selection procedures and criteria for the achievement of macro-outcomes, for example, restrictions on what may be considered in an assessment of risk and the decision-making procedures allowed. The effect of the regulation must be cost effective in meeting the macro outcomes, the cost associated with the effect of limitations must be worthwhile in terms of the outcomes intended and should further be optimal. Where transactional cost-effectiveness is itself a macro outcome, the meta-decision criteria and procedures of the *regulatory system* should compel the resulting qualification, compliance, shortlisting, ranking and award procedures to comply with the model and criteria for cost-effective decision-making. The implications of particular regulatory provisions for the evaluation sub-procedures are dealt with in detail in Part 2 of this study.

4.1.6.2.4 Publicity and solicitation of offers.

Subject to the decision that selects the most cost-effective procedure, the risk of a suboptimal set of available choices later in the procedure will be a function of the

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170 This factor forms part of the element of efficiency in value for money described by Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 29.

171 As an example of method see *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others* 2012 (3791/2012) ZAWCHC 162 (C) 30-31. The scoring system to establish the merit (although technically of a compliance criterion) in terms of functionality produced "rather bizarre results".

publicity and interest created in the issue of the tender. In this respect, factors such as the audience reached and the time allowed for response will affect the wideness of options available for downstream decision-making.

4.1.6.2.5 Execution of the evaluation and award procedures

While the process of evaluation is undertaken as part of the execution of the *transactional system*, the parameters for the execution are determined in the assembly of the *transactional system*. The factors determining the cost-effectiveness of the evaluation process are determined by the rules of the *transactional system* but may be related to decisions taken in execution if discretion is so permitted.

Judicial interpretations of cost-effectiveness in the evaluation process by the courts[172] provide useful insight into the application and importance of the requirement in this stage. In *Grinaker LTA Ltd and another v Tender Board (Mpumalanga),*[173] it was stated by De Villiers J that the award to a tenderer other than the one with the lowest price offer would result in a "contract which is not competitive and cost effective". De Villiers J held that because a tender is "within the budgeted amount is irrelevant", thereby rejecting a single exogenous benchmark when superior courses of action were available. In *JFE Sapela Electronics (Pty) Ltd & another v Chairperson, Standing Tender Committee*[174] the tender process was also pronounced not to have achieved cost-effectiveness, as "it did not ensure the identification of best value for money". In *SA Container Stevedores (Pty) Ltd v Transnet Port Terminals & Others*[175] it was stated

172 As noted above, in terms of the *Allpay* judgment the direct justiciability of cost-effectiveness to the validity of procurement transactions would now appear to be unavailable. The judgments interpreting cost-effectiveness that follow are not out of context in the light of *Allpay* as they relate to the decision to select and their interpretations of cost effective are valid as it informs standard for the administrative decision. See paragraph 3.4.1.

173 2002 3 All SA 336 (T) 70. This is quoted to make the point regarding the use of the superlative for the requirement of cost-effectiveness in the competitive context. The consideration of price alone in the judgment, without reference to other factors in the consideration of cost-effectiveness is not supported in general. It should also be noted that the reference to a contract 'which is not competitive' is different from the requirement for a system to be competitive and should be understood to mean a tender (offered contract) that does not offer competition to other tenders (offered contracts).

174 2004 JOL 12848 (C) 37.

175 2011 JOL 27105 (KZD) 104.

that the "purpose of section 217 is, subject to the affirmative action issue, to ensure that the government gets the best price and value for which it pays". Case law interpretations of the requirement for cost-effectiveness in the evaluation procedure appear consistent in requiring the selection of the proposal with the best proposition for value for money. This is consistent with the conclusion above,[176] that cost-effectiveness is only achieved by the selection of the course of action that is optimal in terms of the price-outcome relationship.

Judicial decisions have also confirmed the achievement of cost-effectiveness to include considerations of factors other than cost alone in the *selection process*. In *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others,*[177] an improper consideration of functionality[178] was ruled not to satisfy the requirements of achieving cost-effectiveness. In *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape,*[179] Davis J made it clear that the "ability of the tenderer to deliver what is required, to meet the need of the tender, to deliver a service or commodity which it fit for purpose" has a "direct bearing on the question of whether a tender is cost-effective". Davis J went on to equate the question of whether a tender is cost effective with "whether it yields the best possible value for money".[180]

4.1.6.2.6 Post-award procedures

After the evaluation, selection and award process, competitive or otherwise, a contract should be concluded with the supplier. The terms of the contract governing risk allocation and dispute avoidance are also motivated by the attainment of cost-effectiveness.[181] The conclusion of the contract with the supplier may involve the negotiation of terms that were not fixed in the specification to achieve a more cost-effective position for the public body.[182] In a competitive process, the ability of the

176 Par 4.1.3.3.
177 2012 (3791/2012) ZAWCHC 162 (C) 34.
178 See par 6.4 for the definition of "functionality" and its use in evaluation procedures.
179 2013 (21158/2012) ZAWCHC 3 (WCC) 109.
180 2013 (21158/2012) ZAWCHC 3 (WCC) 109.
181 Bolton *Law of Government Procurement* 110.
182 *SA Container Stevedores (Pty) Ltd v Transnet Port Terminals & others* 2011 JOL 27105 (KZD) 72. Ndlovu J stated, "The concept of post-tender negotiations is not uncommon in public tender

public body to engage in negotiations subsequent to, or during, the process is restricted. To the extent possible negotiations should be conducted in order to optimise the choice made.[183] In non-competitive procedures, this would be a necessary and pivotal stage for the system to ensure cost-effectiveness in terms of assuring the solution is worthwhile and optimal.

4.1.6.3 The contract administration phase

The contract administration phase consists of the management and oversight of the concluded contract through to its termination. The previous planning and procurement phases of the system can only provide the platform for the contract as the instrument governing the delivery of the procurement need. Effective administration and enforcement of the terms of the contract must ensure the delivery of the intended benefits at the intended price. Without such attention, the public body places the achievement of cost-effectiveness at risk.[184] From the perspective of the models for cost-effectiveness, decisions made during the delivery phase should still apply if not as requirement of the procurement system, then as part of the supplier management processes of the responsible organ of state.

4.1.7 Summary and conclusions

An organ of state to which *Section 217* is applicable is required to contract within a system which is, *inter alia*, cost-effective. The requirement to be cost effective was

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dealings and has been found to be a legally acceptable practice as long as, it seems to me, it is included in the tender document as a requirement in the tender process". Also at 104 Ndlovu J saw "no reason why 'commercial arm twisting' should not be allowed in the procurement process and that it must be borne in mind that the purpose of section 217 is, subject to the affirmative action issue, to ensure that the government gets the best price and value for which it pays".

183 Bolton *Scope for negotiating government contracts* 277-278. Bolton makes the point that, in general, a public body should be prevented from negotiating post award of a tender. However, the achievement of value for money may be difficult without such negotiations. A complete prohibition could therefore possibly defeat the objective of achieving cost-effectiveness and therefore negotiations should be permitted in certain circumstances subject to certain restrictions.

184 Bolton *Law of Government Procurement* 128-129. As this phase of the procurement process is regulated by the terms of the contract, the regulatory aspects would be those governing general financial management. This aspect is not investigated further in the study. For an insight into the strategy, process and effects on outcomes after the tender award see, for example Mattisson and Thomasson *Strategic process* 439-454, Gutman *Room for discretion* 13-14.

examined from a definitional standpoint as well as technical applications of the concept to establish its meaning in the general public procurement context. The definition of the term in context was concluded to be the broad term "effective or productive in relation to its cost".[185]

The broadness of outcomes in the public procurement context led to the conclusion that the span and depth of the meaning of cost effective should not be limited and in principle could apply to all outcomes, from micro-level, or transactional outcomes to macro-level, systemic outcomes.

Issues regarding the comparative nature of 'cost-effective' were investigated: the comparative integrity, the determination of value, comparative basis and the comparative standard. It was concluded that the difficulties in establishing value for general outcomes could be overcome by finding a practical meaning for cost effective through its application in cost-effectiveness measures and analyses.

It was concluded that the relevance of cost-effectiveness for a system of public procurement lies mainly in the means for its prospective determination. The proxies for cost and value of outcomes - projected cost and intended value - were concluded in addition to require the assessment of risk.

The term 'value for money' - used pervasively in other jurisdictions, literature and local case law, that embodies the concepts of cost-effectiveness - was analysed and commonalities assessed. It was concluded that the common usage of value for money could be considered the equivalent of transactional cost-effectiveness and the achievement of value for money as an equivalent to that of the transaction being cost-effective. It was concluded that macro views of value for money that incorporate social value, although less commonly used in the public procurement context, equate to the macro-level view of cost-effectiveness.

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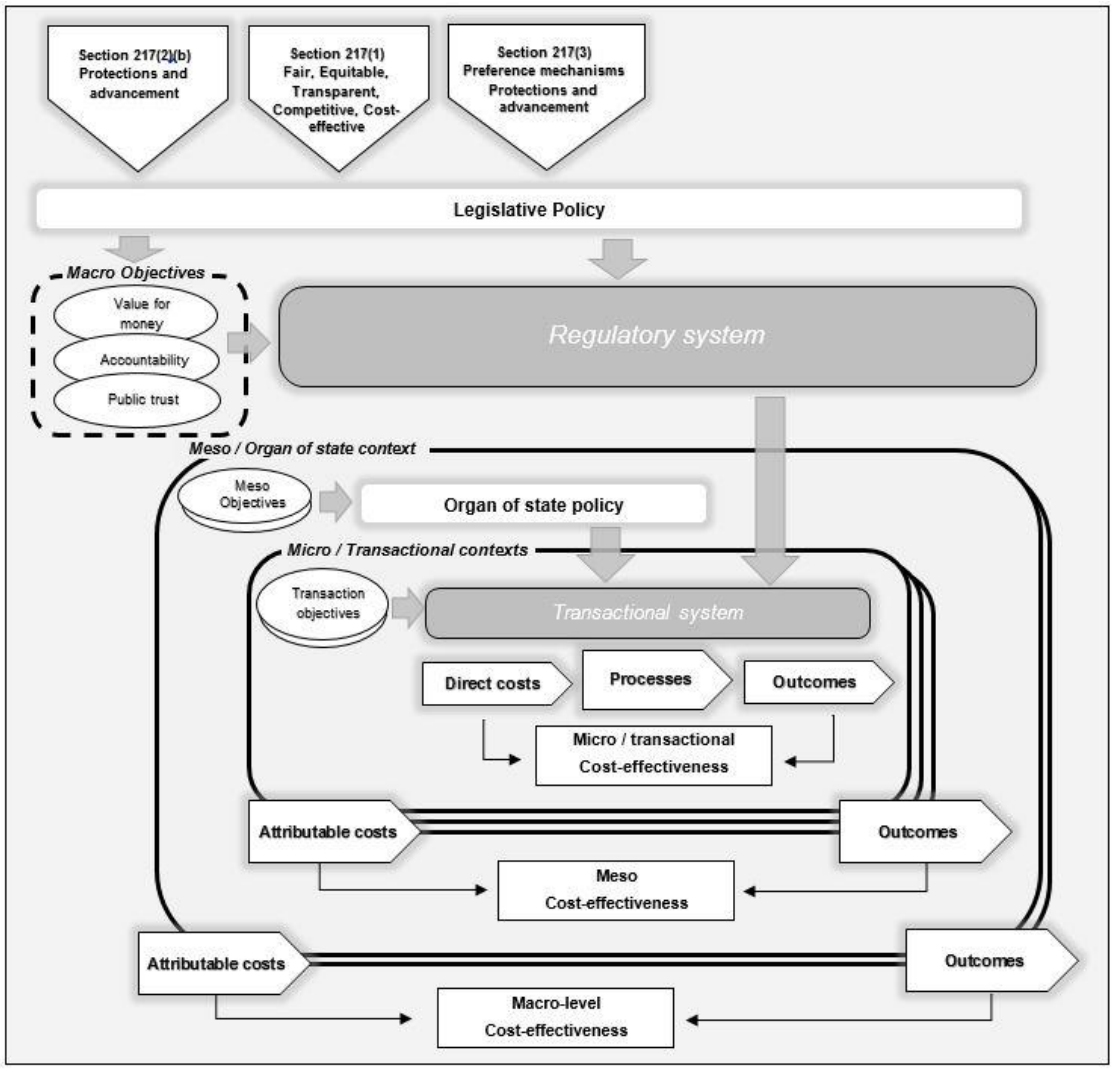
185 Par 4.1.3.7.

Using the conclusions drawn regarding the meaning of 'cost effective' in the public procurement context, models were proposed for the requirement to be cost effective, retrospectively - with regard to a course of action - and prospectively with regard to the decision to adopt a course of action.[186]

Figure 4: Cost-effectiveness depth in the constitutional scheme sets out a conceptual summary of cost-effectiveness at different depths in the constitutional context.[187]

Figure 4: Cost-effectiveness depth in the constitutional scheme



186 Par 4.1.3.7.

187 Note the inclusion of meso-level organ of state outcomes. See the discussion in par 4.1.4.1, and particularly footnote 114 above.

The scope of these macro-level outcomes was concluded to encompass all outcomes of the system in principle, including the requirement for general transactional cost-effectiveness and outcomes of a horizontal nature.[188]

The provisions of subsection 217(2) were considered for the potential of limiting the application of cost-effectiveness as a requirement of the system. It was concluded that the macro requirement of the system to be cost effective would not be limited by the provisions of subsection 217(2) but would only require that the application of resources toward such policy outcomes was worthwhile and that optimal mechanisms are adopted. It was further concluded that the requirement of macro cost-effectiveness would potentially be limited by constitutionally valid policy-determined mechanisms, but not by policy-determined outcomes, nor by a policy-determined weighting of outcomes.[189] The requirement for the particular macro outcome of transactional cost-effectiveness was concluded to have the potential of conflicting with horizontal outcomes and could be interpreted to prevent the implementation of certain mechanisms. This conflict of outcomes could be resolved by the balancing of outcomes.

The system's requirement for cost-effectiveness was analysed with respect to the completeness in terms of both the *regulatory system* and the *transactional system*. It was concluded that the *regulatory system* was required to be complete with regard to macro-level outcomes but that discretion should be permitted for cost-effectiveness with regard to transactional outcomes.[190] The assertion that the requirement to be cost effective informs the principles for administrative action provides a means for safeguarding the requirement in discretionary decision-making. The provision for discretionary decision-making in the execution of the *transactional system* was also concluded necessary and that the cost-effectiveness of such decisions in execution is similarly protected.

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188 Par 4.1.4.1.
189 Par 4.1.4.1.
190 Par 4.1.4.2.

A variant of the test for cost-effectiveness was proposed for its application to a system as follows: a system is cost effective if the rules and principles of the system have the effect of compelling the selection of cost-effective courses of action with regard to the intended balance of outcomes of the system.[191]

Perspectives of the requirement to be cost effective were examined with regard to mechanisms for the achievement of goals other than direct transactional goals. Macro-level cost-effectiveness was concluded to require the selection of the most cost-effective mechanism in terms of macro-level cost-effectiveness. Certain mechanisms were concluded to diminish aspects of transactional cost-effectiveness, but should be selected for their optimality in achieving the balance of outcomes and cost in terms of macro-level cost-effectiveness.[192]

Regarding the requirement to be cost effective from a standalone perspective, the implications of the requirement was considered from various perspectives throughout the life cycle and the implications for specific junctures was considered for the *regulatory system*, the *transactional system* and decision-making in execution.[193] It was concluded that requirement of the system to be cost effective applies throughout the life cycle of public procurement and considerations for cost-effectiveness exist in the design of the *regulatory system* through to decisions taken in execution of the system.

4.2 The requirement of competition

4.2.1 Definition and rationale for a competitive system

Competition as a requirement for a procurement system was explained as a strategy or instrument imposing procedures of a competitive nature, not as an end in itself, but as a means to achieving a number of end objectives.[194] This rationale for competitive procedures is variously argued as follows:

191 Par 4.1.4.3.
192 Par 4.1.5.
193 Par 4.1.6.
194 Par 2.2.3.

(a) If public competitive procedures are well established and accepted, and offer unrestricted participation these will promote public confidence in the outcomes of the procurement system.[195]

(b) In a competitive setting, participants will tender their best offering in terms of the criteria determining merit in order to succeed in winning the business and therefore the public body will be able to select from the best offerings available in the market.[196]

(c) Open competition sets the rules and procedures as a fair and transparent basis for allocating state business.

(d) As procurement transactions involve public funds, it is incumbent on the public body to ensure the opportunity to benefit from participation is open to its citizens.[197] Open competition ensures a basis for such participation.

(e) Owing to the significance of public procurement as factor in the market,[198] it should not seek to undermine the forces that drive the competitive market. [199]

The requirement that the system in accordance with which a public body contracts must be competitive can be understood to mean that the procedures and rules of system are characterised by competition.[200] The requirements for competitive procedures are generally defined as: (1) the competition is open and inclusive; (2) competitors must be treated equally; (3) they must be fully informed as to the content and rules of the competition; and (4) the competition must be evaluated and adjudicated so that the most meritorious competitor is successful.[201]

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195 Par 2.2.3.
196 De la Harpe *Public Procurement Law* 389.
197 See footnote 54 in Chapter 2.
198 Par 2.1.1.
199 Bolton *Law of Government Procurement* 42. The requirement has also been associated with the competitiveness found in free-market economies as commercial decisions are generally based on gaining a competitive advantage, which in turn drives efficiency, innovation and choice in the economy.
200 Bolton *Law of Government Procurement* 41.
201 De la Harpe *Public Procurement Law* 289.

4.2.2 The requirement that the system is competitive

Subsection 217(1) requires that the procurement *system* must be, *inter alia,* competitive. Considering this requirement in isolation, it literally specifies a meta-requirement: that the rules and principles of the *regulatory system* must specify procedures compelling competitive procedures in *transactional systems*. The rationale for competitiveness, as argued above, lies in the end objectives of the requirement and therefore the ensuing discussion focuses on purposive interpretations of the requirement.

For a procedure to succeed in being competitive in nature, of necessity there must be more than one participant. It can be argued that the greater the number of participants, the greater the competition. Case law interpretations of the requirement have held that system procedures may not have the effect of diminishing the participation to less than two competitors during the competition.[202] At the other extreme, the absence of competition for no acceptable reason has been held to be outside a system conforming to the requirement of competitiveness.[203] Purposively, the system should ensure there is sufficient participation in the process to meet the objectives of competition, one of which is the achievement of transactional cost-effectiveness.[204] It is submitted that the required level of competition should rather be determined by its attribution to end objectives of competition and not in terms of absolute thresholds as it is not an objective in itself.

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202 *Allpay* 85. The evaluation had "reduced the number of viable bids to one, rendering the process entirely uncompetitive and obviating any true, comparative consideration of cost-effectiveness". V*odacom (Pty) Ltd and Another v Nelson Mandela Bay Municipality and Others* 2012 3 SA 240 (ECP) 33. Grogan AJ accepted that when the competition is reduced to one competitor, it could no longer be regarded as competitive. If the unsuccessful participants were validly excluded from further participation in terms of the rules of the competition, it is difficult to support the rationale that the process was not competitive *per se*.

203 See for example, *Minister of Transport v Prodiba (Pty) Ltd* (20028/2014) [2015] ZASCA 38 (25 March 2015) 40. The ratio for declaring the purported agreement invalid was made on various grounds but the fundamental basis was 'not embarking on a competitive bid basis'.

204 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 28. To achieve procurement on the "best available terms" requires that participation in the competitive process should be as wide as possible in order to determine what is available. This aligns with criterion for widening the set of available courses of action in terms of cost-effectiveness. See also Bolton *Law of Government Procurement* 41.

4.2.3 Procurement life cycle perspectives of competition

4.2.3.1 The planning phase

Considerations of competitiveness in the planning stage of the procurement system's life cycle are limited. The identification of a public body's needs, the decision to procure and the definition of the procurement requirement do not generally require formal interaction with the market. Interaction with suppliers during this phase may pose a risk to the requirement for openness in the ensuing competition because of the susceptibility of the need to being tailored to a specific offering thereby limiting full and effective participation.

4.2.3.2 The procurement phase

The requirement for the *transactional system* to be competitive can be met by various procedures specified by the *regulatory system*. These have been established through their definition - in national and international systems - into identifiable categories.[205] Arrowsmith, Linarelli and Wallace[206] categorise competitive processes into informal and formal procedures. Informal competitive procedures can take the form of requests for quotations, requests for proposals or competitive negotiation. The characteristic distinguishing informal processes from formal processes is that these are conducted in a less costly manner while preserving the essence of competition. Typically, these measures to reduce the cost of procedures would include soliciting a minimum level of participation and the use of simplified procedures.[207] Formal procedures may take the form of a public call for tenders,[208] restricted or selective tenders.[209] Other examples of common competitive procurement procedures are two-stage bidding,

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205 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 459.

206 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* Chapter 8. See also Bolton *Law of Government Procurement* 132.

207 Bolton *Law of Government Procurement* 132-134. Note that there are cases where the amount is so low that even the essence of competitiveness would not be justified, typically when petty cash processes are used.

208 Also known as an "open tender".

209 In the case of restricted and selective tenders, participation in the process is reduced by virtue of the subject or scope of the tender, whereas the reduced participation in informal process has as its objective to simplify and reduce the cost of the procurement process.

qualification lists and reverse auctions.[210] The decision as to which competitive procedure to employ would be driven by factors, for example those relating to the value of the intended transaction; the cost-effectiveness of the procedure; the circumstances of the procurement; or the public body's inability to produce detailed specifications.[211] Regardless of the level of participation determined by the procedure employed, in order to satisfy the requirement of competitiveness, the purposes of competition must be met: equal treatment; being fully informed; and to be evaluated so that the most meritorious competitor is successful.[212] In principle, all end objectives of competition are only fully served by maximising the level of participation in the competition, although maximising participation must be seen in balance with other objectives, such as procedural or macro cost-effectiveness.

4.2.3.3 The contract management phase

After an award has been made, the elements of competitiveness cease to exist; however, it is still necessary for activities within the procurement system to take place in a manner that preserves the integrity of the past competition.[213]

4.2.4 Relationship between cost-effectiveness and competitiveness

Bolton[214] observes that the requirements of cost-effectiveness and competitiveness are related. As discussed above, a key rationale for the requirement of

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210 Bolton *Law of Government Procurement* 136-137. These processes are discussed in more detail in Chapter 5.

211 Bolton *Law of Government Procurement* 132-137.

212 Par 4.2. This is also discussed under the principle of fairness below where the objectives of competition include promoting fairness.

213 For example to conduct negotiations that change the scope or terms of the competition or by way of variation during the contract management phase. For an analysis of the conditions under which contract may be modified during the contract management phase, see Dekel *Modification of Government Contracts* 425-426. Dekel suggest a "presumption of impermissibility" and lists considerations that may be taken into account for permissibility, amongst others, to be: "the necessity of the modification, its efficiency, the possibility of implementing the change with another contractor, whether the modification is subject to the duty to hold a competitive bidding process, and the type of contract in question".

214 Bolton *Law of Government Procurement* 131. Bolton describes the relationship as "The principles of competitiveness and cost-effectiveness are therefore at all times interconnected and interrelated – the principle of cost-effectiveness may either restrict or reinforce the principle of competitiveness".

competitiveness is to establish the basis for a procedure in which competitors will tender their best offering at the best price to succeed in winning the business. The elements of competition support making a wide set of the best offerings available from which a selection can be made. Provided that the merit on which the winning offering is selected is based on the cost-outcomes relationship, it contains the elements of the model for cost-effective decision-making.[215]

However, competitiveness is neither a necessary nor a sufficient condition for transactional cost-effectiveness. Non-competitive processes may achieve the most cost-effective result, for example situations of emergency would dictate that reduced levels of competition must be followed because of the time sensitive nature of the outcome sought.[216] Conversely, a competitive procedure cannot ensure transactional cost-effectiveness.[217] For example, transactional cost-effectiveness is dependent on how merit is determined in the competition and how the selection of a winner is made from the courses of action available to the decision-maker. If competition is to support transactional cost-effectiveness, the criteria for deciding merit in the competition should comply with the model of cost-effective decision-making.[218]

The execution of a competitive process, especially in the case of a formal process such as a public call for tenders, carries with it a high cost.[219] In terms of macro-level cost-effectiveness, this cost must be worthwhile in terms of the achievement of the outcomes intended. Transactional cost-effectiveness is one of the outcomes sought by widening the set of available courses of action through a competitive process. Outcomes such as public confidence and trust and fulfilment of the duty to make state business accessible are also outcomes toward which the cost of competitiveness is directed. In terms of macro-level cost-effectiveness, the cost attributed to a gain in public confidence and trust through participation would not be served by costs

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215 De la Harpe *Public Procurement Law* 389. This statement is based on the assumption that the criteria for the selection of the "most meritorious competitor" include cost-effectiveness.
216 Par 4.1.6.2.1(c).
217 Bolton *Law of Government Procurement* 44-45.
218 The prospective test for cost-effective decisions.
219 Bolton *Law of Government Procurement* 132.

disproportionate to the transaction itself.[220] Therefore, in situations where the cost of competition would not be worthwhile in terms of the benefits sought through competition, the use of less competitive processes, such as informal processes, should be permitted in order to preserve macro-level cost-effectiveness. The categories of formal and informal procedures provide a structure for implementing this balance. This argument supports the proposition that macro-level cost-effectiveness considerations decide this balance.[221] This suggests that the requirement for competitiveness is attendant to the achievement of cost-effectiveness in terms of the procedural cost in relation to the outcomes sought from the transaction, or terms of macro-level cost-effectiveness.

4.2.5 Relationship between competition and horizontal mechanisms

Using *Arrowsmith's taxonomy*, the different classes of *horizontal mechanisms* may be analysed for their general effect on the characteristics required of a competitive system.[222] The *horizontal mechanisms* can broadly be grouped into those affecting the entry to the competition; those that affect the rules of the competition; or those that have an unspecified effect on competition or will depend on specific implementations. *Set-asides*; *preferences in the invitation*; and *contract conditions laid down by the purchaser* will, in general, reduce the entry to the competition and therefore reduce competitiveness, whereas *measures to improve access to government contracts* and *packaging and timing of orders*, in general, will increase competitiveness. In terms of the requirements for the competition, incorporating *horizontal mechanisms* by means of clearly defined rules, clear communication of the rules, evaluation and adjudication such that the most meritorious competitor in terms of these rules is successful, the essential elements of competitiveness may be retained. Using an *award criteria*

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220 Presented with such a cost relationship, the outcome of public confidence, in all probability, would diminish, which could not be argued to be cost effective from any angle.

221 These processes may remain partially competitive in nature depending on the extent to which the level of participation is reduced. For example, in the case of restricted procedures, where the requirement for competition is allowably diminished in order not to compromise the cost-effectiveness of the process. Bolton *Dispensing with Public Tender Procedures* 26. This was also argued purely from a cost-effectiveness viewpoint in par 4.1.6.2.1.

222 Par 4.2. A competitive system should possess the following characteristics: is openness and inclusivity; equal treatment; fully informed as the content and rules of the competition; and, the competition must be evaluated and adjudicated that the most meritorious competitor is successful.

mechanism, together with the requirement of subsection 217(3) that such *award criteria* must be legislated, establishes that clearly defined rules must exist before such award criteria can be used within the procurement system. The *award criteria horizontal mechanism* together with prescripts of subsections 217(2) and 217(3) can therefore be said to comply with the requirement of a competitive system. The *decision to purchase or not to purchase* is a consideration at the initiation of the procurement process and therefore does not have an effect on competitiveness. The *decision on what to purchase* may have an effect on competition in either a positive or negative sense depending on its specific implementation.[223]

4.2.6 Summary and conclusions

An organ of state to which *Section 217* is applicable is required to contract in accordance with a system which is, *inter alia*, competitive. This requirement of the system has been determined to be that the process of deciding with which party to contract should be determined by competition. The elements of competition are that sufficient participation in the process is solicited; the participants must be treated equally; they must be fully informed as the content and rules of the competition, including the criteria determining merit; and the competition must be evaluated and adjudicated so that the most meritorious competitor is successful.

The requirement of the procurement system to be competitive exists throughout the system's life cycle, although - as observed above - the competitive nature of the procedure in the procurement phase is the primary requirement. Considerations of the competition in the other stages of the procurement life cycle merely support the requirement by not disturbing the integrity of the competition that will take, or has taken, place in the procurement process stage.

The requirement for a competitive system is concluded to support the objective of transactional cost-effectiveness although it is neither a necessary nor a sufficient

[223] The decision on what to purchase may have the effect of excluding other potential solutions to the end outcome sought.

condition. The requirement for competitiveness is also observed to support wider objectives in the procurement process such as supporting the market economy principles, fairness, transparency, open participation and public confidence in the procurement system. In circumstances where transactional cost-effectiveness and competitiveness as a principle may oppose each other, macro-level cost-effectiveness appears to decide the balance in terms of the outcomes sought by competition as processes of a less competitive nature are permitted by reducing the level of participation in the competition to the point where it is macro cost effective.

Horizontal mechanisms can affect competitiveness in two broad ways: those that affect entry to the competition and those that have an effect on how merit is determined. While mechanisms that limit entry to the competition would generally diminish the end outcomes sought by competition, in particular fairness and transactional cost-effectiveness, the other horizontal mechanisms, in principle, do not affect the characteristics required of a competitive system.

4.3 The requirement of fairness

The requirement of fairness is closely tied to the principle of equity.[224] The merit of dealing with these two requirements separately is to a certain extent dependant on the interpretation of these two concepts. The requirements of fairness and equitableness will therefore be dealt with together at the start of this paragraph on fairness to investigate interpretations of the distinction between the two, and thereafter dealt with individually.

4.3.1 Interpretations of fairness and equitableness

Bolton[225] introduces the concept of fairness in the government procurement context as "free from discrimination, just and appropriate in the circumstances, impartial, in

[224] Penfold and Reyburn *Public Procurement 25-9.* Penfold and Reyburn deal with these two principles together as the requirement of procedural fairness. Other authors on this topic treat them distinctly although with varying measures of overlapping values, for example Bolton *Law of Government Procurement* 46 and De la Harpe *Public Procurement Law* 276.

[225] Bolton *Law of Government Procurement* 46. Bolton summarises from various dictionary definitions.

conformity with rules or standards, treating people equally, unbiased, uncorrupted, and unprejudiced". In essence this definition establishes the principle that a fair system will treat parties affected by, or participating in, the system impartially, justly and equally in terms of its rules and principles. Within this literal interpretation of fairness, two separate aspects of fairness are distinguished in the legal interpretation, that of procedural fairness and of substantive fairness. The aspects of procedural fairness include 'free from discrimination', 'impartial', 'treating people equally'; 'unbiased'; 'uncorrupted' and 'unprejudiced'. Substantive fairness balances the preceding concepts with the concept of being 'just and appropriate in the circumstances'.[226] Several provisions of the *Constitution* refer to fairness for which interpretations include the substantive element of fairness.[227] Of particular relevance to procurement is section 33 of the *Constitution* in which the right to administrative action that is 'procedurally fair' is entrenched.[228] Bolton,[229] observing that government procurement decisions are generally of an administrative nature, concludes that the use of the word 'fair' in *Section 217* does not relate to substantive fairness and is concerned with the procedural aspect of fairness. Bolton argues further that the principle of equity should govern the substance of procurement system decisions. De la Harpe,[230] on the other hand, does not draw a pointed exclusion of substance from the requirement of fairness stating that while, in general, fairness refers to procedural fairness it "need not be limited to procedural fairness only". The latter view is preferred for the following reasons:

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226 Dekel *Legal Theory of Competitive Bidding* 250. Dekel defines substantive fairness (equality) to be "equal treatment of equals and different treatment for those who are different when the circumstances justify such a differentiation".

227 Section 9 of the *Constitution*. The word 'fair' is used to qualify discrimination to entrench a right that permits discrimination in circumstances that would be, simplistically, 'just and appropriate', a form of substantive fairness. Currie and De Waal *Bill of Rights* 245. Section 19 of the *Constitution*: the right to, *inter alia*, 'free and fair' elections. This has been interpreted as every citizen having one (equal) vote. Currie and De Waal *Bill of Rights* 458. Section 23 of the *Constitution*: the right to fair labour practices. Section 34 of the *Constitution*: the right to have a dispute decided in a fair public hearing.

228 Section 33(1) of the *Constitution.* "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

229 Bolton *Law of Government Procurement* 46. Bolton draws this conclusion relying mainly on the interpretation of section 33 of the *Constitution* in the majority judgment in *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 9 BCLR 891 (CC). Bolton cautions that the substantive and procedural fairness are 'intertwined'.

230 De la Harpe *Public Procurement Law* 276.

(a) conflating substantive fairness with equity would imply that the constitutional validity of decisions balancing substance and form should only be decided on considerations of equity;[231]

(b) if the drafters of *Section 217* had intended limiting "fair" to procedural fairness only, it would be reasonable to presume they would then have couched the wording of the requirement in the narrower sense as they had explicitly done so in the wording of section 33 of the *Constitution*.[232]

Fairness is understood to have two different aspects in its administrative application: fairness in the vertical - being the relationship between the public body and the private parties - and fairness in the horizontal, being fairness in the treatment by the public body of a party relative to other parties.[233] The application of the requirement of fairness in the horizontal has a counterpart in the requirement of equitableness, which is explained to mean something distinct from equality in the context of government procurement particularly in the South African situation.[234] Equitable treatment means that parties, with regard to certain differences between them, may be placed on an equal footing by taking steps to reduce or eliminate such differences to achieve substantive equality. De la Harpe[235] observes that "there exists no test or formula to determine what is equitable" and that the circumstances must be considered to determine what is equitable on a case-by-case basis. This corresponds to the definition of equitableness as being "recourse to principles of justice to correct or supplement the law as applied to particular circumstances".[236] The inherent

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231 As explained in the following paragraph, this could be then limit the criterion only to the objective of "equalling of disparate groups".

232 See footnote 228 above.

233 Bolton *Law of Government Procurement* 48. In the procurement context, fairness in the vertical sense, for example, may include ensuring sufficient information is provided; allowing enough time to prepare bids; and not making excessive demands of the private parties. In the horizontal sense, the public body must treat all parties equally, for example in the way tenders of the private parties are evaluated.

234 Generally see Bolton *Law of Government Procurement* 49-51 and De la Harpe *Public Procurement Law* 280-283.

235 De la Harpe *Public Procurement Law* 280-281. The casuistic basis would appeal to the micro-level of substantive fairness.

236 Oxford English Dictionary as quoted in Bolton *Law of Government Procurement* 49.

inequalities in South Africa's past have resulted in significant inequality between groups as the beneficiaries of, and in terms of participation in, public procurement processes. The requirement of equitableness therefore finds particular meaning in *Section 217,* as well as in various other provisions of the *Constitution*.[237] In terms of this interpretation, equitableness is a requirement of decision-making in the system that affects the requirement for horizontal fairness by permitting unequal treatment where it is justified. Therefore, equitableness would appear to be conceptually separate from formal procedural fairness but to overlap to a degree with substantive fairness. However, the distinction appears to be drawn that equitableness in South Africa has to do with positively levelling differences between groups at the macro-level whereas substantive fairness may relate to a wider set of circumstances under which the principle would apply.[238]

4.3.2 Requirement that the system is fair

The requirement of subsection 217(1) is that the procurement *system* is required *inter alia* to be fair. Considering this requirement in isolation, this literally requires that the rules and principles of the *regulatory system* are fair and the meta-requirement that they compel the assembly of fair *transactional systems*. Insights into the application of fairness from case law are to be found predominantly in disputes regarding administrative decisions relating to the assembly of *transactional systems* or decisions taken in the execution of *transactional systems*. However, the decisions provide useful insight into the products of the *regulatory system* and therefore have relevance to the form of regulation.

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237 Section 9(2) Equitableness may relate to the promotion of the achievement of equality. Section 15(2) relating to religious beliefs; s 25 relating to land and property rights; s 29(2) relating to access to education; s155(4) relating to the provision of municipal services; s172 relating to the powers of the courts in constitutional matters; and s229(3) relating to the division of municipal powers and functions. These relate to macro- or substantive equality issues.

238 Applications of substantive fairness may relate, for example, to examining the materiality of a deviation from a formal peremptory requirement in terms of the requirement's purpose. This would not be an issue of unequal treatment aimed at levelling differences between groups.

4.3.3 Procurement life cycle perspectives of fairness

The requirement of fairness in the procurement life cycle has application from the stage where it is contemplated that private contracting parties are to be involved. The stages of the life cycle during which private contracting parties are involved is primarily during the procurement process stage, although private parties may be involved in the preparation phase and, obviously, the selected party during the contract administration stage.

4.3.3.1 Prior involvement of private parties

Dealing with a private party prior to the commencement of the procurement process is inherently unfair if such involvement may afford such party an advantage in the subsequent competitive process. A competitive procurement process would be regarded as unfair even if the party may not actually have gained advantage but simply that it was afforded the opportunity to do so.[239] Where the involvement of a future participant extends to more than simply affording it an opportunity of advantage, not only is fairness undermined but transparency and competitiveness are as well.[240]

4.3.3.2 Fairness in the tender specification

The specification, or the documentation reflecting the scope of work sought to be procured by the public entity, must be clear, unambiguous and complete. The supply

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239 *City of Cape Town v Aurecon South Africa (Pty) Ltd*) 2014 (5663/13) ZAWCHC 51 59. Yekiso J stated "it is not necessary to show that a tenderer actively participated in the actual proceedings of the Bid Specification Committee, or actively attempted to influence the design or content of the specification or even that the tenderer intended or hoped to influence the outcome of the tender process, or that the resultant outcome was indeed so influenced". At 60 "to allow a party to bid for a contract, the specifications of which are to a significant extent determined by the same party, is clearly inconsistent with the values underpinning fairness".

240 For example, concluding a secret agreement with one participant. See *Premier of the Free State Provincial Government and others v Firechem Free State (Pty) Ltd* 2000 3 All SA 247 (A) 30. In the extreme case, where a private party is contracted directly without the public body submitting to any procurement processes, for example where the contract with the incumbent provider of services is extended without initiating a competitive procurement process. This would not be fair to would-be competitors by their automatic exclusion. See *Municipal Manager, Qaukeni Local Municipality & another v FV General Trading* CC 2009 JOL 23731 (SCA) 22. This is an example of the requirement for competitiveness and transparency as regulatory instruments with fairness as the objective of these instruments.

of insufficient information prejudices all the participants in the process as their bids may be rejected for reasons not apparent from the tender specification.[241] The specification must be unambiguous and clearly state the requirements for a bidder to qualify. [242] This is an aspect of fairness to all participants in the process in that they must be aware of the requirements before undertaking the effort to participate and that, having decided to do so, they must all be precisely aware of how to establish their qualification.[243] Insufficiencies in the specification of the *transactional system* that prejudice all participants would thus be shortcomings of the system in meeting the requirement of fairness in the vertical sense.

The criteria specified for the evaluation process must not favour, or disfavour, any prospective participant unfairly, intentionally or otherwise. Examples of such would be the tailoring of qualification or compliance criteria to limit entry to the competition unfairly, or in the award criteria unfairly promoting the ranking of certain participants.[244]

The criteria, methods and weightings to be used in the evaluation processes should be made known to the prospective participants.[245] A method of evaluation must be disclosed that considers allocating work to bidders in rotation, a criterion based on spreading the work amongst bidders or taking previous awards made to a bidder into account in the evaluation.[246] The extent to which weightings must be disclosed to tenderers has been considered in various cases. In *South African Post Office Ltd v*

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241 *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* 2009 JOL 23397 (ECG) 33. Sangoni J observed that "the scant information, for example, supplied in the invitation and the apparent lack of specifications did not make the playing field level amongst the bidders. Bidders were disadvantaged by this hence some were rejected as being non-responsive to the terms of the bid".

242 *Allpay* 88.

243 *Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education & others* 2008 JOL 21327 (C) 41.

244 Bolton *Law of Government Procurement* 143, 153.

245 The requirement for disclosure of evaluation criteria, methods and weightings from a fairness perspective is that all competitors are placed on an equal footing. The requirement for disclosure from a transparency perspective is that the process can be monitored. See par 4.5.2.2 for the discussion as it relates to transparency.

246 *RHI Joint Venture v Minister of Roads and Public Works and Others* 2003 5 BLCR 544 (Ck) 36-37. The disclosure of the inclusion of such a method to award a tender must also be made for reasons of transparency.

Chairperson of Western Cape Provincial Tender Board and Others,[247] the non-disclosure of the high weighting of price as a factor was not deemed unfair as there was a rational explanation for its omission and that it could have been deduced from the tender documents. In *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others*, [248] the non-disclosure of a requirement that the completion of every item in a table was required for the purposes of scoring "detracted materially … from the fairness and transparency of the system used". In *South African National Roads Agency Limited v Toll Collect Consortium and Another*,*[249]* the court placed emphasis on objectivity as an aspect of the principle of fairness and ruled that, provided the ensuing evaluation was objective, the fact that the system was not disclosed to the participants in advance did not necessarily mean the system is unfair. It appears that to satisfy the requirement of vertical fairness, weightings need to be clearly communicated if they were not readily deducible. The underlying requirement, however, is for the weightings to be determined prior to evaluation for objectivity.

4.3.3.3 Fairness relating to the tender procedures

The directions for the procedures to be followed in the competitive procurement must be clear and certain to facilitate a fair process in the vertical sense. This aspect of fairness overlaps with the requirement for the system to be competitive, an example of fairness as an end objective of competition.[250]

Formal requirements of the tender procedure must possess inherent fairness. For example, the time allowed must be sufficient to allow all potential competitors to prepare for participation in a tender process. A time that is too short may be unfair to all potential participants or, alternatively, unfair as between the parties.[251]

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247 2001 5 BCLR 500 (C) 16. See also the distinguishing rationale in paragraph 4.5.2.2 relating to the requirement for transparency.

248 2012 (3791/2012) ZAWCHC 162 (C) 26.

249 2013 4 All SA 393 (SCA) 20.

250 *Allpay* 92. Froneman J observed that the "purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive".

251 *Menzies Aviation South Africa (Pty) Ltd v SAA (Pty) Ltd & others* 2010 JOL 24726 (GSJ). The court agreed that an unreasonably short time for the preparation of bids is in itself suggestive of

4.3.3.4 Fairness in the execution of the evaluation process

The evaluation of tenders must be conducted in terms of the methods, criteria and weightings as specified and advertised to the tenderers as part of the *transactional system*. Any deviation from the procedures as published to the tenderers is potentially unfair.[252] A number of cases specifically dealing with this issue have come under the scrutiny of the courts that are useful for analysing decisions and circumstances which may constitute unfairness. In *Metro Projects CC and Another v Klerksdorp Local Municipality,*[253] it was stated:

> Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.

In *Millennium Waste Management v Chairperson Tender Board*[254], the criteria upon which decisions in the procurement process may be considered fair were extended to include those made in the public interest, *in casu*, the condonation of non-compliance with a peremptory requirement:

> Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted … in this case condonation of the appellant's failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost effectiveness which are listed in s 217.

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procedural unfairness, and, *in casu,* the fact that one bidder did not possess the information that enabled other bidders to submit timeously meant it was also unfair as between the parties.

252 See discussion on section 33 in par 3.4.3.

253 2004 1 SA 16 (SCA) 13. (Hereafter "Metro Projects").

254 2008 2 SA 481 (SCA) 17. (Hereafter "Millennium Waste"). This decision relied on *SA Eagle Co Ltd v Bavuma* 1985 3 SA 42 (A) at 49G-H that "the law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted".

The latitude afforded by the *Millennium Waste* judgment has subsequently been reined in by *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and another*:[255]

> In my view, that does not support the proposition that, if it is not inconsistent with public policy, non-compliance with a peremptory requirement of a tender can be condoned so that a tender which is 'unacceptable' as envisaged by the Procurement Act may be accepted. Not only is such a proposition inconsistent with the decision of this court in *Pepper Bay* – a decision regularly followed and approved, including in *Millennium Waste Management* – but it also offends the principle of legality, as emphasised by this court in *Sapela Electronics*. Accordingly, in my respectful view, insofar as the judgment in *Millennium Waste Management* may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect.

Allpay confirmed the requirement of procedural fairness but that the materiality of non-compliance must be considered and such test is whether the purpose of a mandatory condition has been achieved. [256]

> Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose".

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255 2014 1 All SA 545 (SCA) 18.

256 The Constitutional Court rejected the Supreme Court's test of inconsequentiality in the same dispute, or whether compliance with the provisions would have led to a different result, stating an "assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process". See *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2013 2 All SA 501 (SCA) 91.

The current position regarding what actions would be considered fair regarding deviations from the published *transactional system* is essentially that expressed in *Metro Projects* and *Allpay*. An evaluation process will not be tainted by unfairness if actions are taken in the interests of achieving understanding to promote competitiveness and cost-effectiveness but must exclude actions that may assist a tender.[257] Condonation of a non-compliance with a peremptory requirement should be considered in the light of whether the purpose of the requirement has been achieved.

4.3.3.5 Fairness in the review of the evaluation process

As noted above, while the *Section 217* requirement of fairness informs the enquiry into procurement decisions under the PAJA, procedural fairness dictates that parties subject to administrative action have the right to be heard. Fairness in the process requires a procedure for participants to request reasons for decisions and to be provided with sufficient time and information to establish whether grounds for review exist.[258]

It may be necessary for the public body to make decisions regarding the procurement process itself during the execution of the process. For example, the public body may decide to cancel, restart or change the process in the event that the process does not prove competitive,[259] no acceptable bids have been received, or that a flaw had been detected in the process. Procedural fairness in such instances would require that tenderers who submitted acceptable tenders should have an opportunity to request reasons and make representations to the public body.[260]

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257 See also *Sanyathi Civil Engineering & Construction and Another v eThekwini Municipality and Others, Group Five Construction v eThekwini and Others* 1 All SA 2011 (KZP) 92.

258 *Total Computer Services v Municipal Manager Potchefstroom and Others* 2007 JOL 20884 (T) 74.

259 See the discussion in par 4.2.1.

260 *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) 25. See also *CAE Construction CC v Petroleum Oil & Gas Corporation of S.A. and Others* 2006 (3667/2006) ZAWCHC 57 46. A tenderer whose tender was not deemed acceptable did not have the right to be heard on cancellation of the tender.

4.3.3.6 Fairness in the contract conclusion and administration stage

As discussed under the requirement of cost-effectiveness,[261] the scope for negotiations during contract conclusion is limited but, to the extent permitted, should be conducted to obtain the best possible contract terms. The limitation in the scope for negotiation is that the fairness of the process is upheld in the vertical sense and the horizontal sense. The negotiations may not allow the bidder with whom the public body is negotiating a "'second or unfair opportunity; may not be to the detriment of any other bidder and may not lead to a higher price than the bid submitted".[262] From a vertical fairness perspective, the public body may not use the opportunity unfairly to extract a contractual position substantially better than what was offered.[263] The application of fairness in the contract negotiation and conclusion stage apply equally during the contract administration phase in that variations to the contract after conclusion must be subject to the same limitations for such variations to be considered fair.[264]

4.3.4 Relationship to other constitutional procurement principles

The constitutional requirements of fairness and equitableness were observed above to be distinct and, in some respects, opposing requirements.[265] Where fairness in the system is directed at ensuring the playing field is level, equitableness is directed at placing participants on an equal footing and may therefore require the system to treat participants unequally. These two requirements may be reconciled along the lines of the fundamental right to equality in section 9 of the *Constitution*[266], which permits fair discrimination on the grounds listed in subsection 9(2). Fairness, in the constitutional

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261 Par 4.1.6.2.

262 *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & others* 2007 JOL 20448 (SE) 17. See also Bolton *Scope for Negotiating Government Contracts* 278-279.

263 Bolton *Scope for Negotiating Government Contracts* 281.

264 Bolton *Scope for Negotiating Government Contracts* 281-282. There may be unforeseen circumstances that arise during the contract administration stage, which may justify greater latitude in variation without being considered unfair.

265 Par 4.3.1. See also Bolton *Law of Government Procurement* 52.

266 Section 9(2) of the *Constitution* on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

context, is therefore not necessarily concerned only with precisely equal treatment of groups or parties but may include factors to bring about substantive equality.[267] Equitableness, although distinct from substantive fairness, should be seen to support this interpretation of fairness.

The position adopted in this study is that competition is an instrument or regulatory strategy to structure procedures in the pursuit of other goals, one being fairness. Under this proposition, an observation that fairness is supported by the requirement of competition is trite.

Transactional cost-effectiveness and fairness may conflict in the application of procedural fairness where non-compliance with a formality may exclude a worthy competitor and possibly the tender that would otherwise have represented the most cost-effective course of action.[268] Dekel[269] sets out the reasons for upholding a decision to exclude such a tender as a general policy that a short-term gain in efficiency will be outweighed by the long-term gain in public trust and in minimising the evidentiary problems in proving actual bias or corruption. As set out in court judgments above, preserving the procedural integrity of the system is an unassailable goal in general, even if its achievement is at the expense of an optimal result in terms of transactional cost-effectiveness.[270] The unassailability of fairness expressed in macro

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267 Currie and De Waal *Bill of Rights* 246. Note that "substantive equality" is used here in the philosophical sense and not in the sense of substantive equality (fairness) in the legal sense. See also Dekel *Legal Theory of Competitive Bidding* 250 footnote 42.

268 Dekel *Legal Theory of Competitive Bidding* 264.

269 Dekel *Legal Theory of Competitive Bidding* 265. This could be regarded as an application of macro-level cost-effectiveness, where the cost of a suboptimal choice is worthwhile in terms of the public trust in the process. As Dekel further points out, there is a limit to the application in that absurd results will diminish the value of the public trust outcome.

270 *Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality and Others* 2014 (10075/13) ZAKZDHC (KZD) 17. Pillay J, referring to the five principles, summarises that "These five criteria must be considered cumulatively and weighed against each other if necessary. The first three criteria are absolute safeguards, unyielding to the latter two criteria. … [a]ssuming that Rodpaul's bid would have been the most competitive and cost effective bid because it was R5m less than Liverio's bid, Rodpaul must also prove that the other three criteria would have been met if its bid had succeeded."

cost-effectiveness terms would be that the cost associated with the outcome of public trust - through upholding procedural fairness - would always be worthwhile.[271]

The principle of fairness, in the substantive sense, was argued to support the principle of equitableness and would therefore not prevent policies implementing preferences, protections and advancements in subsection 217(2). Horizontal fairness, in the sense of equal treatment of parties, could however be argued to prevent such policies and therefore would not apply to the extent that it would prevent such policies. As argued above,[272] subsection 217(3) supports the principle of procedural fairness in respect of subsection 217(2) policy implementations.

4.3.5 Summary and conclusions

The requirement of fairness has application throughout the procurement life cycle: from the time that the public body is considering the involvement of private parties through to the contract administration stage. The consideration of fairness throughout the procurement process, in the light of developing jurisprudence, requires evaluation of the particular circumstances of each case. From the extent of judicial attention paid to this requirement in the procurement process, the fulfilment of the principle of fairness is clearly fundamental and apparently a requirement posing difficulty in the execution of the procurement process.

Fairness is based on the principle that all participants are treated equally and impartially. The requirement finds a deeper meaning in the constitutional context, together with the principle of equitableness that fairness should permit a system that promotes substantive equality especially in the light of South Africa's past inequalities.

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271 Dekel *Legal Theory of Competitive Bidding* 263. Dekel also argues that the application of procedural fairness may produce 'absurd' outcomes, which will diminish public trust in the process. Therefore, there may be a limit to the unyielding nature of formal procedural fairness at some level of cost. The current test of the materiality of the purpose of the procedure being upheld may provide a safeguard from absurd results.

272 Par 4.4.2.

The requirement of fairness in the procurement system has two aspects: the vertical aspect of fairness between the public body and other parties in general and the horizontal aspect of the public body's treatment of other parties as between themselves. Public procurement system has been shown to constitute administrative action by its nature and the *Section 217* requirement for fairness of the system gives broader content to the right to procedural fairness in section 33 of the *Constitution* in the procurement context.

In certain circumstances, upholding fairness in the process may be at odds with the achievement of transactional cost-effectiveness. Fairness was shown to be of fundamental importance to the objective of public trust in the system of procurement and therefore should not be compromised for a short-term gain in the cost-effectiveness of a single transaction. This was argued to be an application of macro-level cost-effectiveness in terms of its cost, in terms of the diminution of transactional cost-effectiveness, and the macro-outcome of public trust. It was also argued that pubic trust would not be achieved if procedural formal fairness were upheld at an absurd level of cost; hence, a balancing of objectives is necessary. This balance established through case law regarding the application of substantive fairness relating to the procedure, was that it must be limited to decisions that do not materially compromise the purpose of peremptory procedures.

4.4 The requirement of equitableness

4.4.1 Meaning of equitableness

The equitable treatment of parties, with regard to certain differences between them, was concluded to mean that measures might be taken that are directed at placing them on an equal footing by taking account of such differences.[273] A purposive interpretation of the principle in this context would be that it is a requirement of the system to promote the ultimate achievement of equality between groups, and not only to achieve substantive equality between the participants of a particular transaction.[274]

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273 Par 4.3.1.
274 Bolton *Law of Government Procurement* 52-53.

Under this interpretation, it is not a requirement that finds particular application in discrete elements of the procurement life cycle but rather finds its place as an underlying principle of policy in the definition of macro-level outcomes.

The precepts of subsection 217(2)(a) of the *Constitution* specifically permit the implementation of preferential mechanisms of preferences by a public body's procurement policy not to be prevented by the requirements of subsection 217(1) thereby entrenching the permissibility of a specific class of mechanisms that may find application in implementing equitableness.[275] Subsection 217(2)(b) provides more generally for systemic mechanisms toward the objectives of the "protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination" thus defining specific target groups by the cause of inequality.[276] The provisions of subsection 217(2)(b) constitutionally entrench a specific target for the equitableness in the system.

The requirement that public procurement must be performed within an equitable system is largely interpreted to have as its goal the economic empowerment of groups disadvantaged by previous discriminatory policies.[277] This requirement could have application early in the life cycle of public procurement, including when considering the beneficiaries of the procurement and not only the prospective contracting parties.[278] An equitable system for the procurement phase would encompass the specific mechanisms and objectives but, in principle, would not be limited to the specific prescripts of subsection 217(2). While equitableness may find application to the terms of a contract, it would have minimal scope for application in the contract management phase as the contract would have defined the basis for interaction between parties.

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275 See paragraph 3.3.8 for a detailed discussion.

276 See par 3.3.8.

277 Helmrich *Equality-oriented horizontal policies* 62-63. The broadness of the expression of horizontal policies commonly ignores specific aims and purposes.

278 For example, when considering the needs for procurement, the requirement for equitableness should be considered in prioritising the allocation of public funds.

4.4.2 Relationship to other constitutional procurement principles

The relationship between equitableness and fairness was analysed above with the conclusion that the objective of equitableness is to achieve substantial equality, a concept congruent with that of substantive fairness. In the procedural or formal sense of fairness, support for the principle of equitableness finds expression in procurement policies. Constitutional support for policies that permit categories of preference in terms of subsections 217(2) and 217(3) of the *Constitution* specifically allow, in the case of groups disadvantaged by unfair discrimination, for procedural fairness to support equitableness provided it is implemented in terms of legislation.

A system that is competitive, as observed above, should possess the following characteristics: the competition is open and inclusive; the competitors must be treated equally; they must be fully informed as to the content and rules of the competition; and the competition must be evaluated and adjudicated so that the most meritorious competitor is successful.[279] Incorporating mechanisms directed at equitable outcomes by means of clearly defined rules, clear communication of the rules, evaluation and adjudication in terms of the rules such that the most meritorious competitor in terms of these rules is successful will mean that the essential elements of competitiveness are retained. The requirement of the system to be equitable - together with the prescripts of subsections 217(2) and 217(3) of the *Constitution* - does not necessarily run counter to the requirement of the system to be competitive. However, not all mechanisms supporting the requirement to be equitable may be reconcilable with the requirement for competition and the nature of the conflict would have to be balanced with the objectives sought by competition.[280]

The discussion relating to the implementation of horizontal outcomes in general concluded that these would conflict with the achievement of transactional cost-effectiveness. In terms of conflicting macro-level outcomes, this would be resolved through a weighting of the macro-level outcomes. Macro cost-effectiveness of the

279 Par 4.2.
280 See the discussion in 4.1.4.1.

system should ensure optimal and worthwhile direction of resources toward the achievement of this balance of macro outcomes. To date, no issues of constitutionality have been raised regarding legislation giving effect to subsections 217(2) and 217(3) of the *Constitution* in terms of cost-effectiveness. It can be concluded that, to the extent to which measures have given effect to equitableness in legislation and regulation, neither the balance nor the regulatory mechanisms for ensuring the allocation of resources toward the balance are worthwhile and optimal have raised sufficient concern for a constitutional challenge.

The requirement for macro-level cost-effectiveness does not place any requirement on the balance of outcomes being reflective of their merits, but simply that the allocation of resources toward their achievement in terms of such balance is optimal and worthwhile. The need for the formal assessment of macro cost-effectiveness has not been necessary in legal arguments where it was patently clear the allocation of resources would not be worthwhile in particular circumstances. In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others,*[281] Ebrahim J analysed the premium of R220m toward the purported goal of economic empowerment:

> Whatever funds are available must be allocated prudently and utilised in such a manner that it results in the greatest number of people reaping the maximum possible benefits from it. Those in public office, at every level, must constantly be aware of their responsibilities in this regard. Public funds cannot be spent as if it is in endless supply…
>
> In the ultimate analysis the perceived benefits that would accrue to the disadvantaged members of this province was totally disproportionate to the additional cost involved in awarding the tenders to the third and fourth respondents

Regardless of the misalignment of the procurement outcome with the ultimate goal, Ebrahim J found the decision not to have a valid basis, as it would patently not have been worthwhile in any event.

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[281] 1999 1 SA 324 (Ck) 359-360. It should be noted that this was not decided based on the constitutional requirement for cost-effectiveness as this was made under the *Interim Constitution*. The comments made by Ebrahim J, *obiter dictum*, give insight into what is essentially an enquiry into macro-level cost-effectiveness.

The merits of achieving transactional cost-effectiveness are therefore subject to being balanced with the merits of goals attributed to equitableness. In other words, the diminution in transactional cost-effectiveness is a cost attributing to the benefits of equitable outcomes. The optimal allocation of resources toward the defined balance of outcomes, or the requirement for macro-level cost-effectiveness, in principle, supports the requirement of the system to be equitable.

4.4.3 Summary and conclusions

The requirement of a public procurement system to be equitable has as its objective the promotion of equality between groups. The inequality that the principle of equitableness seeks to address is primarily that resulting from South Africa's past discriminatory policies. In this interpretation, it is not a requirement that finds application in discrete elements of the procurement life cycle but rather finds its place as an underlying principle of policy in the definition of macro-level outcomes.

The provisions of subsection 217(2)(b) constitutionally entrench a specific objective for the implementation of equitableness in the system. Subsection 217(2)(a) entrenches the permissibility of a specific class of mechanisms that may find application in implementing equitableness. Although these specifically allowable mechanisms and objectives give content to the requirement of the system to be equitable, the requirement could encompass other mechanisms and broader outcomes.

The requirement for the system to be equitable was concluded to exist as a principle underlying the system that could find application in any stage of the life cycle of procurement. It is also submitted that the requirement for equitableness could apply to decisions regarding the prioritisation of needs outside the procurement life cycle.

Equitableness promotes the principle of fairness from a substantive viewpoint. Procedural fairness, in principle, is unaffected by considerations of equitableness provided such considerations are made in terms of policies and procedures, for example as is required by subsection 217(3) of the *Constitution*.

Depending on the mechanisms implementing the requirement to be equitable, competitiveness may be reduced for example, through limiting entry to the competition. If the rules of the competition that determine merit incorporate the merits of competitor with regard to equitableness, such a procedure would retain the essence of competition. Some mechanisms may improve access to competition for example, through dividing the scope into smaller packages.

Transactional cost-effectiveness was concluded to be an outcome susceptible to being diminished in the pursuit of equitableness. The requirement for macro-level cost-effectiveness in the system was argued to support the optimal allocation of resources toward the achievement of the balance of outcomes and therefore a requirement independent from considerations of equitableness but imposing a requirement in the way in which it is implemented. The optimal allocation of resources toward the balance of goals, or the requirement for macro-level cost-effectiveness was argued to support the requirement of the system to be equitable.

4.5 The requirement of transparency

4.5.1 Meaning of transparency

Literal interpretations of transparency applicable in the context of a public procurement system focus on the concept of openness.[282] Openness, in principle, means that nothing is hidden or disguised and is one of the central values underpinning the *Constitution.*[283] The stakeholders and their interests in a public procurement system include the citizenry, as beneficiaries and benefactors; the state; and private-sector

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282 Bolton *Law of Government Procurement* 53.

283 One of the objectives of the Constitution as set out in its preamble is to lay foundations for an open society. Section 1(d) of the founding provisions of the *Constitution* lists openness together with accountability and responsiveness as some of the objectives of democratic government. The concept of openness is given content in various sections in the *Constitution*. Section 59 requires the National Assembly to conduct its business in an 'open' manner i.e. with certain limitations, to hold sittings in public. Similar requirements are made of the National Council of Provinces in section 72; of the provincial legislatures in section 118; and of municipal councils in section 160 of the *Constitution*.

parties who participate in the procurement system and potentially extra-domestic parties.[284] As with other requirements for openness by the *Constitution*,[285] justifiable limitations exist to the principle of transparency in public procurement. As Bolton[286] explains, the wording of the procurement clause in the *Interim Constitution*, which was also present in the draft of *Section 217,* requiring all decisions of a tender board "to be recorded and shall be open to public inspection" was considered too wide and not carried through to the final text. Transparency in the public procurement context therefore should not require complete and unlimited openness. The extent to which transparency is to be applied should be to the extent that its purpose will be served. Reasons for the limitation of transparency may also relate to the efficiency of the process and the reasonable control by the public body for an effective process.[287]

This purposive interpretation of transparency is further given content by the fundamental rights of the *Constitution*. Section 33 of the *Constitution* provides that anyone whose rights have been adversely affected by administrative action have the right to be given written reasons, providing a procedural right and means to verify the rules have been followed. Section 32 of the *Constitution* provides that everyone has the right of access to information held by the state. Legislation has been promulgated to give effect to the right that provides for limitations to this right "to alleviate the administrative and financial burden on the state".

The requirement for transparency in a public procurement system is that it employs procedures by which its stakeholders can ensure that public procurement is

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284 Discussed in par 2.1.2.

285 For example, the requirement of conducting business in an open manner in the various legislatures and council are qualified by reasonable limitations. For example, having regard for the "nature of the business being transacted". Section 160(7) of the *Constitution*.

286 Bolton *Law of Government Procurement* 55. The reasons provided for not making public all records of proceedings were to protect the confidentiality of bids and the rights of tenderers.

287 Kinsey *Transparency in Government Procurement* 161.

"conducted in an impartial and open manner".[288] Kinsey[289] notes that there is no universally accepted definition of transparency in this context. However, it would be evident from various definitions that in order to be transparent: (1) a public procurement system must employ procedures by which the rules of the system are made known and; (2) stakeholders must be provided with, or must have access to, critical information that will allow them to verify that the rules have been followed. The overall objective for transparency is to instil stakeholder trust in the system and for stakeholders to be able to hold the public body to account.[290] In order for these objectives to be achieved, the system need not require - for example - the records of all proceedings to be open to public inspection, but that sufficient access to the records must be allowed for verification to take place on request by a stakeholder.

Quinot and Arrowsmith[291] explain transparency in terms of four elements: the publicity of contracting opportunities; publicity of the rules; rule-based decision-making; and the possibility for verification and enforcement of the rules. In terms of this analysis, the presence of the elements would establish the basic requirement for a system to be transparent. The purposive interpretations provide a means for establishing specific implementations of these elements.

4.5.2 Procurement life cycle perspectives of transparency

4.5.2.1 Overall transparency and the planning process

Section 217 of the *Constitution* requires the system to be transparent and therefore a literal interpretation requires the entire body of rules defining the system to be made known to its stakeholders. This would require the legislative framework to publish the regulations, guidelines, practice notes and the supply chain management policies of

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288 Kinsey *Transparency in Government Procurement* 162 quoting from Schooner *Objectives* 105. Kinsey points out that there is no consensus on the precise definition of transparency citing a different definition by Arrowsmith. Arrowsmith *Transparency in Government Procurement* 796. Arrowsmith defines a transparent system to be one in which "the rules to be applied in conducting procurements and information on specific procurement opportunities are made clearly known to affected parties".

289 Kinsey *Transparency in Government Procurement* 163.

290 Penfold and Reyburn *Public Procurement* 25-11.

291 Quinot and Arrowsmith *Public Procurement Regulation* 17.

public bodies. There would not appear to be any reason for restriction of access to this information, nor for it only to be available on request. It is submitted that with regard to this aspect, no less than unrestricted publication of the rules of the procurement system would meet the requirement of transparency for its purpose to be met.

In the planning stage of the procurement system's life cycle the identification of a public body's needs, the decision to procure and the definition of the procurement requirement would be subject to the general requirement for transparency in the public administration.[292]

Transparency is required to ensure accountability for decisions regarding the choice of procurement procedure especially if a non-competitive, restricted or limited form of competition is selected. In this respect, reporting and access to the decision by the public is necessary to achieve the purposes of transparency. The selection of a public competitive method, provided it is sufficiently widely published, would transparently make the intention of the public body known.

4.5.2.2 Transparency in the evaluation and award process

The transparency with which a public body exposes the specification of its need is not only in the interest of transparency but, as was argued above, in the interest of fairness for prospective participants to attain full understanding of what is required.[293] In light of the purpose of transparency, the requirements for, for example criteria for determining a tenderer's qualification for entry, would need to be known for a stakeholder to determine that qualification criteria have been applied correctly.

Transparency in the specification of evaluation criteria was discussed from the aspect of fairness above.[294] It was concluded that the purpose is that the criteria, methods

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292 Subsection 195(g) of the *Constitution*. "Transparency must be fostered by providing the public with timely accessible and accurate information". Section 215 of the *Constitution* requires the budgets and budgetary process in all spheres of government must promote, *inter alia*, transparency. Domain-specific legislative implementations of planning law may require, for example public consultation and the periodic publishing of strategic plans. See footnote 152 above.

293 Par 4.3.3.2.

294 Par 4.3.3.2.

and weightings are fixed before evaluation to ensure objectivity in decision-making. From the aspect of transparency, the criteria, methods and weightings must be sufficiently disclosed for the parties to determine the rules and to verify that the evaluation was performed within the rules. The requirement for prior disclosure of the criteria is to show that the rules were in fact objective. In *South African Post Office Ltd v Chairperson of Western Cape Provincial Tender Board and Others,*[295] the non-disclosure of the high weighting of price as a factor was judged not to offend the principle of transparency. The reasons given were that the rationale for the non-disclosure of the weighting was sufficiently important to the process and the fact the weightings would not be disclosed had itself been communicated to the tenderers.[296]

In *South African National Roads Agency Limited v Toll Collect Consortium and another*[297], Wallis JA set out the requirement for transparency with regard to the extent to which evaluation criteria should be exposed, emphasising the purposive nature of the principle:

> Transparency in a tender process requires that the tender take place in an environment where it is subject to public scrutiny. In other words the tender must be advertised publicly and its terms be available for public inspection. Those terms must set out clearly what must be submitted by those competing for the award of the contract. The adjudication of the tender must take place in an impartial manner and the results made publicly available. If there is a challenge to the outcome of the tender there must be a record that discloses how the process of adjudication was conducted. In that way the tender process is transparent and the public can see that it was conducted fairly. When the Constitution, in s 217, requires that the procurement of goods and services by organs of state shall be transparent, its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the state or those whose interests the relevant officials and office bearers in organs of state wish to advance. It requires that public procurement take place in public view and not by way of back door deals, the peddling of influence or other forms of corruption. But, once a tender is issued and evaluated and a contract awarded in an open and public fashion that discharges the constitutional requirement of transparency. It is not there to be

295 2001 5 BCLR 500 (C) 20. Compare to par 4.3.3.2 for the rationale relating to fairness.

296 The respondent's argument that the reason for the non-disclosure of the details of the weighting was that "tenderers were thereby discouraged from concentrating on the criteria which carry greater weights at the expense of others" was accepted as this had been communicated to the tenderers. This indicates the acceptability something short of complete transparency if there is an acceptable reason for its reduction.

297 2013 4 All SA 393 (SCA) 18.

> used by a disappointed tenderer to find some ground for reversing the outcome or commencing the process anew, by claiming that there should have been greater disclosure of the methodology to be adopted in evaluating the tenders.[298]

The requirement for transparency would therefore be met by the disclosure of the evaluation method, criteria and weighting of the criteria to the extent that the purpose of the public being able to satisfy itself of the fairness and the absence of abuse and corruption in the process is met. This onus of disclosure therefore falls shorter than that of having to disclose every detail.[299]

Wallis JA's judgment reveals further insight into the requirement for transparency beyond that of just the disclosure of the evaluation criteria: the purpose of transparency should also be served by a record of the evaluation and public notice of the award. Specific procedural steps in such record and notice were noted to include the public opening of tenders; publication of tenderers who have submitted bids; publication of the identities of successful tenderers and the contract prices of the tenders.[300]

A further aspect related to the purpose of transparency would be the compulsory disclosure of interests by a person involved in the evaluation of bids. The purpose of this disclosure supports transparency in the process to permit proper scrutiny of decisions for bias.[301]

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298 Wallis JA's conclusion that "once a tender is issued and evaluated and a contract awarded in an open and public fashion that discharges the constitutional requirement of transparency" is briefly commented upon in par 4.5.2.3.

299 Chen *Economic Approach* 412. The author proposes that a fully transparent system would exclude relative scoring methods as a tender's score cannot be calculated in the absolute or without reference to other tenders. The requirement for transparency as exhibited in South African case law does not extend to this extreme.

300 Bolton *Law of Government Procurement* 183-185. These are largely prescribed by regulation. The point being that these specific steps are all to support the achievement of the purpose of transparency.

301 Bolton *Law of Government Procurement* 189.

4.5.2.3 Transparency in the contract conclusion and administration stage

As observed in the discussion of the requirements of fairness and competitiveness[302] the room for variation in the scope of the contract during contract conclusion and during the contract administration stage is limited. Considering the purpose of enabling verification of adherence to the rules, it is submitted that any variation of the scope should be effected through a transparent process open to scrutiny by outside parties to the contract.

4.5.3 Relationship between transparency and other principles

The purpose of the requirement for transparency of the system is for stakeholders of the procurement process to be aware of the rules of the process and to provide stakeholders the means to verify that the rules have been observed. It could be argued that as the rules of the *regulatory and transactional systems* define the implementation of the requirements of the system, making the rules transparent would promote the achievement of all the requirements.

Various steps were identified as requirements for a system to be transparent. For example, the requirement to record proceedings, publish names of tenderers and results. These procedures attract cost and therefore from this perspective are a consideration for procedural cost-effectiveness.[303] For this reason, less onerous steps taken to achieve transparency may be considered for procurement transactions below certain thresholds to provide a safeguard against disproportional process costs limiting the achievement of cost-effectiveness.[304] When weighed against the benefits flowing from transparency, those of accountability; prevention of corruption; and abuse, the cost of transparency has been noted to be low in comparison.[305] From this perspective, macro-level cost-effectiveness has application in determining the appropriate allocation of resources to the achievement of the outcomes sought through

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302 Pars 4.1.6.3 and 4.3.3.6.

303 Kinsey *Transparency in Government Procurement* 166.

304 Such steps may limit the extent to which proactive notification, publication and communication of the adherence to rules must take place. The requirement for transparency to provide for full enquiry into adherence of rules should not be diminished.

305 Kinsey *Transparency in Government Procurement* 166.

transparency. The application of resources up to the point that transparency achieves its objectives would define the optimal course of action to be defined by the procedures of the system.

The requirement of transparency overlaps with the requirements for competition to be publicised and for competitors to be informed fully as to the content and rules of the competition.[306] The purpose of transparency, to ensure accountability in decision-making, supports the requirement for competitiveness by promoting integrity in the evaluation and adjudication process. Under the interpretation that both transparency and competition are instrumental in nature, they overlap and promote common objectives.

The purpose of transparency to provide stakeholders clarity regarding the rules of the system and to provide sufficient information to stakeholders for verification that the system has operated in a manner consistent with the rules is supportive of the requirement for fairness. Without transparency in a procurement system, fairness cannot be determined. As evidenced by judicial enquiry, the lack of transparency itself is deemed an affront to fairness in the vertical sense.[307] Similarly, it can be argued for equity to operate in the manner intended within the applicable rules, transparency is required. It is submitted that a process not meeting the requirements of transparency may also compromise the achievement of equitableness. The achievement of fairness and transparency are thus interdependent and for similar reasons, equitableness and transparency are interdependent.

Transparency's purpose - to ensure the rules of the system are made known and that means exist to verify that the rules have been followed - is no less applicable to the implementation of policies provided for by subsection 217(2). Implementations of policy should be transparent in any event to verify their compliance to subsection 217(3). It is therefore submitted that the requirement of the system to be transparent

306 Par 4.2.
307 An example of this is *Allpay* 92 discussed under vertical fairness in par 4.3.3.3.

does not prevent and remains a requirement of policies provided for by subsection 217(2).

Bolton[308] remarks in dealing with the balance between the procurement principles that the "weight attached to each principle will differ depending on the circumstances of the particular case" but that transparency must always be complied with, save for the presence of exceptional circumstances, for example for reasons of national security. The arguments above support Bolton's view, with the understanding that the requirement for transparency must be met to the extent that it achieves its objectives.

4.5.4 Summary and conclusions

In its literal sense, transparency in a procurement system requires that the system is open and, in principle, that nothing is hidden from the stakeholders in the system. The purpose of transparency in the procurement system is to provide sufficient information for its stakeholders to have clarity regarding the rules of the system and to provide sufficient information to such stakeholders to be able to verify that the system has operated in a manner consistent with the rules. In practice, the level of openness required is the level required for transparency to achieve these purposes.

Transparency is required throughout the procurement life cycle in principle. Owing to the participation of the wider group of stakeholders during the procurement process, it is during this process that transparency in the system has its most important application. In the relationship between transparency and the other four requirements, transparency was concluded to support their achievement and itself promotes enquiry into compliance with the other requirements. A possible exception noted to this conclusion was the cost associated with measures to achieve transparency and the consequent effect on the achievement of procedural cost-effectiveness. However, the argument was made that the benefits flowing from transparency will generally outweigh the diminution of procedural cost-effectiveness. The requirement of cost-

308 Bolton *Law of Government Procurement* 56 and 69-71. Penfold and Reyburn *Public Procurement* 25-11 footnote 1.

effectiveness at the macro-level will define the point at which the outcomes sought by transparency are worthwhile in terms of the procedural overhead cost. Transparency as an instrumental requirement was concluded to be unassailable to the extent that it serves its underlying objectives.

4.6 Summary and conclusions

4.6.1 Objectives of this chapter

The objective of this chapter was to investigate the constitutional requirements for the procurement system to be fair, equitable, transparent, competitive and cost effective. This was approached by examining each of the requirements with specific focus on their definitional meanings, their meanings in context, and perspectives of their application in the system and aspects of the interplay between the requirements.

The investigation paid particular attention to the requirement of cost-effectiveness and the application of this requirement to the system and its application in the context of the other requirements. Conclusions drawn from the previous chapter regarding the wider constitutional requirements of the procurement system were incorporated in the investigation to develop a holistic understanding of the requirements.

To limit repetition of the summaries presented at the end of the sections dealing with individual requirements, the conclusions below focus only on the relevant themes drawn from the individual investigations.

4.6.2 Overall conclusions

An organ of state - to which *Section 217* applies - is required to contract within a system, which is fair, equitable, transparent, competitive and cost effective.

The requirement to be cost effective was examined from a definitional standpoint as well as from technical applications of the concept to establish its meaning in the general public procurement context. The definition of the term in the public

procurement context was concluded broadly to mean "effective or productive in relation to its cost".[309] The broad definition was summarised in terms of a proposed model relating to a course of action that incorporates endogenous and exogenous means for determining the comparative standard.

A course of action is cost effective if it is:[310]

(a) worthwhile in terms of its cost and the value of its outcomes; and/or
(b) the optimal choice from available courses of action in terms of their cost-intended outcome relationships.

The practical relevance of retrospective determinations of cost-effectiveness was concluded to be limited to the improvement of regulatory design and practice.[311] Decisions determining cost-effective courses of action prospectively were established to rest on the same principles with additional considerations of risk. In practice, and accepted as a basis for legal argument, actual cost-effectiveness need not be determined, and indicators of future costs and quality of outcomes are sufficient to found legal argument regarding the cost-effectiveness of administrative decisions taken to select a course of action.[312]

In a prospective sense, the cost-effectiveness relates to the basis for the decision to adopt a course of action and the following model was proposed:[313]

The decision to select a course of action can be said to be cost effective if:

(a) the intended outcomes of the course of action and criteria for its achievement are defined and relevant risks to its achievement are identified; and
(b) a projection of the costs of the course of action is made and relevant risks to its variation are identified; and

309 Par 4.1.7.
310 Par 4.1.3.7.
311 Par 4.1.3.4.
312 Par 4.1.3.4.
313 Par 4.1.7.

(c) taking into account the relevant risks, the course of action is:

i. worthwhile in terms of its projected cost and the value of its intended outcome; and/or

ii. the optimal choice from available courses of action in terms of their projected cost-intended outcome relationships.

The concept of cost-effectiveness was concluded not to be limited to any particular span or depth in its application to a system of public procurement. Cost-effectiveness could thus be applied at various levels, having application as a requirement of the procedure, the transaction or at the macro or system-level.[314]

Using the arguments regarding the span, depth and completeness of the system, a model for a cost effective system was proposed, with regard for the meta-nature of the system as follows:[315]

> A system is cost effective if the rules and principles of the system have the effect of compelling the selection of cost-effective courses of action with regard to the intended balance of outcomes of the system.

The requirement of the system to be cost effective in terms of the transactional outcomes, commonly expressed as the goal of value for money, was concluded to be one of the outcomes that could be considered in the determination of macro-level cost-effectiveness. Macro-level cost-effectiveness was concluded not to impute any requirement as to the relative merits, or balance, of any macro-level outcomes, only and in terms of the model above, to require that the application of resources toward the achievement of the balance of outcomes is worthwhile and optimal.

The system requirements for cost-effectiveness were analysed with respect to the completeness in terms of both the *regulatory system* and the *transactional system*. It was concluded that the *regulatory system* was required to be complete with regard to

314 Par 4.1.4.1.
315 Par 4.1.4.3.

regulatory measures directed at macro-level outcomes but that discretion should be permitted for cost-effectiveness with regard to transactional outcomes. The assertion that the requirement to be cost effective informs the principles for administrative action provides a means for safeguarding the requirement in discretionary decision-making, although retrospectively. Discretion in the execution of the *transactional system* was also concluded to be inevitable for the cost-effectiveness of decisions made in execution and similarly safeguarded by the requirements of administrative law.

The requirement for a competitive system was concluded to support the objective of transactional cost-effectiveness although it is neither a necessary nor a sufficient requirement. The requirement for competitiveness was also observed to support wider objectives of the procurement process such as supporting market economy principles, fairness, transparency, open participation and public confidence in the procurement system. In circumstances where transactional cost-effectiveness and competitiveness may oppose each other, macro-level cost-effectiveness, appears to decide the balance in terms of the outcomes sought by competition. In this respect, processes of a less competitive nature can be permitted by reducing the level of participation in the competition to the point where it is macro cost effective.[316]

The requirement of fairness in the procurement system has two aspects: the vertical aspect of fairness - that between the public body and other parties in general - and the horizontal aspect of fairness being the fairness in the public body's treatment of parties as between the parties. Public procurement decisions have been shown to constitute administrative action by its nature and the right to procedural fairness in section 33 of the *Constitution* gives further content to the requirement of fairness. Substantive fairness in decision-making during the procurement process also finds application within the requirement of fairness but through the analysis of judicial interpretations, this is to be limited so as not to disturb the integrity of procedural fairness.[317]

316 Par 4.2.6.
317 Par 4.3.5

In certain circumstances, upholding fairness in the process may be at odds with the achievement of transactional cost-effectiveness. Fairness was shown to be of importance to the objective of public trust in the system of procurement and therefore should not be compromised for a short-term gain in the cost-effectiveness of a single transaction. This was argued to be an application of macro-level cost-effectiveness in terms of its cost - in terms of the diminution of transactional cost-effectiveness - and the macro-outcome of public trust. The balance established through case law regarding substantive fairness relating to the procedure, was that it must be limited to decisions that do not materially compromise the purpose of the procedure.[318]

Transactional cost-effectiveness was concluded to be an outcome susceptible to being diminished by the pursuit of equitable outcomes. The requirement for macro-level cost-effectiveness in the system was argued to incorporate the requirement for equitableness with the proviso that the direction of resources toward their achievement is optimal and worthwhile.[319]

Transparency was concluded to support the achievement of all other requirements of the system by enabling enquiry into compliance with the requirements. A possible exception noted to this conclusion is the cost associated with measures to achieve transparency and the consequent effect on the achievement of procedural cost-effectiveness. Cost-effectiveness at the macro-level requires that the value of the outcomes sought by transparency is worthwhile in terms of the procedural overhead costs and requires that the means to achieve such outcomes are optimal. Transparency as an instrumental requirement was concluded to be unassailable to the extent it serves its underlying objectives in the balance of constitutional procurement system requirements.[320]

In conclusion, through the comprehensive analysis of the meaning of cost effective as a constitutional requirement of the procurement system, the meaning was found to

318 Par 4.3.5
319 Par 4.4.3
320 Par 4.5.4.

have application in a wider sense than inferred from its common usage. The conceptual elevation of cost effective to apply at various levels in the system was found to accord with its application in programme measurement and analysis, literary opinion and in case law as well as in the general principles applied to the design of procurement regulation. The application of different views of cost-effectiveness provides a different vantage point as a requirement for regulatory design. The models proposed for cost-effective courses of action, decisions regarding the choice of courses of action and for macro-level achievement of system outcomes provide basic criteria for determining constitutional compliance of the *regulatory and transactional* systems with the requirement of cost-effectiveness as well as decisions taken in their execution. The concepts, views, conclusions and proposed models for the requirement of the system to be cost effective in balance with the other requirements of the system are taken forward to the second part of the study examining the cost-effectiveness of the legislative implementation of the *regulatory systems* in the procurement phase.

PART 2

5 Public tender decision-making processes

5.1 Introduction

The introductory chapter to this part of the study examines a central aspect of the public procurement life cycle: that of the decision-making processes in the procurement phase. The chapter introduces the different procedural modes adopted in the procurement phase but concentrates on the decision-making processes in the most common and default mode, the tender or auction procedure.[1] The objective is to ascertain the functional components of these decision-making processes to establish a referential framework for the analysis of the effects of procurement regulation.[2] The chapter concludes with a general analysis of the role of the functional evaluation components in cost-effective decision-making in terms of the models developed in the previous chapter.

5.2 Phased decision-making

The public procurement processes for evaluation are effectively decision-making processes with the objective of selecting a supplier with whom the public body will contract, or in other words finding the solution to the procurement problem.[3] A phased decomposition of a generic decision-making process is commonly seen as consisting of: (a) identification of the problem, (b) information-gathering, (c) production of possible solutions, (d) evaluation of solutions and (e) selection of a solution.[4]

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1 The procedural mode adopted for the *transaction system* is a significant decision for cost-effectiveness in the life-cycle of a procurement transaction. See par 4.1.6.2.1. The regulation of this aspect is equally important, although for the reasons set out later in par 5.3.5.4, the study focuses on the auction procedure.

2 While the framework concentrates on the functional components of the *transactional system*, the framework is used as the basis for the analysis of *regulatory systems*. The ensuing analyses examine the way regulation mandates, compels or prevents the functional outcomes identified in the framework.

3 Csáki *Decision Making Practice* 881.

4 See for example, Witte, Joost and Thimm *Complex Decision-making Processes* 164. The decomposition can be less detailed by aggregating phases but this is chosen as an appropriate level of detail for the purposes of this study. This is a subset of the broader problem-solving phases,

These decision-making phases can be understood in the procurement context as being:

(a) Problem identification. This is the expression of the procurement problem in terms of the originating need forming part of the *planning phase* of the procurement life cycle.[5]
(b) Information-gathering. This relates to the gathering of information relating to the problem and the availability of possible solutions. It may include interaction, formal or informal, with the market as part of the *planning phase* of the procurement life cycle
(c) Production of possible solutions. This phase involves determining the requirements, attributes and criteria for solutions being sought and includes the solicitation of solutions from the market. In general decision-making terms, this may involve an iterative process of adapting criteria to potential solutions and *vice versa*. This would formally be undertaken in the *procurement phase*.
(d) Evaluation of solutions. In this phase, possible solutions are examined and assessed to establish their ability to solve the problem and would be undertaken as part of the *procurement phase*.
(e) Selection of solution. This is the phase in which a solution is selected and adopted as the solution to the problem. In the procurement life cycle, this would consist of the final activities of the *procurement phase*, including the conclusion of the contract.

5.3 Procurement phase procedures

Procedurally the procurement decision-making process can adopt different modes: competitive, non-competitive or a hybrid of the two. Generally, these are analysed in

which would typically include the implementation or performance of the selected solution as the final of sixth phase. See also Csáki *Decision Making Practice* 878. Csáki deconstructs the phases as "identifying the problem, defining alternatives, choosing from alternatives, and executing the solution".

5 This excludes aspects of the problem that may exist outside the procurement scope. See pars 2.1.3 and 4.1.3.2.

terms of procedural models based on auctions, negotiations or procedures embodying the characteristics of both.[6]

5.3.1 Auction procedures

Auctions are explained generally as an "institution with an explicit set of rules determining resource allocation and prices on the basis of bids from the market participants".[7] In general, auctions are undertaken to solve the problem of informational asymmetry between the organiser and market participants in obtaining the best deal for the organiser.[8] In public procurement, the mechanisms of auction-based procedures not only seek to address this informational problem but are also a means to satisfy the requirements of competition: open and equal participation, fairness and accountability.[9]

A fundamental theoretical premise on which the economic efficiency of an auction is founded is the organiser's ability to commit to a set of policies governing the procedure to elicit participation and the basis on which the auction is decided.[10] The organiser's commitment to making an award of business in terms of such policies justifies the cost of participation and induces participants to make their best offer.[11]

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6 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 459-461. The authors base the methods of procurement on national and international systems, describing them as formal to informal systems. See also Lalive, Schmutzler and Zulehner *Auctions vs negotiations* 2. An example of a hybrid procedure consisting of elements of both auctions and negotiations would be competitive dialogue procedures.

7 McAfee and McMillan *Auctions and Bidding* 701. Krishna *Auction Theory* 2.Competitive procurement procedures are nothing other than an auction procedure.

8 The alleviation of this problem is in the interests of achieving transactional cost-effectiveness.

9 Bajari, MacMillan and Tadelis *Auctions Versus Negotiations* 373. The authors use the example of the Federal Acquisition Regulation but the justification for auctions procedures can be extended to general jurisdictional objectives.

10 McAfee and McMillan *Auctions and Bidding* 703. In theory, bidders will not bid in the same way if the organiser may renege on the commitment.

11 McAfee and McMillan *Auctions and Bidding* 703. See also Costantino *et al Balancing Additional Costs* 192.

Of the basic auction procedures,[12] the first-bid sealed-bid auction type is the most commonly used procedure for public procurement although variants of open ascending-bid and dynamic auctions are also used, for example reverse auctions.[13] The basic auction procedures exhibit different properties of economic efficiency and cost minimisation[14] under varying conditions of informational asymmetries, bidder asymmetries and attitudes toward risk.[15] The susceptibility of basic auction procedures to conditions of risk, collusion and other inefficiencies from the organiser's point of view have theoretical responses and trade-offs in variations of the basic auction procedures.[16] An in depth treatment of this topic, while relevant to the regulatory design governing procurement auction procedures and cost-effectiveness is beyond the scope of this study.[17] For the purposes of this study, the discussion will be limited to the two most common basic auction types, sealed-bid first-bid and open ascending-bid auctions.

Public procurement auctions are generally not limited to price as the sole determinant of the merit of an offer. Quality and other preferences of the public body may constitute merit and therefore require a multi-dimensional assessment to determine the merits of

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12 Open ascending-bid (bidders successively announce lower (higher) prices until one bid remains); open descending-bid (auctioneer announces descending (ascending) prices until one is accepted); first-price sealed bid (bidders submit sealed bids of which the best is accepted); second-price sealed-bid (the best is accepted, but the price of the second best is paid). McAfee and McMillan *Auctions and Bidding* 702. See Carpineti, Piga and Zanza *The variety of procurement practice* 20. The authors set out variations of the auction process as used in various jurisdictions.

13 Generally termed electronic reverse auctions, to enable the instant announcement of bids and the calculation of the evaluation method. While the auction type is termed an open ascending-bid, in procurement auctions this would generally involve descending price bids. In multi-attribute determinations of merit, descending pricing would be regarded as a component of ascending merit and therefore the term open ascending-bid is retained in this study.

14 For example, see Albano *et al Information and Competitive Tendering* 155.

15 McAfee and McMillan *Auctions and Bidding* 704. Albano *et al Information and Competitive Tendering* 156. The authors propose specific components of common information that would indicate the use of specific formats.

16 For example, the benchmark (or reserve price) variation, or *ex post* valuation mechanisms (cost-plus bidding). McAfee and McMillan *Auctions and Bidding* 717. Albano *et al Information and Competitive Tendering* 143-145 Dynamic auction types are also susceptible to collusive practices and other strategies by bidders reducing optimality for the organiser. An in depth treatment of this topic is beyond the scope of this study. While relevant to the regulatory design governing procurement auction procedures and cost-effectiveness, for example, how variations of the auction types affect the solicitation of optimal solutions, only high-level observations that may have consequences for tender decision-making will be made.

17 For example, variations of the auction types may affect the solicitation and production of optimal solutions.

the offers.[18] The method for determining merit must therefore form part of the commitment of the public body in the procedure.[19]

The commitment to contract with the most meritorious bidder, as an entity unknown to the organiser prior to making the commitment, is not one that the organiser of a public procurement auction is generally able to, or would want to, make.[20] A public procurement tender therefore usually takes the form of an invitation to make an offer. The commitment made by the organiser to conduct a public procurement tender in terms of the advertised auction policies arises from administrative law,[21] preserving elements of the economic dynamics of the auction construct, but may include specific conditions under which the organiser's commitment to award the tender may be not be fulfilled.[22] For example, an advertised reserve price set by the organiser equates to a price above which the organiser is not prepared to pay.[23]

Public procurement tenders therefore have the characteristics of commitment to the criteria in terms of which merit is determined and, in principle, the commitment to award the business to the most meritorious tender. The implications for the use of competitive auctions for the public procurement decision-making process is that the procedure is non-recursive; the procedure and the parameters for decision-making during the procedure are pre-determined and published, including the criteria for determining merit, and the extent of the commitment of the public body to making the award to the most meritorious tender.

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18 The complexity of a multi-attribute assessment does not present a problem for a sealed bid type of auction. In dynamic auctions, the assessment would have to be performed in real time and therefore would rely on an electronic assessment. For an example of such a method, see Kameshwaran *et al Multiattribute electronic procurement* 521.

19 This is relevant both in the context of bidder asymmetries from the organiser's point of view, where horizontal preferences may be accorded merit. McAfee and McMillan *Auctions and Bidding* 707.

20 See for example Christie *Law of Contract in South Africa* 42. Contracting with a party unknown prior to a procurement auction is a risk that the organiser would not necessarily countenance in general. For simple commodity procurement auctions, this should not present a problem.

21 For example, the legitimate expectation of tenderers that their tenders will be considered in the manner advertised.

22 The commitment to the expenditure of public funds cannot be made on the same basis as a commercial auction contract.

23 Costantino *et al Balancing Additional Costs* 192. Dimitri *Best Value for Money* 168.

5.3.2 Negotiation procedures

Negotiated procedures, whether of a partially competitive nature or not, differ from auction procedures by the absence of commitment from the decision-maker to be bound to making an award as well as the absence of predetermined criteria for evaluating offers made as part of the process.

Negotiated procedures address the informational asymmetry problem directly by relaxing the requirement for direct and iterative interaction with prospective market participants. The criteria for the solution may thus be adapted to accommodate what can be offered to find the optimal solution.[24] While negotiation may represent an effective procurement procedure, especially for complex procurements; the inherent risks of compromise to the general objectives of public procurement such as tailoring of solutions, bias, lack of transparency, undue influence and the lack of open competition, it is generally reserved for exceptional circumstances that justify its use.[25]

5.3.3 Hybrid procedures

Hybrid procedures accommodate the requirement for competition in negotiated procedures to an extent meeting the transparency and participation requirements of public procurement while overcoming some of the problems associated with auction procedures, such as inadequate information, bidder collusion, high transactional costs and the risks of *ex post* contract modification.[26] Hybrid procedures may take the form of a negotiation phase preceded by a competitive phase[27] or vice versa.[28] The competitive dialogue procedure will be used as an example to illustrate features of a hybrid procedure in this study.

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24 Bajari, MacMillan and Tadelis *Auctions Versus Negotiations* 375-376.
25 Tadelis *Public Procurement Design* 299, 301.
26 Lalive, Schmutzler and Zulehner *Auctions vs negotiations in public procurement* 2.
27 For example, the competitive procedure with negotiation in Reg 29 of the *UK Regulations,* par 7.5. See also Article 19 and 49 of the *Model Law.*
28 For example, the competitive dialogue procedure in Reg 30 of the *UK Regulations,* par 7.5.

5.3.4 Procedural implications for decision-making phases in tender processes

5.3.4.1 Information-gathering

The procedural implications for the information-gathering phase depend on the information held by, or available to, the procuring body. A critical factor for the decision regarding the choice of procedure is how information is to be obtained.[29]

Information regarding the market, for example the level of competition, will inform the decision regarding procedure. Information relating to potential solutions must also be acquired to establish and inform the specification and attributes of desired solutions and potentially procedures to acquire information. Information-gathering can be pursued in the market as part of formal procedures, such as a request for information. These procedures can be regarded as non-competitive and do not represent a part of the actual procurement process, although may contain embedded entry rights to a subsequent procedure.[30]

Procedures for information-gathering that involve external parties may take the form of formally procuring the services of an external party. If this is the case, such a 'procurement within a procurement' can be regarded as a separate transaction, although an implication is generally that the party engaged to perform information-gathering is excluded from competing for the business.

The processes undertaken to gather information have an associated cost. From a decision-making perspective, this is a manifestation of the conflict of resources in

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29 Albano *et al Information and Competitive Tendering* 143-145. The optimal procedure is related to the common uncertainty (favouring dynamic procedures) or that related to private component of information (favouring sealed bid procedures).

30 De la Harpe *Public Procurement Law* 135. De la Harpe describes the use of two-stage bidding procedures as provided for in the *Model Law* to be used for information-gathering where negotiated procedures are unavailable in the case of complex procurements. Ye *Indicative Bidding* 202. Two-stage auctions are not discussed at any depth in this study, but the theoretical conclusions regarding the optimality of two-stage auction - where entry is costly - could be relevant in the procedural implications for cost-effectiveness.

determining the appropriate level of cost in reducing uncertainty.[31] Generally, a tender procedure will be subject to restrictions and formalities governing how the information is gathered. By the nature of negotiated procedures, information can be gathered by direct interaction during the negotiation with fewer restrictions on how it is obtained.

5.3.4.2 Production of possible solutions

The criteria for solutions sought through a tender process will be required to inform the tailoring of solutions to meet the need and to be used as criteria for evaluation. The non-recursive characteristic of decision-making in tender procedures means that the decisions regarding the criteria cannot be revisited after the solicitation of solutions and that the solutions produced through the tender process must be evaluated in terms of the same criteria. Iterative procedures, such as the open ascending-bid procedure, permit the successive production of solutions but generally not in terms of changed criteria.[32]

This feature of the tender process distinguishes it from negotiation procedures. The negotiation procedure aligns with descriptive models of decision-making in that solutions are iteratively produced by both changing the criteria for the solution and the solutions during the procedure to arrive at an optimal set of possible solutions and criteria.[33] Hybrid procedures - such as competitive dialogue procedures - would typically include a negotiation procedure to establish the criteria for the solution

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31 Csáki *Decision Making Practice* 879. Erridge, Fee and McIlroy *Assessment of Competitive Tendering* 37. "… the better the quality of the information provided to and required of suppliers …, the less the likelihood of bounded rationality resulting in an unsatisfactory purchase. A poorly specified product, vague selection criteria, unclear delivery requirements or inadequate volume information will distort the calculations of potential suppliers, resulting in bids at a lower than optimum price. Lack of information on demand for specified products, or provision of inaccurate information also results in increased costs. Where no information is provided, or its accuracy is doubted by suppliers, a risk premium may be built into the price."

32 The criteria may be changed between iterations, for example in a best and final offer process, but cannot be changed after the receipt of tenders or during the decision-making process of evaluation.

33 Csáki *Decision Making Practice* 883. Descriptive models of decision-making typically search for alternatives by iteratively modifying these together with the "goals, objectives and value-relations according to options available". In this respect, negotiation procedures represent the way in which decision-making occurs in the absence of other constraints.

through such an iterative process, after which a procedure with the characteristics of an auction would be conducted to produce the final set of possible solutions.

The solicitation process in all procedures should produce a set of possible solutions that is as wide as practicable. The conflict of resources from a decision-making point of view, in balancing the gains of increasing the set of possible solutions versus the effort of solicitation, evaluation and selection may determine the wideness of the solicitation in practice.[34] The effort involved in conducting negotiation procedures will places a greater constraint on the number of parties from whom solutions are sought. Hence, in general, practical steps may be considered to restrict the number of solutions sought where the preparation of offers is costly or the evaluation of solutions will require significant effort or cost.

5.3.4.3 Evaluation of possible solutions

The produced solutions in auction procedures may be evaluated in a discrete phase, subsequent to the production of solutions in the case of first-bid sealed-bid procedures, or interspersed with the production of solutions in the case of open ascending-bid procedures.[35] In auction procedures with a single dimension of variability in the offers, most commonly price, the commitment would be to select the lowest-priced solution. In auctions involving multiple dimensions of variability in the offers, the commitment would be to select the most meritorious solution where merit is determined as a function of the multiple dimensions.[36]

The iterative nature of negotiation procedures implies that not only are solutions adapted between iterations of evaluation, but the evaluation criteria may also be adapted between iterations of evaluation.

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[34] McAfee and McMillan *Auctions and Bidding* 711. The theoretical model of auctions shows that as the number of bidders increases so the best offer will improve. However, if the organiser incurs cost in evaluating or bidders incur cost in preparing offers this does not necessarily hold. Csáki *Decision Making Practice* 879.

[35] Volk *Principles-oriented approach* 135-137 Owing to the dynamic nature of reverse auctions, the evaluation of non-pricing factors must either be performed prior to the dynamic part of the auction or non-pricing factors must be capable of being reduced to price.

[36] The term 'merit' is generally used in this study to denote the basis for decisions that involve the trade-offs between risk, goals and stakeholder objectives. Csáki *Decision Making Practice* 879.

The evaluation of possible solutions in hybrid procedures, for example in competitive dialogue procedures, may include the iterative evaluation and modification of solutions and criteria in the negotiation phase as well as a discrete evaluation process with fixed criteria in a final competitive phase.

5.3.4.4 Selection of a solution

The selection of a solution is performed using the output of the phase of evaluating solutions. The *selection process* consists of formally choosing and adopting a solution for execution.

Procedurally the selection decision would be triggered by events that are defined by the procedure employed. Selection in sealed-bid procedures would be conducted on conclusion of the evaluation process. In iterative open ascending-bid auction procedures, the selection of the solution would be made when a defined terminative condition for iteration is met.[37]

Negotiated procedures terminate on mutual acceptance of the terms of the offered solution. Hybrid procedures would generally commence with a negotiated phase to fix criteria and then employ a competitive phase, which would terminate under conditions similar to those employed in sealed-bid or open-ascending procedures, and possibly after mutual acceptance of the terms negotiated with the selected party.

5.3.5 Summary and conclusions

Distinguishing characteristics of three public procurement procedural modes were investigated in the context of their implications for decision-making procedures: auction or tender procedures, negotiations and hybrid procedures.

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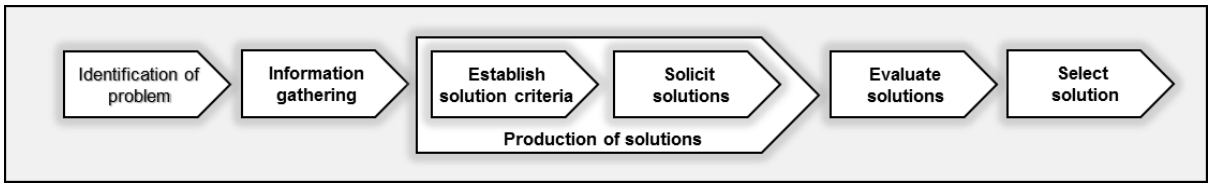
37 De la Harpe *Electronic Reverse Auctions* 24. Usually time-based, either a closing time or a defined period after which no new bids have been received.

5.3.5.1 Public tender or auction procedures

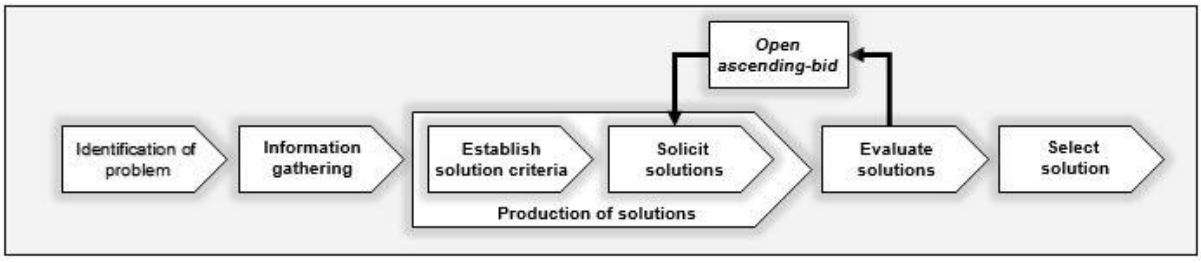
The public tender construct can be fundamentally distinguished by its non-recursive decision-making procedure and the commitment of the public body to the policies governing the procedures and decision-making criteria. Information-gathering is a discrete precursory phase of decision-making that is constrained in terms of market interaction, but may take place in terms of formal procedures.[38] Procedures and criteria for decision-making in the later phases are determined prior to the solicitation of solutions, and the evaluation and selection of solutions are executed in terms of these specifications. The sequential non-iterative nature of the open tender procedure is shown in *Figure 5: Open tender procedure* below.

Figure 5: Open tender procedure



The iterative nature of solution solicitation of reverse auction procedures is shown in *Figure 6: Reverse auction procedure*. While solutions may be iteratively sought, the criteria remain predetermined.

Figure 6: Reverse auction procedure



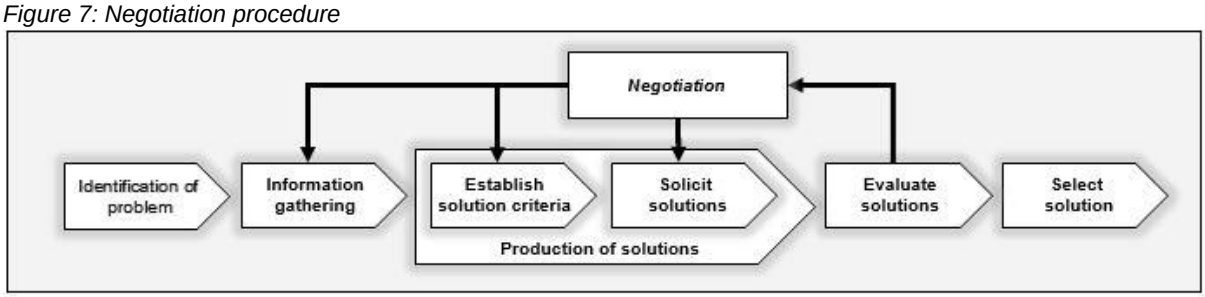
5.3.5.2 Negotiation procedures

Negotiated procedures align with descriptive models of decision-making by iteratively gathering information and establishing criteria in conjunction with the solicitation and

[38] For example, two-stage bidding procedures. See footnote 78 below.

evaluation of solutions as shown in *Figure 7: Negotiation procedure* below. The conclusion of the evaluation and solution selection phases are functions of mutual agreement and not usually a function of procedure. In general, there would be no commitment to a terminative condition for conclusion and award.

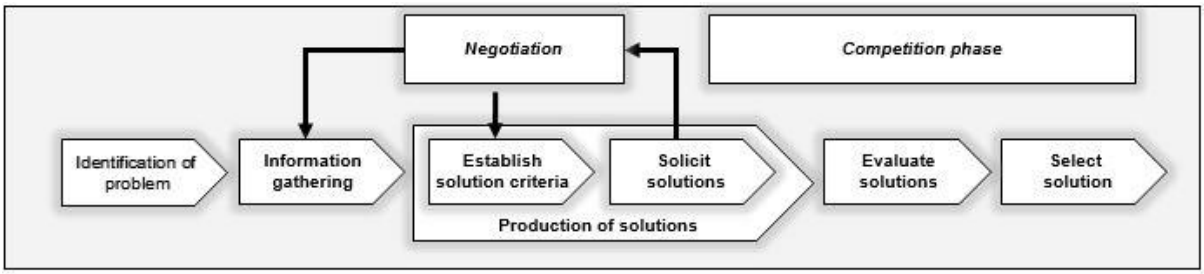
Figure 7: Negotiation procedure



5.3.5.3 Hybrid procedures

Hybrid procedures may be difficult to categorise specifically, but were concluded to possess characteristics of both auction and negotiated decision-making procedures. *Figure 8: Competitive dialogue procedure* below depicts a typical hybrid procedure.[39]

Figure 8: Competitive dialogue procedure



5.3.5.4 Conclusions

Tender procedures cannot be regarded as producing optimal results, *per* se, and factors such as the complexity of the procurement, conditions in the market and information available to the public body may render the procedure inherently economically inefficient. The decision to select a procurement procedure other than a tender procedure is thus relevant to the achievement of cost-effectiveness. For the

[39] This is based on the example of the competitive dialogue procedure in Reg 30 of the *UK Regulations.*

reasons set out in the previous chapter, save for the presence of particular circumstances, procedures are expected, and required in the South Africa regime, to be of a competitive nature. The study therefore narrows its focus on the public tender procedures and the effects of regulatory mechanisms on cost-effective decision-making processes within this procedure. Negotiated procedures, and variants of such, will be referenced only in terms of the scope and conditions under which they are permitted but details of procedures that may be employed are not pursued further in this study.[40]

5.4 Public tender decision-making processes

Conventionally, the term "evaluation" is confined to the assessment of the relative merits of tenders to determine the basis for the award of the contract.[41] This study takes a broad view of the term evaluation process to include all decision-making from the appraisal of potential tenderers and tenders through to the process of selecting a tender. In some cases, evaluation process involves not selecting any tender for the award.

As concluded in the previous paragraphs, the evaluation process in tender procedures must be conducted in accordance with procedures and criteria decided prior to the solicitation of tenders. The initial decision-making that takes place as part of the specification of a tender defining the procedures and criteria for later decision-making could therefore be argued to be of greater relevance to the outcomes than the execution of the evaluation process itself. The study therefore focuses on the regulatory stipulations and constraints imposed on the specification of decision-making procedures, criteria and methods.

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40 The regulatory framework for negotiated and hybrid procedures and the decision-making regarding the choice of procedure would be a worthy avenue for further study in terms of their implementation of the cost-effectiveness requirement. Given their limited regulatory attention in the South African framework, this is excluded from the scope. For general applications, findings, limitations and implications, see Tadelis *Public Procurement Design,* OECD *Principles for Integrity* and Krüger *Ban-on-negotiations*.

41 Arrowsmith, Linarelli and Wallace *Regulating Public* Procurement 673. In this narrow sense, 'evaluation' is restricted to the determination of the "the actual costs and relative merits of the offers…to determine which offer is to be accepted for contract award".

5.4.1 Constituent decision-making processes in tender evaluation procedures

Decision-making selection tasks are commonly framed as either decisions choosing options from a given set or decisions rejecting options from the set.[42] Normatively, the application of these approaches can be regarded as having equivalent results, but descriptively the weighing of negative or positive attributes of solutions provide good reasons for rejecting or choosing respectively. Therefore, these frames of decision-making are generally treated separately.[43]

The predetermination, and publication, of how evaluation decision-making will be conducted also distinguishes these frames of decision-making in tender procedures. Prior to the existence of a set of options, it is possible to determine characteristics of options that would be rejected were these to be in the set of options. The publication of these characteristics effectively filters the universe of options by rejecting options, either through the decisions of would-be participants not to participate or by the decision-making of the public body excluding participants after entry. In either case, the decision to exclude is made on the presence of negative attributes.[44]

Under the presumption that the optimal solution must be selected, it is not rationally possible to select the optimal solution from a set without having examined all solutions. Neither is it possible to do so by merely examining the achievement of individual solutions with regard to absolute criteria. The implication is that the set of options must be established and bounded, and further that a process of relative examination exhausting the set must have been undertaken before the process of selection can be concluded. The process of examination should be constructively directed toward the selection by providing a relative ordering of options in terms of their positive attributes.

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42 Soman *Framing* 393.
43 Soman *Framing* 394.
44 They may be phrased as the absence of positive attributes.

In practice, procedures entailing a combination of these approaches are used in tender decision-making procedures and generally are referred to as tasks of filtering[45] and selection:[46]

(a) Filtering. Filtering is the process of excluding solutions from further consideration. Csáki[47] separates the filtering "components of judgement" into those based on formal adequacy considerations, aspects of the suitability of the tenderer and aspects of the solution related to meeting the technical specifications.
(b) Selection. The examination and ordering component evaluates the merits of solutions establishing an ordering of solutions by their relative merit.[48] After such ordering, the selection can be informed by such ordering. The processes of ordering and selection are separated in this study for the reason that the actual selection may be based on factors over and above the ranking produced by the ordering process and may include the decision not to make a selection at all.[49]

In the broad context of the public tender evaluation process, these decision-making sub-processes can be identified in the processes described by Arrowsmith, Linarelli and Wallace:[50] sub-processes determining who may participate, sub-processes determining the compliance of tenderers and tenders, sub-processes that determine relative merit and the sub-process that identifies a tender for the award.

45 De Boer, Labro and Morlacci *Review of methods supporting supplier selection* 77.
46 De Boer, Labro and Morlacci *Review of methods supporting supplier selection* 77.
47 Csáki and Adam *DSS requirements* 455. The separation is based on different regulatory treatment of the criteria under which a tender or tenderer may be rejected.
48 De Boer, Labro and Morlacci *Review of methods supporting supplier selection* 77. This is also referred to as a *ranking process*. Ranking is commonly conflated with the process of selection, which assumes the ranking will produce the choice. This is separated in this study to accommodate the potential of a choice that is not based on the *ranking process* or not to make a choice at all.
49 Tunca, Wu and Zhong *Price, Quality and Incumbency* 1-2. This is termed an open-ended award structure in which the organiser does not commit to awarding to the ranking outcome. While this is observed for general, or non-public, procurement, administrative fairness would require pre-determination of the criteria that would be used in selection.
50 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* Chapters 10 and 11. The breakdown of sub-processes above broadly corresponds to the processes or steps taken in the general evaluation of prospective tenderers, tenderers and tenders as set out by Arrowsmith, Linarelli and Wallace.

As the product of this analysis is to determine a general scheme for the cross-jurisdictional comparative analysis, as far as possible, neutral nomenclature is proposed for the classification of the sub-processes.[51] The naming of the sub-processes and elements of the sub-processes should therefore not be interpreted to represent processes, criteria or attributes classified by the same name in any particular jurisdiction.

The process of decision-making in the tender evaluation procedure is thus broken down into five sub-processes to structure the analysis:

(a) Qualification process. The filtering process determining whether a tenderer qualifies to take part in subsequent steps of the tender process.[52] (Hereafter "qualification process".)
(b) Compliance process. The filtering process determining whether a tender meets "all material aspects of the tender invitation" and thereby the eligibility of the tender for further consideration.[53] (Hereafter "compliance process".)
(c) Shortlisting process. The filtering process limiting the participation in the subsequent processes to fewer tenderers or tenders.[54] (Hereafter "shortlisting process".)[55]

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51 This is in order for the analysis not to be constrained by the rules associated with terms that have specific meanings in procurement systems in particular jurisdictions.

52 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 585. Described as the process deciding whether a tenderer meets minimum standards or conditions for participation.

53 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 650. The term "compliance" is noted as an equivalent to the process of determining a tender's responsiveness. The term 'compliance' is used in this study for reasons of neutrality in this conceptual sub-process discussion to avoid specific jurisdictional interpretations of responsiveness.

54 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 645-647. The *shortlisting process* is described as "reducing the number of bidders". However, the factors considered in this process may include those attaching to the tender itself.

55 The *shortlisting process* is included to present a complete picture of possible decision-making processes, although its application and permissibility in general is somewhat limited. Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 645. The authors comment on a *shortlisting process* not enjoying universal permissibility. Whether a *shortlisting process* is performed based on attributes of the tenderer prior to the call for tenders or after the call for tenders, it excludes tenderers or tenders prior to a full evaluation being performed

(d) Ranking process. The process of examining, assessing and ordering tenders in terms of their relative merit.[56] (Hereafter "ranking process".)

(e) Selection process. The decision-making process selecting a tender for award.[57] (Hereafter "selection process".)

The list above does not make an assertion as to the order in which the sub-processes may be undertaken or whether they are undertaken once, multiple times, or at all, during the procurement procedure.[58] The inclusion, exclusion, or order of sub-process execution may have implications for the design of other sub-processes. They must work in concert to achieve the desired result.[59]

The decision-making sub-processes may variously consider factors that relate to attributes of a tender in the sense of the legal offer that is being made relating to the subject matter of the intended transaction and factors relating to attributes of the tenderer.[60] The distinction between these two categories of factors has legal significance.[61] Some sub-processes, by their nature, will be restricted to considering one of the categories, for example, a pre-qualification process can only assess the attributes of tenderers as solutions have not yet been solicited. As this chapter is primarily concerned with the conceptual position, the legal significance of the

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56 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 673. This is referred to as the "evaluation process" in the narrow sense. See also at page 702. The process of ranking is a preparatory step informing the selection process and is not performed in the abstract.

57 The award process is considered separate from the selection, involving public notification and the conclusion of other formalities to award the business. The process of notification and contract conclusion are beyond the scope of this study. The *selection process* may also include the possibility of not making a selection or award. Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 743. The procedure for improving the position after selection and prior to contract through negotiation is only considered in terms of its permissibility and not dealt with as a decision-making process.

58 Certain assumptions can be made, for example, that the entire process will terminate with a selection process, or an iteration of the selection process.

59 For example, the absence of positive attributes of a tender may be required in a ranking sub-process if these are not considered in a filtering sub-process.

60 The tenderer is the legal person or persons submitting the tender. This will be taken to include attributes that may attach not only to the tenderer, but also to those of its partners, subcontractors or associates, who will be responsible for aspects of delivery or participate in the accountability for the ensuing contract.

61 For example in the *EU* and in the *US*. See footnote 117 in this chapter.

separation will be considered in later chapters in the context of specific regulatory frameworks.

5.4.2 Terminology in the evaluation sub-processes

The term criterion in the sense of "a standard on which a judgment or decision may be based"[62] may not distinguish the granularity of concepts sufficiently in the operation of the sub-processes. The following terminology is proposed:

(a) The term "attribute" will be used in the context of "an inherent characteristic" or quality, feature, characteristic or property that is possessed by a tenderer or tender.[63]
(b) A "metric" will be used to describe a type of measurement that is used to gauge the attribute(s) of a tender or tenderer in a quantifiable way.[64] A criterion would be defined with regard to an attribute or to a metric.[65]
(c) Where the consideration of more than one criterion is involved, the term "method" or "scoring rule" will be used to describe the process of how criteria are considered together to prepare for, or arrive at, a decision.[66]
(d) The term "weighting" will be used to denote the relative importance accorded to a criterion amongst other criteria by a method.[67]

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62 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary.
63 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary. For example, that a tenderer is tax compliant or possesses a tax clearance certificate.
64 Merriam-Webster 2017 http://www.merriam-webster.com/dictionary. For example, a tenderer's experience measured by the number of previous projects undertaken.
65 Using the examples in the preceding footnotes, the criterion that a tenderer is tax-compliant could be judged by the attribute that it possesses a tax-clearance certificate. The criterion that a tenderer has sufficient project experience may be determined by whether the metric of the number of previous projects exceeds, for example, two.
66 This is not constrained to mathematical aggregation techniques. It could involve, for example a procedure that sequentially tests conditions. See the example at the end of par 5.4.4.2 and associated footnote.
67 This may be expressed as a proportion, simply as high or low or even as an ordered list denoting priority or importance.

5.4.3 Design and specification of the evaluation process

It was concluded that the criteria, methods and weightings to be applied in the tender evaluation procedure must be determined prior to the receipt and opening of tenders to satisfy the requirement of fairness in the evaluation.[68] In order to satisfy the requirements of transparency, it was concluded that the criteria, methods and weightings must be disclosed prior to the call for tenders.[69] The commitment to the policies of an auction procedure is congruent with these requirements.

The publication of the design and specification for decision-making has two important consequences: (1) potential tenderers will make a decision based on the evaluation criteria whether to participate or not; (2) as the evaluation criteria are an expression of the requirements and preferences that the public body is seeking from the solutions, the solutions will be tailored accordingly. After receipt of tenders, changing the criteria may therefore have the effect of having deterred parties who may otherwise have participated or of evaluating the set of solutions against criteria that do not correspond with the criteria signalling directions for their construction. Any deviations from the design of the evaluation process during the execution are therefore constrained by these considerations of vertical fairness.

5.4.4 Qualification process

The *qualification process* is a filtering process that limits further participation in a tender process to those tenderers that are considered acceptable.[70] 'Acceptable' can mean that the tenderer in question has met formal *qualification process* requirements; that the tenderer conforms to standards and regulatory requirements; has required licences and certifications; has a satisfactory performance record; has financial, operational and organisational competencies; or capacity capable of delivery.[71]

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68 Par 4.3.3.2.
69 Par 4.3.3.2.
70 Jin, Ryan and Yund *Two Stage Procurement Processes* 147.
71 The factors are listed in more detail in par 5.4.4.2.

The output of a *qualification process*, with regard to a tenderer is either that the tenderer qualifies for further participation or that it does not. It would make sense that the acceptability of the tenderer in terms of the factors listed cannot depend on the qualities or attributes of a different tenderer. The *qualification process* therefore evaluates the attributes of tenderers against absolute threshold criteria to establish their acceptability and a decision can be made without the knowledge of attributes of other tenderers.

While the *qualification process* is a filtering process in nature, it should not set out with the purpose of reducing the set of tenderers, or potential tenderers, even though it may have that effect.[72] The test for criteria and methods to be used in the *qualification process* is therefore that they should not restrict participation and, consequently, narrow the set of available solutions without good reason.[73] The *qualification process* should merely result in a set of all acceptable tenderers who are able to deliver viable solutions.

5.4.4.1 Execution of *qualification process* within the evaluation process

Unlike attributes of a tender, which can be tailored to the specification for solutions, attributes possessed by a tenderer exist independently of the qualification criteria.[74] An implication of this observation is that the timing of a *qualification process* can be independent of the call for tenders. *Qualification processes* may also be undertaken at more than one juncture in the evaluation process or in general "at any stage of the procurement proceedings".[75] A *qualification process* may therefore be undertaken prior to a call for tenders as a discrete stage in the execution of tender procedure; as a step prior to other sub-processes; or after the other sub-processes.[76]

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72 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 608.*
73 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 609.*
74 Where the legal *persona* of a tenderer may be constructed for the purposes of tendering, for example a consortium, this may be possible.
75 De la Harpe *Public Procurement Law* 102. This is specifically provided for in the *Model Law*.
76 Not, in terms of this model, after the final iteration of the selection process.

A *qualification process* that takes place prior to the call for tenders is generally termed 'pre-qualification'. This may take place as a distinct step and separate from a tender process. It may take the form of setting up and maintaining a general registry or list independently qualifying suppliers of any particular tender.[77] In a two-stage tender process, the set of potential tenderers for the second stage will generally be established by means of a *qualification process* as a distinct and initial step.[78] Where the qualification of tenderers is undertaken at the same time as other evaluation sub-processes, it remains a logically separate process.[79] Likewise, if a *qualification process* is undertaken after a *ranking* or *selection process* it remains logically separate.[80]

Qualification processes are generally undertaken earlier in the evaluation procedure as the effort expended in the execution of the other evaluation sub-processes would usually exceed that of the *qualification process*.[81] Resources are therefore not wasted by the evaluating body by including a tender in subsequent processes when its tenderer would not be acceptable for selection. Therefore, the overall efficiency of the evaluation process may be a factor in sequencing the *qualification process* among the

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77 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 639-645.* Lists can be either optional or mandatory. Some forms of list do not require a *qualification process* and only registration is required. Quinot *Role of Quality* 1112. General industry registration lists may also be used.

78 This may be combined with a *compliance process* as the first stage of a two stage tendering process. De la Harpe *Public Procurement Law* 135.

79 Braun *Selection of bidders* 1. The separation of the *qualification process* should not only remain separate from a conceptual standpoint, but its separation is motivated by the influence that the results of other sub-processes may have. For example that a tenderer who would otherwise not be qualified may be treated more leniently because of an advantageous ranking in terms of unrelated criteria.

80 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 597. Some procurement regimes distinguish any *qualification process* undertaken after a pre-qualification process as being a post-qualification process. For the purposes of this study "post-qualification" will be considered to be a *qualification process* specifically occurring as the last process to be executed just prior to, or as a condition of award. The implication of a post-qualification process is that an iterative selection process must be contemplated. See par 5.4.8. The decision-making process relating to post-qualification has additional information at its disposal. Knowledge of, for example, the ranking of its tender may influence the decision to disqualify, or not disqualify a tenderer.

81 Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 73. This does not mean that processes of a qualificationary nature could not be taken after the *ranking process* to assess whether a tender will be capable of satisfying the need after its selection for award. This may be warranted when the effort to determine its suitability requires a significant effort and cost, for example, undertaking comprehensive due diligence exercise.

other evaluation sub-processes. A further factor motivating a pre-qualification process, as opposed to a *qualification process* later in the procedure is that it is clearly detached from other sub-processes and qualification decisions are not susceptible to being influenced by the results of other evaluation sub-processes.[82] A pre-qualification process may also inform the procuring entity as to adjustments that, if permitted, it may implement prior to the call for tenders to make the overall tender process more effective.[83]

The publication of the qualificationary criteria was concluded to be necessary to ensure achievement of the principles of fairness and transparency.[84] A sufficiently clear, unambiguous and complete specification of qualificationary criteria would enable a prospective tenderer to establish for itself whether it will qualify for the competition. This obviates unnecessary cost for a potential tenderer in compiling a tender for work for which it, in any event, would be considered unsuitable. Assuming prospective tenderers are sufficiently diligent, transparent disclosure of the criteria used in the *qualification process* would effectively perform a pre-qualificationary function.[85]

5.4.4.2 *Qualification process* criteria and methods

A *qualification process* should be undertaken in terms of a method, which examines the status and attributes of a tenderer in terms of predefined criteria. Palaneeswaran and Kumaraswamy[86] propose a framework of criteria for the qualification of tenderers, which will be adopted for the purposes of this study:

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82 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 611. See also Graells *Exclusion, Qualitative Selection and Short-listing* 99. For empirical evidence of the potential of such influences, see Dekel and Schurr *Cognitive Biases.* Dekel and Schurr reason that recognised cognitive biases have an impact on the evaluation of qualitative components. The remedy suggested by the authors regarding the low-bid bias is to use a two-envelope system where price is only revealed after other factors have been fixed.

83 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 611.

84 Par 4.3.3.2 and 4.5.2.2.

85 Bolton *Law of Government Procurement* 185. Bolton describes this situation in the context of specific goals, but the same principle would apply to any qualification criterion for which a potential tenderer could determine its own qualification status.

86 These categories have been derived from Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies*, Palaneeswaran and Kumaraswamy's pre-qualification framework,

(a) Formal responsiveness[87]

The tenderer's compliance with formal aspects of the *qualification process*, for example: timely submission; promptness in response to queries; correctness, validity and completeness of documentation and information; attendance of mandatory meetings or registration.[88]

(b) Responsibility[89]

The tenderer's conformance with, for example: regulations, standards and bylaws; history of punishments, debarment, penalties for poor performance; performance ratings; quality systems; quality-control of safety systems; environmental concerns and any specific requirements for the instant transaction such as specific licences or certifications.[90] Other factors may include conformance with horizontal criteria, for example, meeting a threshold SMME criterion.[91]

(c) Competency

This would consist of the criteria relating to attributes of the tenderers relevant to satisfying the need including:

i. competency and capability, including financial resources such as net worth, turnover and credit rating;

ii. human resource factors such as: experience, qualifications and record of accomplishments;

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the "Responsiveness, Responsibility and Competency" framework. A reason for using this is that it has been derived without dependence on any specific jurisdiction. While this framework was established through empirical research into the procurement of construction works by public bodies, it is submitted that the principles are sufficiently general to apply to all categories of procurement.

87 This would apply if the *qualification process* were conducted separately from the tender process, for example a pre-qualification process, otherwise formal responsiveness may be considered as part of formal responsiveness under the *compliance process* in par 5.4.5.2.

88 Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 73.

89 Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 73. "Responsibility" has other meanings in specific jurisdictions, for example in the *US*.

90 Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 73.

91 Criteria limiting entrants to small, medium and enterprises. Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 624*. Also known as "eligibility criteria" in the *US*.

iii. operational resources, such as: machinery, plant and equipment, past experience, project specific knowledge; current workload, subcontracting, management;

iv. technical capability, and

v. other factors such as capacity for innovation.[92]

Within the criteria that broadly could determine a tenderer's ability to deliver, a further subdivision exists, namely: those applying to the ability of the tenderer to deliver in general and those that apply to specific abilities relevant to the subject matter of the particular transaction.[93]

In practice, the *qualification process* may consider many threshold criteria. The *qualification process* is not, in principle, limited to any particular method to deal with multiple threshold criteria, with the proviso that the method, criteria and their weightings, if applicable, should be made known to the tenderers.[94]

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92 See generally: Arrowsmith, Linarelli and Wallace *Regulating Public Procurement 689;* Braun *Selection of contractors and contract award criteria* 1; Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 73.

93 For example, the distinction could be the qualifications held by a tenderer's staff generally versus the qualifications held by specific staff that will be assigned to performance of the contract. See for example, the discussion in Quinot *Role of Quality* 1112-1113. Quinot describes the latter as 'overlapping' with responsiveness criteria and therefore may form a part of the *compliance process*. This conclusion is supported. For the purposes of this study, they will be considered part of the qualification process to underpin the suggested definition of the qualification, being attributes attaching to the tenderer and where treated differently from other qualification criteria, appropriate note will be taken. See also Faustino *Award Criteria* 129. Faustino discusses the assessment of quality and experience of staff in the *qualification* and *ranking processes* and the risk of "double assessment". To avoid this, the author suggests that general or quantitative elements of the tenderers should be assessed in the qualification process and specific qualitative elements of the experience of the staff designated to perform the contract in the *ranking process*.

94 De Boer, Labro and Morlacci *Review of methods supporting supplier selection* 87. The methods, for example, may take the form of conjunctive or disjunctive screening, lexicographical screening, or a multi-attribute decision method. A conjunctive screening process requires that a tenderer must meet or exceed each specified criterion. A disjunctive screening process requires that a tenderer need only meet one criterion (potentially of many criteria). A lexicographical process is performed in terms of criteria in descending order of importance. The discussion on multi-attribute scoring methods in the discussion on the *ranking process* is relevant to the employment of such methods in any of the sub-processes.

5.4.4.3 Use of the same attributes across evaluation sub-processes

In general, the same attribute regarding a tenderer or tender may be considered in decision-making in more than one sub-process, albeit the criteria applied to the attribute may be different. For example, a criterion in the *qualification process* with regard to an attribute may simply establish whether the attribute of the tenderer has met a certain minimum condition. This same attribute may also be relevant and examined again in other evaluation sub-processes to determine, for example a tenderer's relative merit with regard to other tenderers.[95] For this conceptual construct, while the same attribute may be used in different sub-processes, the role of the attribute in decision-making would be distinguished by the sub-process's purpose.

5.4.5 Compliance process

The *compliance process* is the process that determines whether a tender 'meets all material aspects of the tender invitation'.[96] Save for the fact that the *compliance process* is dealing with attributes of the tender as opposed to the tenderer, the process has a fundamental characteristic in common with the *qualification process* in that the process's output results in the object of the process either being considered eligible for further participation or not. The 'material aspects', to which a tender must comply, would include formal process requirements as well as substantive criteria, for example, whether the tender complies with specified deliverable,; contractual requirements; reserve price or horizontal requirements.

In common with the *qualification process*, the *compliance process* should not set out to reduce the set of tenders even though it may have that effect.[97] The criteria used in

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95 Quinot *Role of Quality* 1111. Quinot notes that an attribute such as "past experience" may be stated as threshold criterion but may also contain a relative aspect. To expand on Quinot's example: in order to qualify, a tenderer must have executed at least two similar projects. The threshold to qualify is thus two projects but the criterion could also be used in a relative sense in that one tenderer may have successfully completed more projects than another tenderer. Quinot *Role of Quality* 1112. Quinot observes there is an overlap between the criteria used for qualification and ranking. While these observations are made in the general context, in certain jurisdictions, there is a regulated separation of these criteria and hence an overlap may have to be treated with caution. See also Braun *Selection of contractors and contract award criteria* 1.

96 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 650.

97 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 608.

the *compliance process* should therefore be limited to testing for shortfalls in the promise for delivery of the outcomes sought by the tender and should result in a set of tenders that comply in this respect.

Clear, unambiguous and complete specifications of compliance criteria should enable a prospective tenderer to establish for itself whether it will be able to construct a tender that will meet compliance criteria. The specification of work to be undertaken must also be fully specified in order for a tenderer to construct a proper response and determine a price inclusive of all elements to be performed.[98] This not only obviates unnecessary cost for a potential tenderer in compiling a tender for work for which it, in any event, could not deliver but would also minimises the risk of implicit dependencies and variation orders to complete the performance in the contract management phase.

5.4.5.1 Execution of *compliance process* within the evaluation process

Given that the execution of the *compliance process* deals with a tender*,* it can only take place after the submission of tenders. The reasons motivating the execution of the *qualification process* earlier in the overall evaluation process would similarly motivate the execution of the *compliance process* directly after the submission of tenders to avoid procedural cost in evaluating tenders that are not compliant and to avoid the effects of cognitive biases in downstream decision-making.[99]

However, further information may emerge during the *ranking process* regarding the relative attributes of a tender, for example a price that is abnormally low. Such information may prompt additional enquiry as to whether risk is attached to solution that is effectively an outlier among the mainstream of tenders proposed and if unacceptable, whether it renders the tender non-compliant.

98 Bolton *Law of Government Procurement* 186.
99 See footnote 82 above.

5.4.5.2 *Compliance process* criteria and methods

A *compliance process* is undertaken in terms of a method that examines the tender in terms of predefined criteria. These are discussed in the following categories:

(a) Formal responsiveness[100]

The tender's compliance with formal aspects of the tender procedure, for example timely submission of the tender; promptness in response to queries; correctness and completeness of formal information; or attendance of mandatory meetings

(b) Substantive responsiveness[101]

This refers to the status of a tender's compliance with the specified threshold criteria related to substantive aspects of the tender. This category includes the proposed solution's compliance with technical specifications;[102] agreement to contract under specified service levels, contractual undertakings, qualifications of assigned personnel,[103] or commitment to delivery times.

This category of criteria may also include compliance with horizontal requirements related to the tender such as local content requirements, use of labour from local communities, use of SMME subcontractors, or acceptance of contractual conditions relating to horizontal objectives.

As with the *qualification process*, the *compliance process* may consider many threshold criteria and is not, in principle, constrained to any particular method to deal

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100 Also referred to as 'responsiveness'. Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 73. See also Quinot *Role of Quality* 1112.

101 Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies* 75 and 83. Quinot *Role of Quality* 1112-3.

102 See for example, *Allpay* 30. The requirement for biometric verification provides a good example of a mandatory technical criterion, issues surrounding the clarity of the specification, and the consequences of not meeting such.

103 Quinot *Role of Quality* 1113. Quinot observes that attributes relating to the compliance of the tender such as qualifications of personnel proposed to be assigned in the execution of the tender may be difficult to distinguish from criteria used in the qualification process to assess the tenderer.

with multiple threshold criteria, with the proviso that the method, criteria and the weighting of the criteria have been made known to the tenderers. The methods used, with appropriate modification, would be similar to those available for the *qualification process* save that they apply to attributes of the tender and not the tenderer, and are not repeated here.[104]

A distinction exists between the effect of compliance criteria and qualification criteria from the tenderer's perspective: qualification criteria will inform a potential tenderer whether it could participate or not whereas compliance criteria will also inform a potential tenderer how it must tailor its proposal for a solution. Obviously, if the tenderer is unable to tailor a solution to meet the compliance criteria there is effectively no difference in this respect but where the tenderer is capable, the compliance criteria establish the minimum requirements for the solution and will direct the construction of the tender.

5.4.6 Shortlisting process

The objective of the *shortlisting process* is to limit the number of the tenders or tenderers that will participate in subsequent steps of the evaluation process.[105] The purpose of limiting the number of tenders in further participation in the *shortlisting process* is to reduce the burden of the evaluating body in having to perform a detailed evaluation of a larger number of tenders than is necessary.[106] The *shortlisting process*

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104 See footnote 94 above.

105 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 645. The *shortlisting process* is described as the process of "reducing the number of permitted bidders". Braun *Selection of contractors and contract award criteria* 1-2. More generally, a *shortlisting process* can be used to limit the number of tenders for participation in further evaluation processes using criteria related to the tender, for example price. See examples discussed in South African case law. *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd* 2009 8 BCLR 813 (SCA) 4. A shortlist of four was constructed. *Vikela Africa Waste Care CC v MEC: Mpumalanga Department of Health* 2013 JDR 0603 (GNP) 3. A shortlist of three was drawn up. For the purposes of the conceptual analysis, the *shortlisting process* may use any criteria and may apply to the shortlisting of tenderers or tenders. The term 'shortlist' is also used loosely to describe the subset of tenderers who have qualified or the subset of compliant tenders. This is to be distinguished from subsets resulting from the execution of a *shortlisting process* as described.

106 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 646. The reason for performing a *shortlisting process* is described as where the "number of firms requesting to be invited is greater than the number which it is appropriate to invite".

entails ranking the tenders, or tenderers, in terms of a method to enable the selection of the subset of tenders or tenderers at the top end of such ranking for the shortlist.[107]

In common with the *qualification and compliance processes*, the *shortlisting process* results in a binary outcome for each tender, it is either eligible for further participation or not. In contrast to the *qualification and compliance processes*, the *shortlisting process* has characteristics in common with the *ranking process* in that the relative merits of tenderers or tenders may be considered in determining the shortlist.

5.4.6.1 Execution of *shortlisting process* within the evaluation process

A *shortlisting process* may be undertaken prior to the call for tenders[108] if the process depends only on attributes of the tenderer, or as a discrete stage during the evaluation process. In principle, there is no reason why a *shortlisting process* could not be undertaken at more than one juncture in the evaluation process. Given the purpose of the *shortlisting process*, it should be performed early in the evaluation process and should be executed prior to the *ranking process*.

5.4.6.2 *Shortlisting process* criteria and methods

A *shortlisting process* is undertaken in terms of a method, which examines and assesses attributes of tenders or tenderers in terms of predefined criteria. Possible criteria for determining the relative position of the tenderers could include their relative financial or technical situations;[109] external factors and factors outside the immediate transaction;[110] the likelihood of the tenderers submitting the best tender in terms of the award criteria;[111] or relative achievement of horizontal attributes.[112]

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107 The criterion for determining the subset may be, for example, the top three tenders from a ranked list. The number determining the shortlist may be regulated to be no less than a specified minimum or no greater than a specified maximum in certain jurisdictions.

108 This could overlap with the definition of a restricted or limited bid procedure.

109 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 647.

110 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 647. This is explained as the consideration of external factors such as the likelihood of "strikes or political unrest". Factors such as probability of building up "long term co-operative relationships" It is submitted that these factors are better suited to a *qualification process* as they would be difficult to evaluate on a relative scale.

111 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 647. This should demand that criteria similar to those used to the *ranking process* would be used.

112 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 647.

Given the purpose of the *shortlisting process*, the set of criteria considered should be limited and the demands of the method, in terms of effort, should not exceed the effort to be expended in later processes.

The methods used for the ranking of tenders for the *shortlisting process* may use attributes also used in the *qualification* or *compliance processes* to produce an ordering for shortlisting.[113]

The criteria and methods for shortlisting may have the same characteristics as those employed in the *ranking process*, save for the level of detail and effort employed. Whatever method is employed to rank tenders or tenderers for shortlisting, given it is a relative consideration, it should not exclude potential winners and therefore the method and criteria should be aligned with the criteria employed in the *ranking process*.[114]

5.4.7 Ranking process

The objective of the *ranking process* is to examine, assess and order tenders in terms of their relative merit to identify the most meritorious tender. The question of what determines merit can be divided into two categories: the merits of a tender related to the performance of the intended transaction to satisfy the needs of the issuing body and the merits of the tender relating to horizontal objectives determined by public policy.[115] The categories are discussed separately below.

5.4.7.1 Attributes relating to the intended performance

The question of what determines the merit of a tender relating to the performance of the intended contract is recognised, in general, to consist of considerations of a multi-

113 Braun *Selection of contractors and contract award criteria* 1-2. Par 5.4.4.3.
114 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 647.
115 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 674. Whether the inclusion of horizontal aspects is generally permissible in determining merit depends on the jurisdiction. In South Africa, it is expressly permitted in the *Constitution*. Par 3.8.

dimensional nature including attributes of cost and quality. The nature and circumstances of a specific transaction will inform the relevancy and importance of specific attributes. For example, where commodity goods are being procured, price may well be the most important, or only, attribute necessary for determining the relative merit of an acceptable tender. By contrast, complex outsourcing services, for example, may consider many attributes of the tender beyond that of price. Such attributes may include tendered price, cost, technical aspects of the solution, organisational experience, project management experience, technical expertise, past project performance, company reputation, client-supplier relations and capacity.[116] This list of exemplars readily exposes the diverse nature of attributes that may be considered in the determination of merit and the overlap with attributes that may be considered in the other sub-processes.

While a public body may be protected to an extent by contractual remedies in entering into a transaction that presents high risk, the priority of the need may require it to accord a tender greater merit if contracting with the tenderer poses less risk in the performance of the resulting contract. Attributes attaching to the tenderer rather than the tender are therefore relevant to the question of relative merit when such attributes determine risk. Depending on the rules of particular procurement systems, relative consideration of criteria related to attributes attaching to tenderers may be restricted in the *ranking process*.[117]

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116 Watt, Kayis and Willey *Tender evaluation* 54. This list of criteria was used in an empirical study of the relative importance of actual selection criteria employed in general tender evaluation. The results of the study showed past project performance, technical expertise and cost as the most important. Organisational experience, workload and reputation were shown to be the least important.

117 For example in the *US* and *EU*. Dauer *Responsiveness or responsibility* 14. In California, a public entity may not evaluate aspects of a tenderer's quality, fitness or capacity in relation to another tenderer. Dauer advances the reason as being the extent of discretion afforded to a public entity in this determination. Such attributes must be considered against an objective standard and not one determined in the presence of another tenderer's attributes. This is explored in more detail with regard to specific legal frameworks in Chapters 7 and 8.

5.4.7.2 Attributes relating to horizontal merits

The question of what determines the merit of a tender in terms of horizontal objectives relates to the attributes of a tender or tenderer toward the achievement of policy objectives such as socio-economic, industrial or environmental objectives.[118] These may relate to attributes of the tenderer, for example the participation of disadvantaged persons in the tendering entity or relating to attributes of the tender, for example, the extent to which use is made of local content or local labour in the proposed performance.

The disclosure of the consideration given to horizontal criteria in the method, criteria and the weighting is important in producing the appropriate solutions to include horizontal outcomes sought. In the example given above, if the employment of local labour is an outcome sought and the criteria defining this aspect of merit was published, it must be assumed that tenderers will tailor their tender offers to maximise this aspect and the resulting set of tenders made available for evaluation should contain optimal solutions. The weighting of horizontal criteria in determining merit that a potential tenderer cannot accommodate will inform its decision to participate based on its assessment of its prospects in the competition.

5.4.7.3 *Ranking process* criteria and methods

Determining the relative merit of a tender with regard to a single attribute in isolation should, from a conceptual standpoint, present few difficulties. Provided the single attribute can be reduced to a metric that is objectively comparable between tenders, a ranking of tenders can be determined. In general, it would be necessary to determine the merit of a tender in respect of more than one attribute, for example, the merit associated with a low price may be traded off against lower quality or higher risk.[119] However, determining a metric from more than one attribute, for example price and

118 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 674.
119 Dini, Pacini and Valletti *Scoring rules* 295.

quality, is non-trivial.[120] An underlying problem is that of defining the method, or scoring rule, that will reduce different attributes to common values capable of comparison. The price of a tender is readily comparable to the price of another tender as both are expressed in monetary units. However, when a second attribute, for example, quality or a horizontal attribute, is introduced, either the second attribute must be expressed in terms of monetary units or both price and the second attribute must be expressed in common units of value to enable comparison.[121] Different approaches, such as algorithms that employ external reference points for determining metrics versus those that rely on an endogenous measure, for example the minimum or average of the submitted tenders, exhibit fundamentally different behaviours and results in the output ranking.[122] As evidenced by the profusion of literature on the topic and the variety of existing and proposed algorithms, no single technique emerges as the best approach for solving this problem.[123]

Aside from the technical complexities associated with methods to reduce different attributes and metrics to common comparable units, the predetermination of the method, criteria and weightings precludes live calibration. While the predetermination of the ranking method furthers claims to the rationality and objectivity of decision-making, determining a method that will operate as intended remains a complex problem.

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120 Generally, see Stilger *Formulas.* Stilger compares 27 scoring rules for evaluating price and quality. Each scoring rule is shown to have different behaviours, strengths, weaknesses and protections for different distributions of values. Stilger also shows that different scoring rules will produce different rankings for the same set of tenders. Commonly used scoring rules may even possess logical inconsistencies, for example the "ranking paradox". See also Chen *Economic Approach* 410-411. Chen gives an example of relative scoring rules that are not deterministic in the sense that the relative ranking of two tenders may depend on the presence of a third tender. See also De Boer *et al Analysis of some mistakes* 3-6.

121 De Gouveia *Price Factor* 686-687; Stilger *Formulas* 4; Bergman and Lundberg *Tender evaluation* 74.

122 Stilger *Formulas* 6-7. See also Lorentziadis *Post-objective determination* 262.

123 Generally see: Watt, Kayis and Willey *Tender evaluation*; Bergman and Lundberg *Tender evaluation*; Braun *Selection of bidders* De Boer, Labro and Morlacci *Review of methods supporting supplier selection*; Dini, Pacini and Valletti *Scoring rules*; Estache and Iimi *Quality or Price*; Asker and Cantillion *Optimal Procurement*; Holt *Which contractor selection methodology?*; Lorentziadis *Post-objective determination*; Tsai, Wang and Lin A *Improving the ranking procedure;* Nydick and Hill *Using the Analytic Hierarchy Process;* and Ng *Multiple criteria*. It is beyond the scope of this study to examine the properties of different methods and only key characteristics of different methods will be considered where relevant to the question of cost-effectiveness.

The publication of the predetermined *ranking process* informs the construction of solutions in the balance expressed by the method.[124] The method therefore will influence the set of produced solutions as well as the ranking of the solution. A high weighting of price offers an opportunity for a tenderer to 'game' the system to maximise its prospects of winning. While abnormally low pricing could be regarded as an anomaly of the ranking method, this is direct consequence of the tender invitation signalling a high price weighting.

5.4.8 Selection process

The *selection process* is the sub-process of decision-making, generally conducted directly after the *ranking process* that finalises the tender evaluation process. While the output of the *qualification*, *compliance*, *shortlisting* and *ranking processes* should be a ranked list of acceptable tenderers and compliant tenders, the most highly ranked tender may not automatically be selected for award. If the *selection process* does not select the most highly ranked tender, three possibilities exist:

(a) No selection is made. This would imply that neither the most highly ranked tender, nor any other tender, could satisfy the public body's need. This could be for a variety of reasons, for example, that no tenderer is acceptable, no tender is compliant, no tender is affordable,[125] the need has changed or no longer exists or that the public body may have decided to satisfy the need by other means, for example from within.[126] This could also be for the reason that the tender process is somehow flawed, for example: there was insufficient competition, that collusion among the tenderers has been detected or that there was a formal process defect on the part of the procuring public body.

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124 Dimitri *Best Value for Money* 160. The ranking system signals, for example, the public body's preference weighting of price versus quality.

125 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 745. This could be determined in the lowest-priced tender exceeding a pre-determined pricing benchmark.

126 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 743-744.

(b) A tender lower on the ranked list is selected for award. Given the objective of the evaluation process as a whole, that it must select the most meritorious tender, the selection of a tender other than the most highly ranked tender implies that the *ranking process* has not produced the most meritorious tender. This may occur in the following situations:

i. where the *ranking process* has not considered all factors, for example, where a price-only *ranking process* has been performed and a further decision-making process is necessary to balance all relevant factors to determine merit inclusively.[127] In this case, additional steps in determining the most meritorious tender for selection could be regarded as an extension of the *ranking process*.[128]

ii. where factors relating to the compliance of a tender are only identified during the *ranking process*. If, for example, cost is accorded a high weighting, the *ranking process* may determine that an abnormally low-priced tender is accorded the highest rank. If permitted, the price of a tender may be identified as abnormally low in terms of absolute benchmarks as part of the *compliance process* but the examination of price relative to those of other tenders is usually only assessed in the *ranking process*. If a tender is not selected because it has been determined to have an abnormally low price in relation to other tenders, it could be either be regarded as a factor that has reduced its merit to that extent or that it poses unacceptable risk, and has effectively been excluded as part of a post-*compliance process*.

(c) A tender equivalent in rank to another at the top of the ranking is selected for award. This situation would occur when the *ranking process* has not identified a single top-ranked tender. Along lines similar to (b) above, using further decision-

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127 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 707-721. An example of a case balancing the merits of the technical offering against price is discussed after a ranking has been produced in terms of lowest price only.

128 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 707-721. The example of the Consultant's Guidelines is given where a scoring method is used determine the award in best-value terms. As the authors point out, such a method could equally be regarded as an additional scoring rule in the *ranking process*.

making processes to refine the ranking to determine the most meritorious tender could simply be regarded as an extension of the *ranking process*.[129]

The decision to make an award to a tenderer other than the one determined by the *ranking process*, in general, should only be made on predetermined and exceptional grounds. The permissibility, circumstances and justifications for this aspect of the evaluation process may differ across jurisdictions and its implementation and implications will be discussed in more detail under specific legal frameworks in later chapters.

A post-qualification or post-compliance process conducted after the *selection process* implies that the *selection process* may have to be conducted iteratively if the *qualification* or *compliance process* rejects the initial or a subsequent selection.[130]

5.5 General evaluation sub-process requirements for cost-effectiveness

As discussed above, the tender evaluation process can be broken down into two basic activities in the procurement life cycle: the design and specification of the tender process and the execution of the process.[131] The analysis of the application of the constitutional requirement of cost-effectiveness will be undertaken with regard to each of these phases and to its relationship to other constitutional procurement requirements.

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129 Alternatively, if the merit of more than one tender is considered equivalent to the most meritorious tender in all respects, the *selection process* may take the form of a tiebreaker mechanism to decide the winner. The observation that this could be included as a method within the scoring rule applies equally in this situation. Provided the mechanism is fair and transparently pre-disclosed, the selection process would still ensure the objective of selecting the most meritorious tender by ensuring: (1) a selection is made, (2) no other tender possesses more merit and (3) the basis for selection would have been accepted by tenderers in terms of the rules of the tender process.

130 This may also be the case if a conditional award is made and the suspensive condition is not fulfilled.

131 Par 5.4.3.

5.5.1 The evaluation process in the context of the constitutional requirements

The general objective of the evaluation process is that the most meritorious acceptable and compliant tender is determined and that a selection or award is made in accordance with this determination. As determined in the previous chapter, all the constitutional requirements have application to the procurement system and specifically to the evaluation process. A question specifically relevant to the evaluation process is what application each of the constitutional requirements has in determining acceptability, compliance and merit. The requirements of fairness, transparency and competition have application to the system defining the process of how acceptability, compliance and merit of a tender are determined but do not have application to the question of what substantively determines acceptability, compliance or merit.[132] With regard to achieving cost-effectiveness, the criteria for determining the most meritorious tender must include the consideration of a tender's proposition for macro-level cost-effectiveness, which may include its transactional cost-effectiveness.[133] The analysis of the requirement of equitableness and constitutional preferential objectives concluded that they are applicable to the question of what may determine acceptability, compliance and of what may determine merit.[134] If, as concluded in the previous chapter, macro-level cost-effectiveness is the requirement that resources are optimally directed at the achievement of the balance of these objectives, the merit of a tender must be determined in accordance with such balance. The reverse implication of this conclusion is that, provided the evaluation process is otherwise fair, transparent and competitive, what determines the selection of a tender, in an absolute or relative sense, need only be driven by the requirement of macro-level cost-effectiveness.

A decision to select a course of action was concluded to be cost effective if:[135]

(a) the intended outcomes of the course of action and criteria for its achievement are defined and relevant risks to its achievement are identified; and

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132 Pars 4.2.4, 4.3.4 and 4.5.3.
133 Par 5.4.7.1.
134 Pars 5.4.4.2, 5.4.5.2 and 5.4.7.2.
135 Par 4.1.3.7.

(b) a projection of the costs of the course of action is made and relevant risks to its variation are identified; and

(c) taking into account the relevant risks, the course of action is:

i. worthwhile in terms of its projected cost and the value of its intended outcome; and/or

ii. the optimal choice from available courses of action in terms of their projected cost-intended outcome relationships.

In terms of the five decision-making sub-processes of the tender evaluation process, each sub-process can be regarded as contributing to the ultimate choice of a course of action where the courses of action available are represented by the available set of tenders in addition to the course of action not to select a tender.

5.5.2 Qualification process

The objective of the *qualification process* is to limit further participation in the tender process to those tenderers who are acceptable.[136] An 'acceptable tenderer' in the context of the *qualification process* - was described as one meeting formal responsiveness, responsibility and competency criteria.

5.5.2.1 Formal responsiveness

The design and execution of the *qualification process* in terms of determining and meeting formal responsiveness criteria must meet the requirements of fairness and transparency. Provided the formal criteria are fair from a vertical and horizontal perspective, the exclusion of otherwise acceptable tenderers may be made on formal grounds and may be justified by the maintenance of integrity and public trust in the system.[137] From a transactional cost-effectiveness perspective, the exclusion of

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136 Par 5.4.4.

137 Par 4.3.3.3. *Dekel Improving public procurement efficiency* 63-77. Dekel proposes that criteria, which under common public procurement practices would be considered formal responsiveness qualificationary criteria, could be evaluated in a compensatory way to retain competitors and not diminishing the set of available course of action. Dekel's proposal permits formal errors - which can only be rectified in one way - to be rectified in exchange for a loss of points in the *ranking process*, rather than outright disqualification and the potential loss of a winning tender. A detailed

otherwise acceptable tenderers on formal grounds may reduce the optimality of the ultimate selection. Even from the macro-level cost-effectiveness perspective, as a qualification decision does not balance cost, the decision to exclude a tenderer is made 'at any cost' and an argument for the optimal direction of resources toward the achievement of macro-level outcomes may be difficult to sustain.

5.5.2.2 Responsibility

The responsibility criteria included in the design of the *qualification process* were described as those relating to conformance with legal requirements, required licences and certifications. Provided the requirements are relevant to the subject matter of the tender, the exclusion of non-compliant, but otherwise capable tenderers, may reduce the set of available courses of action and therefore, potentially, optimality. If required in terms of a generally applicable law related to the delivery of services, it would be justified by considerations of fair competition or generally to deter non-compliance with law.[138] It must be assumed that the pursuit of cost-effectiveness in public procurement would extend only to courses of action delivered by legally compliant tenderers and therefore the exclusion of non-compliant courses of action, because of their tenderer's status, would not affect the courses of action available for selection.

Responsibility criteria may relate to the status of a tenderer that could pose sufficient risk to the delivery of the direct outcome to warrant exclusion, for example if the tenderer was subject to insolvency proceedings, a history of non-delivery or of past transgressions of tender proceedings. The threshold of risk to delivery or of invalidating the tender proceedings would justify their exclusion without consideration of their associated tenders.

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analysis is beyond the scope of this study, but Dekel's proposal may provide a more proportional sanction than disqualification for formal shortcomings. Dekel's proposal extends only to the rectification of formal errors in the *compliance process*.

[138] Par 4.1.5. This excludes legal requirements specifically related to public procurement that are unrelated to the subject matter of the tender, as the purpose of the study is, in part, to investigate their effect.

Responsibility criteria regarding a tenderer's compliance with policy requirements unrelated to the performance of the tender, or those directed toward the achievement of horizontal outcomes, may result in the exclusion of tenderers whose solutions may otherwise have been optimal. The publication of such qualification criteria may have the effect of tenderers declining to participate based on a self-assessment of their prospect for disqualification. By operation of the *qualification process,* the public body is bound to disqualify tenderers who do not meet the qualification criteria in any event. As the direct outcome was concluded always to occupy some weight of the balance of outcomes, the exclusion of a tenderer for reasons other than those related to the direct outcome would be made regardless of its prospects for offering a course of action that in balance would be optimal.

As cost is not a balancing factor in the *qualification process*, such exclusions would be made without regard to their cost. To justify such exclusion on cost-effectiveness grounds it would have to be asserted that the horizontal outcomes would not be achieved if the excluded tenderer were to participate and that the horizontal outcome's achievement is being sought at any cost. Unless the general cost of excluding otherwise acceptable tenderers is determined by another process, the inclusion of such criteria could not be said to support cost-effective decision-making at the macro-level.[139]

5.5.2.3 Competency

In designing the specifications for criteria related to competency in the *transactional system,* discretion must exist for determining the specific attributes to be considered and what threshold criteria should exist for their qualification. The criteria can merely assess the probability of successful delivery based on the current competency or experience of a tenderer. A threshold criterion, for example, that a tenderer must have experience of similar projects would be rationalised by the assertion that having no

[139] See the discussion on set-asides in par 4.1.5. The suggested check and balance for the mechanism is to include a comparison with commercially available terms. For an individual transaction, this would have to be included in the rules of the *transactional system* in order to prevent an award 'at any cost'. This may satisfy cost-effectiveness from the aspect of proceeding with a worthwhile course of action but would not have tested optimality.

such experience presents an unacceptable risk of non-performance by a tenderer. Likewise, the inclusion of criteria relating to present attributes, such as access to a minimum quantum of financial resources, could be reasoned to represent unacceptable risk if it falls below a threshold. In terms of the cost-effectiveness model, the exclusion of tenderers presenting risk above the risk threshold can be argued to provide assurance of the achievement of the outcomes of the transaction and therefore cost-effectiveness.

The effect of setting the bar too high for competency criteria will have the effect of excluding courses of action that in fact do not present unacceptable risk and will reduce the set of available courses of action unnecessarily, even if argued to reduce the margin of risk.[140] The effect of setting the bar too low for competency criteria may have the effect of making unacceptably risky courses of action available for ultimate selection.[141] As disqualification is final, setting the bar too high cannot have compensating measures in other sub-processes. If potentially unacceptable risk determined from certain attributes of the tenderer can be mitigated by compensating attributes, they must therefore be considered simultaneously as there is no further opportunity to do so. As the *qualification process* only considers attributes of the tenderer, it does not consider the cost of the solution. The threshold level for acceptable risk must therefore be set at a level for which no cost advantage could balance; otherwise, the set of available tenders may potentially exclude an optimal selection.

It was observed above that the timing of the *qualification process* in the evaluation process, or in other words, whether a pre-qualification, qualification or post-*qualification process* is performed should be driven by considerations of the cost of

140 Estache and Iimi *Quality or Price* 460. Risk that the execution will deteriorate for example, "cost overruns, project delays, or even heavy casualties".

141 Estache and Iimi *Quality or Price* 460. Loosening qualification standards related to risk may be intentional, for example, as a matter of policy to open up participation to local firms.

the procedure. In general, an earlier *qualification process* will result in a more efficient evaluation process.[142]

5.5.3 Compliance process

The objective of the *compliance process* is to limit further participation in the tender evaluation process to those tenders that meet 'all material aspects of the tender invitation'.[143] A tender meeting all such aspects was described as one meeting formal responsiveness and substantive responsiveness criteria.

The same argument with regard to formal responsiveness criteria in the *qualification process* is applicable to the *compliance process* and the exclusion of tenders that would otherwise be substantively responsive on the grounds of not meeting formal responsiveness criteria may be justified to maintain integrity and public trust in the system.[144]

In contrast to the *qualification process*, where attributes of the tenderers are assessed to indicate the likelihood of performance, the *compliance process* assesses whether the tender offer meets the specification of performance. The design of the *compliance process* in terms of substantive responsiveness criteria must therefore ensure that compliant tenders undertake to meet the desired outcomes. Assuming the performance specification accurately represents specification of solutions that will meet the desired outcomes, the *compliance process* should not include tenders that do not meet the specification and must not reject tenders that meet the specification.

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142 Par 5.4.4.1. The susceptibility of the pre-qualification process to bias or 'twisting' is disregarded from the cost-effectiveness perspective. Costantino *et al Balancing Additional Costs* 196-197. The authors conclude through an empirical analysis that limiting the number of bidders for a price-only contest does improve the balance of transaction cost to the received pricing. This depends on the narrowness in the deviation in pricing expected. Although the authors suggest limiting the number of bidders by way of a pre-qualification process, they do not provide criteria that would achieve this. For the purposes of the present study, the objective of limiting the number of bidders would be achieved through a *shortlisting process*.

143 Par 5.4.5.

144 Par 4.3.4. The achievement of procedural fairness to maintain the integrity and public trust in the system are more important goals than the inclusion of a capable tenderer who does not meet formal procedural requirements. See the proposal by Dekel in footnote 137 above.

The case where the specification may not represent all solutions for the desired outcome, the process may entertain the submission of variant solutions, in which case the output specification must form the basis for evaluation.[145]

The direct outcome always occupies a proportion of the balance of outcomes, and thus the shortfall in a tender's proposition to meet the direct outcome must be of such significance that the achievement of no other outcome could compensate for the shortfall.[146]

Any misalignment between the performance specification and the desired outcomes can be argued to result in the set of courses of action available for selection being suboptimal simply for the reason that the set of solutions produced may be constructed to solve a different problem. Assuming there is additional cost to solutions to meet a specification that includes requirements unnecessary for the achievement of the outcome, no solution in the set produced can be optimal. The omission of requirements necessary for the achievement of the outcomes does not exclude the possibility of an optimal solution set but under the assumption that such omissions present an opportunity for tenderers to reduce price, it is unlikely the solution set would be optimal.

Performance specification misalignment has the potential to affect the *compliance process* in two further respects. Including requirements unnecessary for the desired outcomes may cause potential tenderers to exclude themselves from participation or may result in unnecessarily excluding a tender from further participation during the execution of the *compliance process.* Both of these possibilities flowing from an over-

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145 Where the tenderer can vary criteria, for example price and quality, the tenderer may submit more than one tender with solutions embodying a different mix of the criteria to improve the probability of winning the tender. Chen *Economic Approach to Public Procurement* 411-412. More generally, a variant is a tender that proposes a different approach. The different approach may be to include horizontal benefits, innovation or simply to improve the solution. Arrowsmith *Horizontal Policies* 171, Telles and Butler *Public Procurement Award Procedures* 26. Note also the potential for the evaluation of variants to introduce obscurity into the evaluation criteria, which may raise issues regarding the transparency of the system. See Chen *Economic Approach to Public Procurement* 411-412.

146 Par 4.1.3.2. The direct outcome can never be disregarded and therefore the direct outcome must occupy some weight.

specification misalignment would reduce the set of available course of action unnecessarily and for this reason may further reduce optimality in terms of the cost-effectiveness test.

The publication of a reserve price establishes the maximum price the public body is prepared to pay. This should signal the point above which an offer is unaffordable or not worthwhile. This may positively increase the set of produced solutions that are worthwhile and it would establish a criterion for rejecting tenders earlier in the process that are not worthwhile which would improve procedural cost.

Horizontal requirements in the specification of performance, for example mandatory contract conditions providing for horizontal objectives not directly related to the subject matter of the public body's need must be mandatory requirements for outcomes of macro-level cost-effectiveness. Only if the conditions are necessary for the achievement of such outcomes, can the exclusion of a tender not meeting such threshold conditions be justified.[147] As cost is generally not a balancing factor in the decision to exclude a tender in the *compliance process*, the exclusion of a tender on such grounds is therefore made at any cost. Unless the general cost of excluding otherwise acceptable tenders is determined by another, possibly external, process, excluding tender on this basis could not be said to support cost-effective decision-making.

The timing of the *compliance process* in the evaluation process can generally be deduced to reduce procedural costs if it is conducted earlier in the process provided the *compliance process* effort is lower than that required in the *ranking* and *selection processes*.[148]

147 See discussion in par 4.1.5. *Contract conditions laid down by the purchaser* is an example of such a horizontal mechanism.
148 Par 5.4.5.1.

5.5.4 Shortlisting process

The objective of the *shortlisting process* is to limit participation further in the tender processes to fewer participants to alleviate the burden of evaluating an inappropriate number of tenders. [149] The *shortlisting process* is thus aimed at reducing the set of solutions available for selection in return for gains in efficiency or procedural cost-effectiveness. While the efficiency gains may be determinable, the exclusion of tenderers or tenders prior to determining their relative merit of tender could only be argued to be procedurally cost effective if the most meritorious tender were not excluded.

This presents a conundrum for the cost-effectiveness of an open process: the process may not exclude the most meritorious tender but the purpose of the process is to reduce the effort of determining merit. The only method that could satisfy these conditions is one that could identify suboptimal choices without conducting a full evaluation.

The *shortlisting process* therefore could only be procedurally cost effective if: (1) the shortlisting method ensured that excluded tenderers or tenders did not have the potential to be the most meritorious tender and (2) the cost of conducting the *shortlisting process* is less than the cost of a full evaluation of the tenders excluded by the *shortlisting process*.[150]

5.5.5 Ranking process

The *ranking process* is only concerned with establishing the relative merits of the tenders. As concluded above, a tender's merit must be determined by its prospects for achievement of the outcomes of macro cost-effectiveness, where transactional cost-effectiveness may be one of such outcomes.[151]

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149 Par 5.4.6.
150 Costantino *et al Balancing Additional Costs* 196-197. See the discussion in footnote 142 above.
151 Par 5.5.1.

Determining merit in general was concluded to be a non-trivial balancing of many factors.[152] The methods, criteria and weightings employed in multi-attribute *ranking processes* were likewise concluded to be complex and that they may render differing results depending on the choice of method. Provided the method, criteria and weighting of the *ranking process* produce an ordering reflecting the balance of macro-outcomes it will determine optimality congruent with the model for cost-effective decision-making. The conclusion that the direct outcome, in general, will occupy some weight in the balance of outcomes implies that criteria assessing the direct outcome must be accounted for by the method and criteria related to the direct outcomes must carry some weight.[153]

Clearly, a tenderer will not be able to determine whether it will be successful, even from a fully transparent disclosure in the tender documentation of the method, criteria and weightings employed in the *ranking process*.[154] However, a transparent disclosure will inform a tenderer of what constitutes merit in the eyes of the public body and therefore to maximise its prospect of winning will tailor its tender accordingly. The alignment of the method determining merit with the balance of outcomes sought and the transparency of the method are essential for producing a set of solutions that contains the optimal solution.

The observation that even commonly used methods may produce different ranking for the same set of tenders further motivates that the method must be determined prior to commencement of the evaluation process.[155] The requirement of fairness could not be met if the method was chosen or devised during the execution of the *ranking process*.

The advantage of a calculated *ranking process* is that it is objectively predetermined, systematic and therefore should be reliably deterministic. The disadvantage is, as

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152 Par 4.1.7.
153 Par 4.1.3.2.
154 See footnote 299 of Chapter 4 and the conclusion that fully transparent disclosure of the method will not enable a tenderer to determine scores are assigned by the method relative to other tenders.
155 Par 5.4.7.3.

described above, that in reality it can neither be fully tested nor changed. The resultant ranking's congruency with a true ranking of merit may be questioned in certain circumstances. A ready example is the common 'anomaly' of the ranking method according the highest merit to an abnormally low bid if price has a dominant weighting among criteria determining merit.[156]

The conclusion regarding the effect of the *ranking process* is that it is a critical sub-process for cost-effectiveness both in the production of solutions and for the determination of optimality within the set of produced solutions. A limitation to the achievement of cost-effectiveness by the *ranking process* is inherently present in the complexity of predetermining a method, criteria and weightings that will reflect merit in practice.

5.5.6 Selection process

In the analysis of the *selection process*, three situations were described where the *selection process* would not select the most highly ranked tender for award.

In the case where it is decided that no award is to be made, the consideration of cost-effectiveness is of great importance. If no tender were to be found acceptable, the decision to make no award would essentially be made because a threshold level of effectiveness was deemed not to be achievable from any tender.[157] If no tender is affordable, the available funds or - in other words - the public body's pre-estimate of what it was prepared to pay for the value, when compared to the cost of the tenders would not be favourable and therefore not worthwhile. If in-house provision is an available course of action and is optimal, the tender would be cancelled because it is not optimal to proceed with any procurement course of action.[158] If the decision is

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156 Fuentes-Bargues and González-Gaya *Disproportionate tenders* 7-8.

157 This would not apply if the tenders were deemed not acceptable on formal grounds. Aside from this circumstance, if the filtering in the *qualification process* and the *compliance process* resulted in no tenderers or tenders being found acceptable, then it could be deduced that no selection could be worthwhile.

158 It is possible this decision could be taken on strategic grounds. It is submitted that if this was the case, this decision should have been taken prior to issuing the tender, unless circumstances changed during the tender process.

made not to award because a flaw in the process is detected or suspected, apart from reasons grounded in the requirements for fairness, it could also be argued that because of the potential of a challenge, and the consequences for the non-achievement of outcomes and related costs, it would not worthwhile to proceed.

Where the *selection process* results in the award to a tender other than to the most highly ranked tender as determined by the *ranking process*, this could only be justified if the *ranking process* itself has not determined the most meritorious tender. It was concluded that merit is determined by the requirements of macro-level cost-effectiveness.[159] The application of additional factors in the selection decision can be regarded as an extended process refining the determination of merit or optimality by the *ranking process*.[160] The *selection process* may separately consider factors arising from the relative nature of *ranking process* scoring methods, for example, where an abnormally low-priced bid is determined to be the most highly ranked tender.[161] The risk of contracting for an unsustainably low price is effectively the risk of not achieving the outcomes or the risk of future price variations, and in terms of cost-effective decision-making, after the consideration of such risks, a tender other than the most highly ranked tender may be considered optimal. Therefore, if not examined and accounted for in the *ranking process*, the *selection process* may separately consider such risks in terms of merit or a post-compliance process.

More, generally, the *selection process* presents the opportunity to inspect the most meritorious tender identified by the *ranking process* for anomalies or other factors emerging from the relative examination. While the identification of the abnormally low-priced anomaly was specifically dealt with, the possibility of anomalies flowing from any highly weighted non-pricing criteria also exists. Generally, the ability of the *selection process* to detect and consider such anomalies in the selection decision would support macro cost-effectiveness provided the basis for an alternate selection

159 Par 5.5.1.
160 See footnote 127 above. This may alternatively just be considered as an additional scoring rule in the *ranking process*.
161 Par 5.4.7.3.

was made on the optimal direction of resources toward the achievement of the macro-level outcomes.

Where the *selection process* selects a winner from tenders that are ranked equivalently in terms of merit by the *ranking process*, the decision-making may involve a refinement of the determination of merit or in the case of a tiebreaker method, simply to resolve the identity of the optimal selection.

The selection process was concluded to be the decision-making process to select a particular course of action taking into account refinements to the determination of optimality and additional considerations emerging from the relative comparison in the ranking process, including the determination that the selection of a course of action, or no course of action, is worthwhile.

5.6 Summary and conclusions

In establishing the functional elements of the public tender evaluation process, the tender process was first investigated in the general context of problem-solving and decision-making. The tender process, as a competitive procedure, was also distinguished among more general procurement problem-solving procedures using the fundamental tenets of auction theory. The key differentiating characteristics of decision-making in the public tender process were concluded to be the:[162]

(a) predetermination of the procedures and criteria for decision-making;
(b) non-recursive procedures for determining criteria and identifying solutions; and
(c) publication and commitment to the predetermined procedures and criteria.

The functions of decision-making procedures were concluded to consist of filtering, or rejection procedures, and selection procedures.[163] With reference to common literary categorisations and analyses of procurement evaluation processes, five decision-

[162] Par 5.3.5.1.
[163] Par 5.4.1.

making sub-processes were identified within the evaluation process, each with distinct functions:[164]

(a) Qualification process. The filtering process determining whether a tenderer qualifies to take part in subsequent steps of the tender process.
(b) Compliance process. The filtering process determining whether a tender meets 'all material aspects of the tender invitation' and thereby the eligibility of the tender for further consideration.
(c) Shortlisting process. The filtering process limiting the participation in the subsequent processes to fewer tenderers or tenders.
(d) Ranking process. The ordering process of assessing tenders in terms of their relative merit.
(e) Selection process. The decision-making process selecting a tender for award.

Regardless of the type of tender process employed, all or some of these sub-processes would be employed to determine the winning tender. It was concluded that the sub-processes may be undertaken in more than one stage in the evaluation process or they may be undertaken together with other sub-processes. The methods, criteria and weightings employed in each of the sub-processes are directed at selecting the most meritorious acceptable, compliant tender.

The tender evaluation processes were further investigated, in particular with regard to their operation and attribution to cost-effective decision-making in term of the models developed in Chapter 5.

The *qualification process* was defined to be the filtering process limiting the set of produced solutions by excluding tenderers not meeting predetermined threshold criteria.[165] The publication of *qualification process* criteria has the effect of informing decision-making by potential tenderers as to their participation prior to the execution

[164] Par 5.4.1.
[165] Par 5.4.1.

of the *qualification process*.[166] As the *qualification process* excludes tenderers, either by their own decision or by operation of the process, without the consideration of cost, the criteria for qualification must contemplate exclusion at any cost.[167] Exclusion on formal grounds and non-compliance to generally applicable legal norms related to the delivery services can be argued to maintain public trust in the public procurement process and in the lawful delivery of services. Exclusion of tenderers with attributes exhibiting an unacceptable level of risk to the delivery of the direct outcomes sought would support cost-effectiveness, provided the risk was great enough to warrant exclusion at any cost.[168] Where attributes of a tenderer are considered unacceptable in terms of the criteria related to the achievement of horizontal outcomes, the achievement of such outcomes is sought at any cost. Unless the general cost of excluding otherwise acceptable tenderers is determined by another process, exclusionary horizontal criteria could not be said to support cost-effective decision-making.[169]

The *compliance process* was defined to limit further participation in the tender evaluation process to those tenders that meet 'all material aspects of the tender invitation'.[170] The publication of the *compliance process* criteria has the effect of informing decision-making by potential tenderers as to their participation in the tender as well as in the design of their solutions.[171] Exclusion on formal grounds and compliance with generally applicable legal norms related to the delivery services can be argued to maintain public trust in the public procurement process and in the lawful delivery of services. The exclusion of tenders that do not meet the tender specification was concluded to support the cost-effectiveness of the evaluation process.[172] Where attributes of a tender are considered unacceptable in terms of the criteria related to the achievement of horizontal outcomes, the achievement of such horizontal outcomes are sought without regard for the tender's prospect for achieving the direct outcomes

166 Par 5.4.4.1.
167 Par 5.5.2.
168 Par 5.5.2.2.
169 Par 5.5.2.2.
170 Par 5.4.1.
171 Par 5.5.3.
172 Par 5.5.3.

and therefore sought regardless of cost.[173] Unless the general cost of excluding tenders that otherwise meet all material aspects of the tender specification is determined by another process, exclusionary horizontal criteria could not be said to support cost-effective decision-making.[174]

The *shortlisting process* was concluded to have the objective of alleviating the burden of evaluating an inappropriate number of tenders by limiting further participation in the tender processes.[175] The *shortlisting process* therefore could only be cost effective if: the shortlisting method ensured that excluded tenderers or tenders did not have the potential to be the most meritorious tender; and the cost of conducting the *shortlisting process* is less than the cost of a full evaluation of the tenders excluded by the *shortlisting process*.[176]

The *ranking process* was defined to be the process of examining and ordering tenders in terms of their relative merit with the objective of identifying the most meritorious tender.[177] The design of the methods for *ranking process* in the general case where merit is considered across a range of attributes of a tender is non-trivial. The publication of the ranking criteria will signal the weighting of attributes sought by the public body, and therefore inform the design and construction of tenders. The predetermination, complexity and publication of the ranking method may lead to anomalies, either through unintended effects of the method or by the design of tenders intending to maximise heavily weighted preferences. For cost-effectiveness, the alignment of the method determining merit with the balance of outcomes sought and the transparency of the method are required for the production of solutions containing the optimal solution.[178]

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173 Par 5.5.3.
174 Par 5.5.3.
175 Par 5.4.1.
176 Par 5.5.4.
177 Par 5.4.1.
178 Par 5.5.5.

The *selection process* is the sub-process of decision-making, generally undertaken directly after the *ranking process*, which finalises the tender evaluation process.[179] If the most highly ranked tender is not selected, three possibilities were concluded to exist: no selection is made, a tender that is not most highly ranked is selected or a tender is selected that has equivalent merit to the most highly ranked tender. Cost-effectiveness would therefore require that, if it is worthwhile, the most highly ranked tender is selected provided the *ranking process* established optimality based on the cost-outcome relationship. The application of additional methods in the *selection process* refining the ranking was argued to be an extension of the *ranking process*. It also presents an opportunity to inspect the most highly ranked tender for additional factors emerging from the relative examination in the *ranking process*, which may result in what would effectively be a post-compliance process. If no tender is affordable, the decision not to proceed with the award of a tender was argued to be on the basis that there was no worthwhile course of action made available through the tender process. If a flaw in the process is detected or suspected, the decision not to select any tender, aside from reasons grounded in the requirements for fairness, could be argued to support cost-effectiveness as the potential of a challenge and the consequences for the non-achievement of outcomes and related costs would render it not worthwhile to proceed.

In the context of an analysis of a legal framework for the regulation of decision-making in tender evaluation processes, it is the *regulatory system* that is the subject of the analysis and not any particular *transactional system.* Such analysis is therefore indirect as it considers the rules and principles that govern the assembly of rules and procedures in *transactional systems*. Conclusions regarding the functional attribution of provisions of the *regulatory system* toward cost-effectiveness can only be made to the extent that they compel, or do not compel, the design of *transactional systems* that are cost-effective, for example:

(a) Enforcing or preventing the inclusion of cost-effective decision-making procedures.

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[179] Par 5.4.1.

(b) Prohibiting or permitting the inclusion of decision-making provisions that conflict with cost-effective decision-making.
(c) Permitting or prohibiting discretion where generalised regulatory provisions cannot serve all transactional circumstances.

The analysis of a legal framework for the regulation of decision-making in the tender evaluation process can thus be structured by identifying the provisions of the *regulatory* system regulating individual sub-process functions in the *transactional system* and analysing their effect on cost-effectiveness.

6 The regulatory system for public tender evaluations in South Africa

6.1 Introduction

Section 217 requires that whenever a public body conducts procurement activities, a system must exist; the system must be fair, equitable, transparent, competitive and cost-effective; and the public body must procure in accordance with such system. *Section 217* reinforces the principle that a system of public procurement regulation must balance the requirements to accommodate constitutionally permissible policies and importantly legitimises and mandates the presence of certain horizontal policies in defining the balance.[1] The application and execution of the system must take place within the broader constitutional principles of just administrative action. The lawfulness, reasonableness and procedural fairness of the execution of public procurement in this context is informed by the requirements of the public procurement system. Other constitutional rights - the right to access information held by the state and the right to equality - were concluded to have direct application to the procurement system.[2]

The constitutional requirements were concluded to have application to both the *regulatory system* and the *transactional systems*, where the *regulatory system* is the statutory and regulatory framework and the policies of a particular organ of state are established in accordance with the *regulatory system*. The *transactional systems* are assembled in accordance with the *regulatory system* and the relevant organisational policies in the context of particular transactions.[3] The execution of a tender is carried out in terms of the rules and procedures defined by a *transactional system*.

This chapter investigates the framework of law comprising the *regulatory system* that governs the assembly and execution of *transactional systems* for public tenders and

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1 Par 3.8.

2 Other constitutional provisions that have relevance, such as those setting out values and principles for public administration, Treasury control and relevant Chapter 9 institutions are discussed in par 3.7.

3 Par 3.3.5.

specifically examines provisions of the *regulatory system* that govern the decision-making processes in the *transactional system* for the evaluation of tenders.[4] The deconstruction of the tender evaluation decision-making processes established in Chapter 5 provides the structure for the classification of provisions. Observations regarding the attribution of regulatory provisions governing tender evaluation to cost-effective decision-making will be made, drawing on conclusions and the models developed in the earlier chapters regarding cost-effectiveness. The detailed analysis of selected provisions is deferred for the comparative analysis in Chapter 8.

6.2 Framework of law regulating the public tender process

In general, procurement activities are governed by private law, in particular the branch of contract law. The private law of contract applies to public bodies engaging in procurement activities as well as the public law that regulates their activities. In the public procurement context, where public bodies act with private parties, the public body does so from a position of vertical superiority and the precepts of public administrative law apply.[5] Statutory provisions specifically dealing with public procurement, or that have implications for public procurement, are incorporated in a wide range of legislative and regulatory instruments making up the *regulatory system.*

6.2.1 Public procurement tenders and the private law of contract

In the private law of contract, the capacity of the public body to contract is derived from the *Constitution* and within the confines of enabling legislation.[6] There may be limited

4 Although specific implementations of organisational policies may be worthy of investigation for cost-effectiveness, it is not practical to include specific implementations within broader scope of this study.

5 De la Harpe *Public Procurement Law* 60-61.

6 Quinot argues that the state's capacity to contract is 'ultimately founded in the Constitution' and the provisions of section 41(1)(f) of the *Constitution* which exclude "all spheres of government and all organs of state within each sphere" from assuming powers or functions not derived from the *Constitution*. Quinot *State Commercial Activity* 105-110.

circumstances where the public body derives its capacity from the common law but, in any event, such derivation would be subject to the *Constitution*.[7]

Beyond the parties' capacity to enter into a contract, the basic requirement for a contract is the existence of consensus between the parties.[8] The most common form of establishing agreement, as a process and for the legal determination of the existence of a contract, is the offer by one of the prospective contracting parties and the acceptance of the offer by the other. A call for tenders may amount to an offer if the terms of the call for tenders contain provisions binding the issuer to accepting a tender, for example, the commitment to accept the lowest priced tender received. As Christie[9] points out, this would be rare as the body calling for tenders would be unlikely to want to bind itself to an unknown party on such a basis. The most common legal construct used is that the call for tenders amounts to an invitation to submit an offer. Tenders received therefore amount to offers that are made to the body issuing the call and, in terms of contract law, such body is not under an obligation to accept any of the offers received.[10] Under this construct, despite the fact that the call for tenders may contain detailed specifications of the issuer's requirements, the specifications are only provided to facilitate the formulation of an offer by the prospective tenderer. Any reliance placed on specifications issued for drawing up an offer is of no contractual significance as the tenderer is the one making the offer. Unless the terms of the invitation specify otherwise, the common law of contract also does not place an obligation on the body issuing the call for tenders to evaluate, award or even consider the tenders, or offers, received.

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7 De la Harpe provides a further possible source of private law competency for public bodies to engage in commercial activity relating to the manner it deals with its property as the owner. De la Harpe *Public Procurement Law* 66.

8 Christie *Law of Contract in South Africa* 22. Christie discusses "true agreement" and the "doctrine of quasi-mutual assent". For the purposes of this study, it is not necessary to set these out in any further detail.

9 Christie *Law of Contract in South Africa* 42.

10 Christie *Law of Contract in South Africa* 42.

6.2.2 Public law governing public procurement tenders

While the fundamental construct under which a public body issues, evaluates and awards tenders lies within the common law construct of tendering, since the advent of the constitutional era public bodies have been bound by their constitutional duties and obligations. A public body that contracts for goods and services, and hence a public body issuing a tender would be bound, among other provisions, by the requirements of *Section 217*.[11] The provisions of subsection 217(3) of the *Constitution* require legislation to enable the implementation of mechanisms directed at the horizontal objectives of subsection 217(2). The PPPFA, together with regulations issued under the PPPFA, give legislative and regulatory content to subsection 217(2) and specifically to the procedures and methods to be applied in the evaluation and award of public procurement tenders.

The provisions of section 33 of the *Constitution* entrench the right to administrative action that is lawful, reasonable and procedurally fair. A public body conducting a tender process must perform the call for tenders, evaluate and make the resulting award in a manner that conforms to the requirements of section 33.[12] The enabling legislation required by section 33, the PAJA gives content to this fundamental right and to the general obligations of the public body with regard to decision-making during the tender process.[13]

The provisions of section 32 of the *Constitution* grants everyone the right of access to information held by the state.[14] A tender procurement process conducted by a public body must therefore make provision for access to information regarding such

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11 Par 3.8.

12 *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (A) 552j–553a. *Logbro Properties CC v Bedderson NO and Others* 2003 2 SA 460 (SCA) 5.

13 Par 3.4. *Allpay* 90. "In the context of a tender process, the tender documents give notice of the proposed administrative action, while the responding bids in effect constitute representations before the decision is made. Adequate notice would require sufficient information to enable prospective tenderers to make bids that cover all the requirements expected for the successful award of the tender."

14 S33(1) of the *Constitution.*

process.[15] The enabling legislation required by section 32, the PAIA, gives content to the right of access to information held by the state and of the obligations of a public body in this regard. Access to information held by the state during a tender process falls within the ambit of this legislative instrument.[16]

The management of public finance by national and provincial spheres of government; constitutional institutions, public entities and government and provincial business enterprises are governed by the PFMA.[17] The prescripts of the PFMA encompass public procurement as an essential activity in the management of public finance. Regulations issued under the PFMA prescribe the detailed procedural requirements and other obligations regarding procurement by such public bodies.[18] In the local sphere, the MFMA in concert with previously promulgated local government legislation[19] governs the policies and procedures applicable to procurement.

The B-BBEEA sets out the legislative framework for the facilitation of broad-based black economic empowerment. *B-BBEE* is defined to be economic empowerment "through diverse but integrated socio-economic strategies that include", *inter alia*, preferential procurement.[20] The B-BBEEA provides for the ministerial issue of "codes of good practice" which set out definitions of different categories of black empowerment entities, qualification criteria for preferential procurement, the indicators and weightings to measure *B-BBEE* and for industry sector transformation charter guidelines.[21] The mechanisms for preferential public procurement applicable to the tender process depend on the measures set out in the B-BBEEA and the associated codes of good practice.[22]

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15 *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) 43.

16 See par 3.5.

17 The PFMA gives effect to section 216(2) of the *Constitution* to "establish a national treasury and prescribes measures to ensure transparency and expenditure control in each sphere of government". See par 3.7.2.

18 The regulations are issued by the National Treasury.

19 Of relevance to procurement in local government is the *Local Government: Municipal Systems Act* 32 of 2000 when providing for externally provided municipal services (hereafter the "MSA").

20 Sections 1(e) and 2 of the B-BBEEA.

21 Issued by the Minister of Trade and Industry. Generally, s9 of the B-BBEEA.

22 Par 6.5.7.2.

The public procurement of construction works falls under the auspices of the Construction Industry Development Board (hereafter the "CIDB"), a statutory body established by the CIDBA.[23] The CIDBA has as one of its objectives, through the *CIDB*, to "determine and establish best practice that promotes … procurement and delivery management reform"[24] and "improved public sector delivery management".[25] The *CIDB* is required "to publish best practice standards and guidelines" by notice in the Government Gazette.[26] The *CIDB* is specifically charged to "establish and maintain a national register of contractors which provides for categories of contractors in a manner which facilitates public sector procurement".[27] The *CIDB* is further charged with promoting the standardisation of procurement processes of construction works within the procurement framework of government policy.[28]

The procurement of ICT related goods and services by departments must be made either from or through the State Information Technology Agency SOC Ltd (hereafter "SITA") established by the *State Information Technology Agency Act*[29] (hereafter "SITAA"). Public bodies other than departments may procure such goods or services from or through *SITA*.[30] Apart from providing ICT-related services to departments and public bodies, *SITA* must act as procurement agent, including facilitating the

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23 S2 of the CIDBA. S16(3) of the CIDBA. The section provides for the Minister responsible for public works to prescribe, within the framework of policy on procurement, the manner in which public sector construction contracts may be invited, awarded and managed. S16(4) of the CIDBA prescribes that every organ of state must require construction work contractors to be registered, where an organ of state is defined as in s239 of the *Constitution*. For the purposes of this study, the CIDBA is regarded as applying to all organs of state when procuring construction works. Construction works are defined in S1(j) of the CIDBA as being "the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure". Anthony *Construction Procurement Regulation* 26-27. Anthony notes the apparent exclusion of construction-related goods and services from the regulations. For the purposes of this study, the precise applicability is not of great relevance and the *CIDBA's* application to all construction works, goods and services will be assumed.

24 S4(c)(iii) of the CIDBA.

25 S4(c)(iv) of the CIDBA.

26 S5(2)(b) of the CIDBA .

27 S5(2)(d) of CIDBA.

28 S5(3) of CIDBA.

29 *Act* 88 of 1998 as amended by the *State Information Technology Agency Act* 38 of 2002. S2 of the SITAA establishes *SITA*.

30 S7(3) of SITAA. See also National Treasury Practice Note 5 of 2009.

evaluation and making recommendations of ICT-related tenders.[31] In performing this duty, *SITA* must operate within the procurement framework applicable to all organs of state,[32] and is explicitly subject to the PPPFA.[33] No specific powers are given to *SITA* to regulate aspects of the procurement process, save for regulations that may provide for its representation in a department's procurement process[34] and regulations that provide for "due consideration of suitable service providers located in the province in which goods and services are required".[35]

Other legislation relevant to public procurement includes the *Competition Act,*[36] *National Small Business Act,*[37] *Prevention and Combating of Corrupt Activities Act,*[38] and the *Protected Disclosures Act.*[39]. For the purposes of this study, the effect of these legislative instruments on the scope of the *regulatory system* considered in this study is too remote to warrant examination.[40]

6.2.3 Operation of the statutory framework

Each public entity to which the PFMA applies[41] is required, through its accounting authority or officer, to ensure that the entity "has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".[42] In terms of the PFMA, the National Treasury may "make regulations or issue instructions which are applicable to all institutions" to which the PFMA applies "concerning the determination of a framework for an appropriate procurement and provisioning system".[43] (Hereafter the "Treasury Regulations").

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31 S7(3) of CIDBA.
32 Par 3.3.2. *SITA* is listed as a public entity in Part A of Schedule 3 to the PFMA.
33 S7(8)(c)(v) of SITAA.
34 S23(2)(a) of SITAA.
35 S23(2)(b) of SITAA. *SITA* and the effects of the SITAA are not considered further in this study.
36 Act 89 of 1998.
37 102 of 1996.
38 12 of 1994
39 102 of 2000.
40 For a comprehensive list of statues dealing with public procurement including the entity-specific provisions, see Quinot *Institutional Legal Structure* 10-11.
41 National and provincial government and entities as listed in the schedules to the PFMA.
42 S38(a)(iii) and s51(a)(iii) of the PFMA.
43 S 76(4)(c) of the PFMA.

Treasury Regulations issued in terms of this provision, require that a supply chain management system must be developed that complies not with only the constitutional requirements but also the PPPFA and the B-BBEEA.[44] The operation of the legal framework is therefore founded on a decentralised model of public procurement requiring the implementation of procurement policies by each public body. While discretion is afforded in determining specific implementations of a procurement system by a public entity, such discretion is only permitted as provided for within the framework of applicable law.[45]

In the local government sphere, each municipality or municipal entity must implement a supply chain management policy,[46] and procure in terms of such policy. The supply chain management policy or system must comply with the prescribed framework.[47]

The PPPFA, which defines the framework for preferential procurement, applies to all organs of state. "Organs of state" for the purposes of the PPPFA are defined in section 1(ii) of the Act to be all national and provincial departments, municipalities, constitutional institutions, Parliament, provincial legislatures, and any other institution included in the definition of an organ of state in section 239 of the *Constitution* and recognised by the Minister of Finance by notice.[48] The Minister's notice in 2011 extended the applicable entities to all public entities, making the PPPFA applicable to all public entities to which the PFMA and MFMA are applicable.[49] It is mandatory in terms of Section 2 of the PPPFA for the applicable entities to determine their preferential procurement policies in terms of the framework set out in the PPPFA and the regulations to the PPPFA.[50]

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44 Reg 16A3.1 of GN R225 in GG 27388 of 15 March 2005. Treasury Regulations issued in terms of the PFMA (hereafter the "PFMAR").

45 A study of individual SCM policies would be well beyond the scope of this study. The study is thus limited to the provisions of the framework within which these SCM policies are determined.

46 S111 of the MFMA.

47 S112(1) of the MFMA.

48 S 1(ii) of the PPPFA.

49 Reg 2 of the *PPPFAR.* Of significance, this broadened the application of the PPPFA to include parastatals.

50 Bolton *Public Procurement* 269-273. Bolton points out that this obliges applicable public entities: (1) to implement a preferential procurement policy, and (2) to implement such policy within the

The CIDBA empowers the *CIDB* to regulate public procurement that falls within the scope of construction works by organs of state[51] "within the framework of the procurement policy of Government".[52] The phrase "within the framework" is thus interpreted to mean that the *CIDB* may promulgate regulations for construction works that are more restrictive than the broader statutory prescripts determined by the PFMA, MFMA and PPPFA, but may not conflict nor permit discretion where discretion is not permitted by the broader legislative framework.

6.3 Approach to the analysis of the legal framework

As set out above, the legal framework consists of a number of statutory and regulatory instruments, which collectively make up the *regulatory system* for tender evaluation in South Africa (the "South African framework"). Each instrument has different applicability, either in terms of the public bodies that are bound, or in terms of the type of procurement that is being performed. For the purposes of this study, the discussion of the *regulatory system* will be divided into three groups:

(a) The group to which the PFMA applies broadly. National and provincial departments, constitutional entities, national and provincial public entities, major public entities and national government enterprises. In order not to intersect with the third group, the regulatory framework applicable to this group will exclude the procurement of construction works (the "National and Provincial Framework").

(b) The group to which the *MSA* and MFMA apply broadly: municipalities[53] and municipal entities. In order not to intersect with the third group, the regulatory

framework of the PPPFA. "Within the framework" is interpreted to mean a policy that is neither more generous, less generous nor different, even if equivalent.

51 S1(o) of the *CIDBA* this is defined to be organs of state as defined in s239 of the *Constitution*. See discussion in par 3.3.2.

52 S5(3)(c) of the *CIDBA*.

53 Chapter 11 (Goods and Services) of the MFMA sets out the supply chain management framework for municipalities and municipal entities. A "municipality" is defined in s2 of the *MSA* to be an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act 27 of 1998. A "municipal entity" is defined in s1 of the *MSA* as "a company, or a co-operative trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of the one or more municipalities, and includes, in the

framework applicable to this group will exclude the procurement of construction works (the "Local Government Framework").

(c) The category of procurement and group to which the prescripts of the CIDBA applies.[54] The group to which this applies is all public entities when engaging in the procurement of construction works (the "Construction Works Framework").

The PPPFA and its regulations have applicability to all public entities and all types of procurements and, therefore, are embedded in all three of the framework groups and do not distinguish a further grouping for the purposes of this analysis. Likewise, the B-BBEEA, in the context of tender evaluation, has application to all the above groupings and does distinguish a further legislative grouping. Primary and subordinate legislative provisions form the basis for determining the provisions of the *regulatory system* applicable to each group. Authoritative practice notes, instruction notes, guidelines, notes and circulars are considered where these are peremptory in nature or of interpretative assistance.[55]

Certain common provisions of the PPPFA are examined before the investigation into the *regulatory system* as PPPFA has application to all three groups. Thereafter the provisions governing each of the three groups are examined as these define the *regulatory system* for the five sub-processes: the *qualification process*, *compliance process*, *shortlisting process*, *ranking process* and the *selection process*.

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case of a company under such ownership control, any subsidiary of that company, or (b) a service utility".

54 S16(3) of the *CIDBA*. The section provides for the Minister to prescribe, within the framework of policy on procurement, the manner in which public sector construction contracts may be invited, awarded and managed. S16(4) of the *CIDBA* prescribes that every organ of state must apply the register of contractors. For the purposes of this study, the application of the *CIDBA* therefore applies to all organs of state when procuring construction works. Construction works are defined in S1(j) of the *CIDBA* as being "the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure". Anthony *Construction Procurement Regulation* 26-27. Anthony notes the apparent exclusion of construction-related goods and services from the regulations. For the purposes of this study, the precise applicability is not of great relevance and the *CIDBA's* application to all construction works, goods and services will be presumed.

55 See Figure 9: Regulatory system in par 6.8.

6.4 Provisions of the PPPFA

Section 2 of the PPPFA provides as follows:

2. Framework for implementation of preferential procurement policy.—(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
   (a) A preference point system must be followed;
   (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
   (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
   (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
   (d) the specific goals may include—
      (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
      (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;
   (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
   (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
   (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.
   (2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.

The PPPFA specifies a framework for the *ranking and selection processe*s within which every organ of state must determine its preferential procurement policy in which: the lowest priced acceptable tender scores 90 or 80 points out of a possible 100 points depending on the value of the intended contract. Other acceptable tenders which are higher in price must score fewer points than the lowest-priced acceptable tender on a pro rata basis in relation to the lowest-priced tender and each tender may be allocated

points for specific goals up to a maximum of 10 or 20 points, depending on the value of the intended tender.

Sections 2(1)(b) and 2(1)(c) specify that only "acceptable" tenders may be awarded points for their pricing. An "acceptable tender" is defined to be "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document".[56] By implication, a tender that does not meet all the specifications and conditions set out in the invitation to tender cannot be awarded points for price. The PPPFA therefore does not specify that if a tender is not acceptable that it must not play any further part in the process, only that it cannot receive points for its pricing. A second point to note is that while the provision states that the "tender" must be "acceptable", no explicit reference is made to the qualification status of the tenderer. As the definition of an acceptable tender includes the condition that the tender must meet "the conditions … as set out in the tender document",[57] if conditions relating to the qualification of the tenderer are set out in the tender document, this could be argued to be a condition for the tender to be acceptable.[58]

Subsections 2(1)(d), 2(1)(b), 2(e) and 2(2) of the PPPFA provide for the allocation of points up to a maximum of 10 or 20, depending on the value for the intended contract, for "specific goals". Specific goals may include certain horizontal goals, provided these are clearly specified in the invitation to tender and are measureable, quantifiable and monitored for compliance. It should be noted that the PPPFA is silent as to whether a tender, which is not regarded as acceptable, may still receive points for specific goals.

Section 2(1)(f) of the PPPFA instructs that the tenderer who scores the highest points must be awarded the tender unless objective criteria, in addition to specific goals for which points have been awarded, justify the award to another tenderer.[59] While section 2(1)(f) does not limit an award on such grounds to be made only to tenderers who

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56 S1 of the PPPFA.
57 S1 of the PPPFA.
58 The implications of this interpretation are that the *qualification process* must precede the *ranking process*, as it would not be known whether to award points for pricing for a tender if its status in terms of acceptability has not been determined.
59 This is discussed further in par 6.5.8

have submitted acceptable tenders but simply "another" tenderer, in this context, it is submitted that it is implicit that it would be to another tenderer who has submitted an acceptable tender.

The *PPPFAR*[60] provide for the evaluation of "functionality". Functionality is defined to mean: [61]

> the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer.

The *PPPFAR* further specify that the evaluation criteria for measuring functionality, the weight of each criterion, applicable values; and the minimum qualifying score for functionality must be clearly specified in the tender.[62] The regulations further set out the consequences for a tender failing to meet the minimum qualifying score in sub-regulations 4(4) and 4(5):

> (4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation
> (5) Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point system prescribed in regulations 5 and 6.

Tenders that achieve the minimum qualification score for functionality must be evaluated further and tenders that have not must not be regarded as "acceptable". This read together with section 1 of the PPPFA does not prescribe a framework that disqualifies a tender not meeting the minimum qualification score for functionality from further evaluation but only that such a tender cannot receive points for pricing.[63]

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60 GN R502 in GG 34350 of 8 July 2011 (hereafter "PPPFAR").

61 Reg 1(k) of the *PPPFAR*. Quinot *Role of Quality* 1114. Note that the quality, reliability, viability and durability are only indicated with regard to a service and not with regard to commodities or goods. Quinot regards this as an oversight in the current regulations.

62 Reg 4(3) of the *PPPFAR*.

63 This interpretation may be regarded as hypothetical given that an unacceptable tender could only score a maximum of 10 or 20 points (depending on the value of the intended contract) versus the lowest-priced acceptable tender scoring 90 or 80 points respectively. If the provisions of s2(1)(f) of

While the framework defined by the PPPFA and the *PPPFAR* does not appear to prescribe meeting the minimum qualifying score for functionality as a requirement for further consideration, guidelines issued by National Treasury unambiguously state that "bids that fail to achieve the minimum qualifying score for functionality must be disqualified".[64] This interpretation of functionality as a qualifying criterion being prescribed by the framework is commonly accepted in case law[65] and by academic authors.[66] It is therefore submitted that the intention of the legislature and executive appears to be that if a *transactional system* is to include a *qualification process* or a *compliance process* examining the criteria contemplated for functionality it must be formulated in the manner prescribed for the evaluation of functionality.

The preamble to the PPPFA delimits the scope of the statute to giving effect to preferential procurement mechanisms and to the protection and advancement of the groups specified in subsection 217(2) of the *Constitution*. In terms of its definition, functionality is solely concerned with the achievement of the direct outcomes of the procurement. The question would naturally arise as to whether the provisions of the *PPPFAR* relating to functionality are *intra vires* in light of the scope of the enabling statute. The argument could be made that the preferential mechanism defined by the *PPPFAR* relies on a filtering process excluding tenders from the possibility of receiving points if they are deemed unacceptable and is in some way required for the overall operation of the mechanism. However, it would remain unclear why such filtering would be confined to operate within the scope of this enabling statute.[67]

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the PPPFA are invoked, in theory, the framework would permit an award to an unacceptable tender.

64 National Treasury 2011 http://bit.ly/2isGrCx. At par 11.1.3.

65 For example, *Allpay* 58, *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others* 2012 (3791/2012) ZAWCHC 162 (C) 56.

66 Quinot *Role of Quality* 1131. Quinot concludes that the PPPFA envisages "functionality as a qualification criterion". See also Bolton *Analysis of Criteria* 1 and De la Harpe *Substantive and Objective Criteria* 111.

67 See also De la Harpe *Substantive and Objective Criteria* 111. De la Harpe makes the point that regulation dealing with the direct outcomes of the transaction is sufficiently general to be dealt with under more general statutes, for example the PFMA or MFMA and not under the statue dealing with the preferential scheme. This question is not pursued further and it is accepted that the legal position is as currently regulated.

6.5 National and Provincial Framework

6.5.1 Provisions of the PFMA

The provisions of the PFMA set out the general responsibilities of the accounting officer or accounting authority of a public body to ensure that the public body has "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".[68] In terms of s76(4)(a) of the PFMA, the National Treasury may "make regulations or issue instructions which are applicable to all institutions" to which the Act applies "concerning any matter that may be prescribed for all institutions" …"concerning the determination of a framework for an appropriate procurement and provisioning system".[69] The PFMA, therefore, empowers the National Treasury to determine generally applicable provisions as well as implicitly empowering the institutions to determine the details of their procurement policies and systems. While the PFMA does not provide further detail regarding the evaluation process, regulations and instruction notes issued in terms of the PFMA provide content to the definition of the *regulatory system*.

6.5.2 Regulations applicable to procurement procedures

The *PFMAR* prescribe that the procurement of goods and services may be conducted by way of a: petty cash process; written or verbal quotation process or by way of a bidding process, depending on the value of intended procurement. The thresholds for the value below which simpler processes may be used, are determined by notices issued from time to time by National Treasury.[70]

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68 Subsection 38(a)(iii) and subsection 51(1)(a) (iii) of the PFMA.

69 Subsection 76(4)(a) and subsection (4)(c) of the PFMA.

70 Reg 16A6.1 of the *PFMAR*. National Treasury 2007 *National Treasury Practice Note No 8 of 2007/2008* http://bit.ly/2jPiIJa. The current threshold values for the procurement of goods, works or services are: below R2 000 procurement can be performed by way of petty cash processes; below R10 000, by means of no fewer than 3 verbal or written quotations from a list of prospective suppliers; and below R500 000, by means of written price quotations from as many suppliers as possible that are registered on a list of prospective suppliers. Above R500 000, an advertised competitive process should be followed. The thresholds also determine that below a value of R30 000 the application of the prescripts of the PPPFA is discretionary. Accounting officers or authorities may lower the thresholds but may not increase them.

6.5.3 Regulations pertaining to evaluation processes in general

6.5.3.1 Criteria for bid documentation

The *PFMAR* prescribe the following:[71]

> Reg 16A6.3 The accounting officer or accounting authority must ensure that -
> (b) Bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

It is therefore mandatory that the bid documentation includes evaluation and adjudication criteria, and such criteria must include the criteria prescribed by the PPPFA and B-BBEEA. Additional criteria not prescribed by the PPPFA or B-BBEEA, may be specified provided all criteria are included in the bid documentation.[72]

6.5.3.2 Publication of bid documentation

By instruction note to applicable public bodies,[73] tenders must be published on the National Treasury eTender website. The required information includes the closing date and time, the bid documentation, or where it can be obtained, and the place of submission.[74]

6.5.4 Qualification process

6.5.4.1 Bidder qualification provisions of the *PFMAR*

The *PFMAR*, practice notes and instruction notes contain various provisions regulating the *qualification process*:

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71 Reg 16A6.3 of the *PFMAR*.

72 The regulations do not insist on all criteria being included. The general principle of transparency would require this. Par 4.5.2.2.

73 National Treasury 2015 http://bit.ly/2k0jYwW. *National Treasury Instruction Note No 1 of 2015/2016.* This applies to all Schedule 2 and 3 public entities, departments and constitutional institutions.

74 National Treasury 2015 http://bit.ly/2k0jYwW.

(a) Requirement to disqualify a bidder if the bidder is listed or any of its directors are listed, as persons prohibited from doing business with the public sector. This condition must be validated at any time during the evaluation process prior to award.[75]

(b) Requirement to disqualify a bidder that does not provide proof that it has no outstanding tax obligations or that the bidder has arranged to meet outstanding tax obligations.[76] Failure to meet this requirement must result in the bid being rejected. The wording "must reject" and by the nature of the requirement, this requirement should be verified at the earliest stage in the process.[77]

(c) Discretion to disqualify a bidder if the bidder, or any of its directors, that has abused or conducted itself improperly with regard to the public body's supply chain management system.[78]

(d) Discretion to disqualify a bidder if the bidder, or any of its directors, has not performed with regard to a previous contract.[79]

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75 Reg 16A9.1 (c) of the *PFMAR*. The accounting officer or accounting authority must check the National Treasury's database prior to awarding any contract to ensure that no recommended bidders, nor any of their directors, are listed as companies or persons prohibited from doing business with the public sector. See footnote 58 above and the implication that this must be performed prior to the *ranking process*. In practice, it may be verified by the registration status of the supplier on the *CSD* (central supplier database) see (g) below in this paragraph.

76 Reg 16A9.1 (d) of the *PFMAR*. The accounting officer or accounting authority must - reject any bid from a supplier who fails to provide written proof from the South African Revenue Service that supplier either has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations. National Treasury 2007 http://bit.ly/2jPiIJa. National Treasury Practice Note Number No 8 of 2007/2008 provides that below the threshold of R30 000, the tax status of a bidder need not be a qualificationary criterion.

77 At the latest before the *ranking process*. See footnote 58 above.

78 Reg 16A9.2 (a) (i) and (ii) of the *PFMAR*. The accounting officer or accounting authority - may disregard the bid of any bidder if that bidder, or any of its directors (i) have abused the institution's supply chain management system or (ii) have committed fraud or any other improper conduct in relation to such system. National Treasury 2009 http://bit.ly/2jAnFpL. National Treasury 2010 SBD 9 Certificate of Independent Bid Certification *SBD 9 Certificate of Independent Bid Certification* http://bit.ly/2jPbKn9 The determination of aspects of this criterion has been made mandatory by National Treasury Practice Note Number 7 of 2009/2010 (Declaration of interests) and National Treasury Practice Note of 21 July 2010 (Certificate of Independent Bid Determination).

79 Reg 16A9.2 (a) (iii) of the *PFMAR*. The accounting officer or accounting authority may disregard the bid of any bidder if that bidder, or any of its directors, have failed to perform on any previous contract. No process is specified for arriving at this determination.

(e) Requirement to qualify (obtain clearance for) a recommended bidder in terms of the National Industrial Participation Programme.[80] The wording of this requirement implies that this is a post-qualification requirement.

(f) Prohibition on the use of qualification criteria based on the category of a bidder.[81] The National Treasury practice note prohibits a set-aside for categories of bidder, for example, based on the bidder's racial group.[82]

(g) Requirement to use registered suppliers. National Treasury practice note[83] directs the use of a central supplier database (hereafter the "CSD") for the verification of, among others: business registration, bank holder information, tax compliance status, *B-BBEE* level, and previous tender default and restricted supplier status. The instruction note requires public bodies to verify the details of suppliers submitting price quotations or participating in competitive bid processes on the *CSD*. The requirement for registration by a tenderer can be regarded as serving a basic *qualification process* function, although successful registration depends only on the submission of essential documentation. The effective role of the *CSD* is that of providing verified information as input to a *qualification process* rather than executing the function of qualification.

(h) Discretion to disqualify a bidder who has not submitted a Certificate of Independent Bid Determination.[84] This practice note sets out the requirement for tenderers to submit a complete and signed certificate. The bidder's tender may

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80 Reg 16A10 of the *PFMAR*. An accounting officer or accounting authority must obtain clearance for a recommended bidder from the Department of Trade and Industry, in respect of contracts that are subject to the National Industrial Participation Programme of the Department. De la Harpe *Public Procurement Law* 506. De la Harpe notes that there is only an indirect legal basis through regulation for this requirement, as no enabling legislation exists.

81 National Treasury 2006 http://bit.ly/2jq9Ixd National Treasury Supply Chain Management Office Practice Note 2 of 2006.

82 In any event, a policy permitting such qualificationary criteria would fall outside the prescripts of the PPPFA.

83 National Treasury 2016 National Treasury SCM Instruction Note No 4A of 2016/2017 http://bit.ly/2k6ft49. Par 4.2 of the instruction note requires registration of supplier prior to submitting a bid for a tender. With respect to certain of the regulatory wording, requirements for registration change the regulatory requirement "not to award to restricted suppliers" from a post qualification to a pre-qualification. This repeals the discretion of the public body to set up pre-qualification lists for petty cash and quotation processes. National Treasury 2007 http://bit.ly/2jPiIJa. National Treasury Practice Note Number No 8 at par 5.

84 National Treasury 2010 *SBD 9 Certificate of Independent Bid Certification* http://bit.ly/2jPbKn9.

be invalidated if the certificate is not submitted, or not submitted within seven working days of a request to submit.

(i) Discretion to disqualify a bidder on formal responsiveness grounds. The National Treasury function has issued a number of standard bidding documents (hereafter "SBDs") in the interest of standardising tender procedures.[85] The inclusion of the SBDs in the invitation to tender is directory.[86] A public body, in general, has the discretion to disqualify a bidder in the event the bidder fails to submit or properly complete SBD documents.[87]

(j) Requirement to disqualify a bidder for late submission of documents.[88]

6.5.4.2 Bidder qualification procedures in guidelines

The provisions of the PFMA, the regulations to the PFMA, the PPPFA and the regulations to the PPPFA set out limited discretion for the inclusion of *qualification process(es)*. Aside from the mandatory, discretionary and prohibited criteria, the regulatory framework is silent about the inclusion of additional qualificationary processes, for example, two-stage bidding, or conducting other forms of pre-qualification or post-qualification. Prior to the publication of the *PFMAR* in 2005, the National Treasury Regulations of 2002 included an explicit reference to pre-qualificationary procedures in the context of supplier selection in PPP agreements,[89] although the provision was withdrawn in 2005.

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85 Issued by the Office of the Chief Procurement Officer function within National Treasury.

86 National Treasury 2003 *Practice Note Number 1 of 2003* http://bit.ly/2jPlJsI.

87 This is discretion is incorporated in the framework by standardised conditions embedded in SBDs and which therefore become conditions of every tender issued. See for example National Treasury Date unknown *SBD 1 Invitation to Bid* http://bit.ly/2k0md3j. The document contains the following provision: "The following particulars must be furnished (failure to do so may result in your bid being disqualified)".

88 This formal responsiveness criterion to disqualify a bidder for the late submission of tenders is present throughout. The requirement is enforced through SBD1, a document that must be issued with the invitation to tender and must be completed by the bidder.

89 Reg 16.6.4 of the National Treasury Regulations 2002. "The procurement procedure must include – (a) and open and transparent pre-qualification process".

The SCM Guide for Accounting Officers/Authorities[90] sets out procedures and requirements in some detail for:[91]

(a) Pre-qualifying bidders. "Pre-qualification should be based entirely upon the capability and resources of the prospective bidders to perform the particular contract satisfactorily, taking into account their capabilities with respect to personnel, equipment and construction or manufacturing facilities; and financial position."
(b) Two-stage bidding. "In the case of turnkey contracts or contracts for large complex plants or works of a special nature it may be undesirable or impractical to prepare complete technical specifications in advance."

It should be noted that none of these procedures are explicitly included in the regulatory framework although they are common procurement procedures in practice. It is, therefore, an open question as to whether the regulatory silence regarding qualification procedures intends for the discretion to include pre-qualification procedures in *transactional systems*.

6.5.4.3 Bidder qualification provisions of the PPPFA and its regulations

The provisions of the PPPFA define a framework that inherently considers attributes of tenderers in the preference system, however, it does not explicitly provide for a separate *qualification process* in the framework. The *PPPFAR* provide a framework for a two-step evaluation process. The first stage provides for the evaluation of functionality.[92]

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90 National Treasury 2004 http://bit.ly/2jF5cbD. (Hereafter the "SCM Guidelines").The guide explicitly disclaims its use as a substitute for legislation or its use for legal interpretation. However, given that National Treasury is the author of the document, its content is worthy of mention where the regulations are silent.
91 *SCM Guidelines* Par 4.9.
92 Par 6.4.

Among the factors considered in the measurement of functionality are the "technical capacity and ability of a tenderer", which are attributes that attach to the tenderer.[93] The phrasing of the definition does not limit the factors, or criteria, to those listed, nor does it explicitly require that the factors listed must be considered, although the words "taking into account, among other factors" suggests that at a minimum the factors that are listed should be considered. The exemplars provided in the definition indicate that criteria attaching to both the tender and tenderer should be considered and, of relevance here, include qualificationary competency criteria attaching to the tenderer.[94]

The *PPPFAR* do not require that functionality must be evaluated. However, if the evaluation of functionality is required in the *transactional system*, then the fact that functionality will be evaluated must be indicated in the invitation to tender; the evaluation criteria for functionality must be objective; and the criteria, their weights, applicable values and the minimum qualifying score for functionality "must be clearly specified in the invitation to tender".[95] If the evaluation of functionality is included, it must result in the determination of whether a tender is acceptable or not.[96] Acceptable tenders must progress to the next step of evaluation and, as concluded above, tenders that are not acceptable must not progress.[97]

In terms of the definition of functionality, its evaluation includes criteria that pertain to attributes of the tenderer and its output is either that the tender of a tenderer qualifies or it does not qualify. The evaluation of functionality as specified is a filtering function in the first step of the evaluation process that, in part, functions as a *qualification process*. No other method of examining qualification competency criteria is provided

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93 Reg 1(k) of the *PPPFAR.* See par 6.4. These are specified generally as the capacity and ability of a tenderer, not specifically to the performance of the scope of the deliverable.

94 *National Treasury* 2011 http://bit.ly/2isGrCx*.* At par 6.2(a), the guideline suggests that in addition to the list provided in the definition of functionality, "the evaluation criteria may include criteria such as the consultant's relevant experience for the assignment, the quality of the methodology; the qualifications of key personnel; transfer of knowledge etc."

95 Regs 4(1), 4(2) and reg 4(3) of the *PPPFAR*.

96 Reg 4(4) of the *PPPFAR*.

97 Regs 4(4) and 4(5) of the *PPPFAR*. See par 6.4 and the discussion regarding the effective disqualification of tenders that are not considered acceptable.

for and it can be concluded that if such criteria are to form part of the *transactional system* they must be considered under the framework of functionality.

The wording of Regulation 4 of the *PPPFAR* suggests that a method must be used to aggregate the scores of the different factors, although the method itself is not regulated.[98] The public entity is therefore afforded discretion in choice of method and the determination of the weightings of criteria, however the use of the word "weight" and the reference to the "minimum qualifying score for functionality" in the singular imply that the use of a method aggregating different factors to a single score is intended.[99]

The second stage of the evaluation process also includes the evaluation of attributes of the tenderer, namely attributes relating to the tenderer's *B-BBEE* status. However, the output of the second step does not result in a qualification or disqualification and therefore does not regulate a *qualification process*.[100]

6.5.4.4 Bidder qualification conditions embedded in bidding documents

To support the initiative to standardise bidding procedures within the regulatory framework, as noted above, National Treasury has issued a number of SBDs. These SBDs operate in concert with specific provisions of the regulatory framework and contain various embedded qualificationary conditions. The mandatory inclusion of SBDs in the *transactional system* therefore removes certain discretion as to the specific implementation of such framework conditions. The requirement for bidders to complete SBDs also adds formal responsiveness criteria[101]. At a formal level, the

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98 The use of the word "weight" and the reference to the "minimum qualifying score for functionality" in the singular. Regs 4(3)(b) and 4(3)(d). This implies that by the use of a method, different factors are aggregated to a single score to be compared to a threshold score to determine acceptability or otherwise. The PPPFA *Implementation Guide* 6.2(d) reinforces this interpretation.

99 Regs 4(3)(b) and 4(3)(d) of the *PPPFAR*.

100 See pars 5.4.4 and 6.5.7.2.

101 National Treasury http://bit.ly/2k0md3j. For example, SBD 1 Invitation to Bid contains the following text "the following particulars must be furnished (failure to do so may result in your bid being disqualified)".

failure to complete, submit or sign forms relating to qualificationary criteria may result in disqualification.[102]

6.5.4.5 Qualification process summary

Specific mandatory and discretionary qualification criteria are prescribed by regulation and one qualificationary criterion has been prohibited by regulation in the *National and Provincial Framework*. The point in the evaluation process at which these specific qualificationary processes must take place is regulated. The evaluation of qualificationary competency criteria may be included in the *transactional system*, and if so, must be within the framework of functionality as required by the *PPPFAR*. The *qualification process* that takes place as part of a functionality evaluation takes place after the submission of tenders and potentially takes place together with the *compliance process*. Other *qualification processes* are not explicitly prohibited by the regulatory framework and some are referenced in guides issued by National Treasury,[103] however it is submitted that any discretionary competency qualification criteria must be considered under the framework of functionality.

The framework contains a number of provisions that require the inclusion of formal responsiveness,[104] responsibility[105] and competency criteria[106]. The framework provides for a general standard that qualifying criteria must be published with the invitation to tender. As observed above, an effect of publishing clear qualifying criteria has the effect of self-prequalification by prospective bidders.[107]

The effects of features of a *qualification process* defined by a *transactional system* on cost-effectiveness were investigated in the previous chapter. The provisions of the *regulatory system* governing the *qualification process* discussed above are therefore

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102 This is subject to considerations of fairness, discussed in par 4.3.
103 *SCM Guidelines* at Par 4.9.
104 Examples are the completeness of SDBs, timeous submission.
105 Examples are the tax compliance status or the listing of the bidder or any of its directors on as persons prohibited from doing business with the state.
106 Examples are the technical capacity and ability of the tenderer.
107 Par 5.5.2.

examined in the way they compel the definition of the *qualification process* in the *transactional system*.

6.5.4.5.1 Formal responsiveness

The *regulatory system* prescribes that the public body has the discretion to disqualify a tenderer on formal grounds, such as the non-submission of required documents and certificates. In the case of the omission of certain forms, a grace period for submission is permitted.[108] Exclusion on formal grounds was generally seen not to support cost-effectiveness for the reason it may exclude an optimal course of action from the set from which a selection will be made. Pre-registration on the *CSD* is an asynchronous activity that can be iteratively performed in the event of formal errors, and therefore assists in avoiding disqualification for formal defects.[109]

6.5.4.5.2 Responsibility

The *regulatory system* provides peremptory provisions for the disqualification of a tenderer if it is not tax compliant or if it is generally prohibited from conducting business with the public sector. Exclusion on non-compliance to generally applicable legal norms related to the delivery services was argued to maintain public trust in the public procurement process.[110] The grounds required by the *regulatory system* for exclusion would appear to fall within a reasonable and justifiable set of circumstances.

In terms of a practice note, set-asides based on the classification of a tenderer are not permitted. This instruction together with the guidance for implementation prohibits the inclusion of qualificationary criteria not related to the performance of the contract. This excludes the possibility of such criteria in the *transactional system,* and of limiting the production of solutions by a smaller set of tenderers.[111]

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108 Par 6.5.4.1. Discretion is permitted by the regulation not to disqualify a bidder in certain circumstances.
109 Par 5.5.2.1.
110 Par 5.5.2.2.
111 Par 5.5.2.2.

6.5.4.5.3 Competency

The *regulatory system* requires *qualification process* criteria to be related to the capability, resources, technical capacity and ability of the tenderer, and proscribes the inclusion of criteria not related to the subject matter of the tender. The *regulatory system* therefore permits qualification criteria to exclude tenderers based on their inability to perform. The specification of criteria would be determined as part of the assembly of the *transactional system* and requires the application of discretion of the public body within these constraints.

The *regulatory system*'s provisions could thus be said to include the basic elements compelling cost-effective decision-making.[112] However, if included in the *transactional system*, competency qualification criteria must be considered under the framework of functionality, which potentially constrains the method to a complex compensatory method combined with the *compliance process.*

6.5.5 Compliance process

The *compliance process* is the evaluation sub-process that determines whether a "tender meets all material aspects of the tender invitation".[113] The criteria that may relate to the *compliance process*, as argued above, are determined in the tender specification phase or the assembly of the *transactional system*.[114]

6.5.5.1 Provisions relating to tender specification provisions

The PFMA and *PFMAR* specify that the bid documentation must adhere to the instructions of the National Treasury and must include evaluation and adjudication criteria.[115] The regulations do not specify requirements for the *compliance process*

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112 Par 5.5.2.3.
113 Par 5.4.5.
114 While the *compliance process* deals with the actual evaluation of a tender's compliance, provisions relating to the specification will largely determine the outcome of the *compliance process*. See par 5.4.3.
115 Reg 16A6.3(a) and (b) of the *PFMAR*.

with regard to the tender specification directly. The *SCM Guidelines* set out certain standards for bid documentation:[116]

(a) Requirement to base all contracts on the General Conditions of Contract;[117]

(b) Requirement to use the SBDs as issued by the National Treasury. Public bodies are permitted discretion to customise the documents;[118]

(c) Requirement that standards and technical specifications should promote the broadest possible competition while assuring that critical elements of the performance or other requirements are achieved. As far as possible, standards issued by Standards South Africa, the International Standards Organisation[119] or an authority recognised by the South African National Accreditation System should be applied to equipment, materials or workmanship;[120]

(d) Requirement that bid documents should include clear specifications of the work to be carried out, place of delivery or installation, schedule for delivery or completion, minimum performance requirements and the warranty and maintenance requirements; tests, standards and methods that would be employed to judge the conformity of equipment or works with the specifications;[121]

(e) Requirement that specifications should be based on relevant characteristics and not on brand names catalogue numbers or similar characteristics; and[122]

(f) Discretion to require bid securities.[123]

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116 *SCM Guidelines* 4.8. The *SCM Guidelines* prevail upon public bodies to ensure the guides are followed, but do not make the requirements mandatory. They are therefore referred to as standards.

117 *SCM Guidelines* 4.8.1 "General and Special Contract Conditions".

118 *SCM Guidelines* 4.8.1 "Using Standard Bidding Documents".

119 Hereafter "ISO".

120 *SCM Guidelines* 3.4.1.

121 *SCM Guidelines* 4.8.1 "Bid Content".

122 *SCM Guidelines* 3.4.2 and 4.8.1 "Use of brand names". If brand names are used, the words "or equivalent" should be added.

123 *SCM Guidelines* 4.8.1 "Sureties". The discretion to include bid securities is tempered with the requirement that such securities should not be set so high that bidders are discouraged.

The requirements and standards set out by the PFMA, *PFMAR* and the *SCM Guidelines* therefore specify standards limiting the discretion of public bodies with regard to the specification of the tender in the *transactional system*.

6.5.5.2 Provisions relating to the *compliance process*

The PPPFA and the *PPPFAR* generally define the framework for the evaluation of tenders. As discussed above, the evaluation of functionality is the first step of the evaluation process, which combines a *compliance process* with a *qualification process*.[124]

6.5.5.2.1 Formal responsiveness

Formal responsiveness evaluates a tender's compliance to formal aspects of the tender, for example timely submission of the tender; promptness in response to queries; correctness and completeness of information; attendance of mandatory meetings or registration.[125]

The use of SBDs is directed by National Treasury.[126] As discussed above in the context of the *qualification process*, the use of SBDs and the use of standardised conditions embedded in the documents incorporate formal requirements into the framework.[127] An example would be the discretion to disqualify a tender if a local content declaration certificate is not submitted as part of the tender or if the tenderer has not declared the local content that has been audited and certified as correct.[128]

6.5.5.2.2 Substantive responsiveness

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124 Par 6.4.
125 Par 5.4.5.2.
126 Although discretion to customise the SBDs is permitted.
127 Par 6.5.4.1(i).
128 National Treasury 2014 *SBD 6.2 Invitation and Evaluation of Bids based on a Stipulated Minimum Threshold for Local Production and Content for the Residential Electricity Meters* http://bit.ly/2iZaX3e. This instruction note from National Treasury specifying minimum local production and content for residential electricity meters is given as an example. Similar provisions exist for other sectors.

Substantive responsiveness refers to the tender's compliance with specified threshold criteria.[129]

The *PFMAR*, practice notes and instruction notes contain various provisions regulating the framework for the *compliance process*. The most important of these are listed below:

(a) Requirement for a tender to comply with minimum local content.[130] In designated sectors where "in the award of tenders local production and content is of critical importance"; the public body must include a specific tendering condition that a stipulated minimum local content must be met in order for the tender to be considered. [131] The public body is also granted discretion to include similar provisions for non-designated sectors in accordance with National Treasury and *DTI* prescripts and thresholds.[132]

(b) Prohibition on the use of cost estimates as benchmarks. The public body is prohibited from rejecting a tender on the basis that its price deviates from the public body's own cost estimates by more than a predetermined percentage.[133]

(c) Discretion to evaluate a tender on functionality. As discussed above, the evaluation of functionality is discretionary.[134] If the public body deems the evaluation of functionality necessary for the *compliance process*, it must do so

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129 See Par 5.4.5.2 for definition of compliance criteria.

130 Reg 9 of the *PPPFAR*.

131 See footnote 128 above. To date through the issue of National Treasury Instruction notes, the *DTI* has designated minimum local content thresholds for residential electricity meters; working vessels(boats); solar water heater components; rail rolling stock sector; valve products; electrical and telecom cable products; furniture products; set top boxes; bus sector; steel pylons sector; processed vegetables; textile, clothing leather and footwear sectors. De La Harpe Substantive and Objective Criteria 112 De la Harpe argues that notwithstanding that local content set-asides are not provided for in the PPPFA, either in the preference system or goals of the Reconstruction and Development Programme, it does not mean that it would necessarily fail a constitutional test in terms of *Section 217.* This is supported in terms of participatory fairness being interpreted to be an obligation to citizens. The cost-effectiveness of this provision is discussed in later paragraphs.

132 Reg 9(3) of the *PPPFAR*.

133 National Treasury http://bit.ly/2jq9Ixd See par 1.2.4 of this practice note. Although pricing is a factor considered in the *ranking process*, the use of a benchmark to disqualify a tender falls within the definition of a *compliance process.*

134 Reg 4(1) of the *PPPFAR*. The PPPFA *Implementation Guide* 6.1 clarifies the need to use functionality to depend on the "nature of the required commodity or service".

within the framework specified for the evaluation of functionality. The measurement of attributes specifically listed in the definition of functionality that relate to a *compliance process* would be those connected to the measurement of a service or commodity in terms of its practicality, usefulness, working or operating capability, quality, viability, reliability and durability.[135] The wording of regulation 4 of the *PPPFAR* suggests that a multi-attribute decision-method must be used to aggregate the scores of the different factors although the method itself is not actually specified.[136]

6.5.5.3 Compliance process summary

6.5.5.3.1 Formal responsiveness

The *regulatory system* prescribes that the public body has the discretion to disqualify a tender on formal grounds: the non-submission of required documents, certificates. Exclusion on formal grounds was generally seen not to support transactional cost-effectiveness for the reason it may exclude an optimal course of action from the set from which a selection will be made. Limiting formal exclusionary grounds by permitting rectification in certain instances is seen to support cost-effectiveness.[137]

6.5.5.3.2 Substantive responsiveness

The *regulatory system* contains various provisions enforcing specifications to be expressed in a non-specific and general sense.[138] The *regulatory system* can be seen to direct specifications for the *transactional system* that are aimed at objectivity and non-exclusivity.[139]

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135 Reg 1 (k) of the *PPPFAR*. The factors listed are only those applicable to the *compliance process*. See also footnote 61 in Chapter 6.

136 Par 6.5.4.3. The evaluation of functionality is discussed with regard to the qualification process. As observed, the evaluation of functionality combines qualification process criteria with *compliance process* criteria to produce an aggregated score that must meet a pre-determined threshold value.

137 Par 5.5.3.

138 For example, the requirement for specification to reference standards issued by accredited standards bodies and disallowing specification of brand names and catalogue numbers. This may be regulated primarily to enforce horizontal fairness but this cooperates with cost-effectiveness by removing limitations in the production and encouraging the proposal of a wide set of solutions.

139 Par 5.5.3.

The requirement for tenders to meet minimum local content thresholds as a compliance criterion effectively compels the system-wide objective of promoting local industry 'at any cost'. The *regulatory system* excludes any test for the optimality of solutions directed toward the outcome of promoting local industry in balance with other outcomes. Any assertion of macro-level cost-effectiveness would have to be derived from an external process to establish the quantum of the cost and the optimality of directing such resources toward the outcome.[140]

The prohibition on the use of cost benchmarks could be seen to compel a wide production of solutions. The elimination of a tender that is based on a deviation from the benchmark could only serve to reduce the set of solutions. However, if cost benchmarks are set at the affordable limit, or the point at which the outcome ceases to be worthwhile, the production of worthwhile solutions may be assisted in that these would be tailored to meet the constraint. While the elimination of a tender exceeding such a benchmark, or reserve, would support cost-effectiveness, the elimination of a tender for the reason that below a threshold price below the worthwhile limit without further enquiry could not be seen to support cost-effectiveness.[141] The blanket regulatory prohibition could therefore be seen not to support cost-effectiveness for the reasons that: (a) a published reserve price may optimise the production of solutions and (b) the earlier exclusion of a tender that is not worthwhile would support lower procedural cost.[142]

While the evaluation of substantive responsiveness criteria is not mandatory, if a public body decides to include a *compliance process* in the *transactional system*, the *regulatory system* prescribes the procedure and method for the *compliance process* using functionality. Criteria for the scoring of functionality must be related to the performance of the contract although the precise weighting and scoring method are not prescribed. The complexities associated with compensatory methods such as

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140 Par 5.5.3.

141 This refers to an externally determined benchmark, distinguished from a point of reference internally derived from tender pricing received, for example in establishing an abnormally low bid.

142 Par 5.5.3.

weighted multi-attribute methods impose a significant constraint on the design and assembly of the *transactional system*, especially when combined with *qualification process* criteria. The limitation imposed on the *compliance process* by the *regulatory system* could be seen to increase the risk of misalignment in the production of solutions as well as the risk of unwarranted exclusions and therefore could be concluded place constraints on cost-effective decision-making.[143]

6.5.6 Shortlisting process

The objective of the *shortlisting process* is to limit the number of the tenders or tenderers that will participate in subsequent steps of the evaluation process based on their relative achievement in terms of the shortlisting criteria.[144] As pointed out above, the term 'short list' is sometimes used to describe the set of tenderers that have qualified or tenders that have been evaluated as being compliant.[145]

The PFMA*, PFMAR* and the PPPFA do not explicitly provide for a *shortlisting process* in the framework for the evaluation process, however, in limited circumstances a *shortlisting process* is contemplated:

(a) Situations where it is impractical.[146] For example, in an emergency, the public body may procure the goods by means other than inviting competitive bids. Bolton writes that this does not mean that the competitive procurement process should be dispensed with entirely but that a reduced set of suppliers may be considered.[147] In such circumstances, a public body may consider that a competitive process of, for example, only three suppliers would be necessary to satisfy the requirement. The criteria for selecting only three suppliers, in this example, would constitute a *shortlisting process*.

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143 Par 5.5.3.
144 Par 5.4.6.
145 Footnote 105 in Chapter 5.
146 Reg 16A6.4 of the *PFMAR*.
147 Bolton *Dispensing with Public Tender Procedures* 21-22.

(b) Where the procurement value is less than a specified threshold. Below a regulated value threshold, a public body may use a quotation process, which permits the public body to consider no fewer than three bidders. The process by which the three or more bidders are selected is effectively a *shortlisting process* as its aim is to reduce the set of qualified bidders.[148]

The *PPPFAR* potentially provide for a *shortlisting process* in the evaluation of functionality. While the regulations specify that the criteria in the evaluation of functionality must be objective,[149] it is not a requirement that the criteria must be determined in the absolute independently from the relative achievement of other tenders.[150] The method used in the *transactional system* for the evaluation of functionality may therefore have the effect of a *shortlisting process*.

6.5.6.1 Shortlisting process summary

A *shortlisting process* is not directly provided for in the framework. Within the provisions regulating the evaluation of functionality, a *shortlisting process* may be accommodated by using a method based on relatively determined thresholds.

Prior to the examination of cost, it is not possible to determine whether a contender for the most meritorious tender may be excluded through the process.[151] While it is not explicitly prohibited, any *transactional system* method that excludes tenders based on their relative achievement of functionality and not based on the achievement of absolute threshold values would not meet the requirement to be cost effective.[152]

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148 See footnote 70 in Chapter 6.
149 Reg 4(2) of the *PPPFAR*.
150 For example, a minimum qualifying score that is determined with reference to other submitted tenders. This may take the form of the minimum qualifying score being that of, for example, being pre-determined to be that of the third-highest bidder. This would effectively shortlist the tenders to three. Whether or not this qualifies as an objective method may be further examined, but is not pursued further in this study.
151 Par 5.5.4.
152 Par 5.5.4.

The exclusion of a *shortlisting process*, other than for the situations described above, is therefore not seen as compromising cost-effectiveness.

6.5.7 Ranking process

The objective of the *ranking process* is to order the tenders in terms of their relative merit to identify the most meritorious tender.[153]

The PPPFA prescribes that an organ of state must determine its procurement policy within a framework that follows a preference points system[154] and sets out the parameters for such a preference points system.[155] The PPPFA further stipulates that, aside from certain situations, the tenderer who scores the highest points must be awarded the contract.[156] The PPPFA therefore sets out the framework for the *ranking process*.

The preference points system required by the PPPFA contemplates the allocation of points for the purpose of ranking tenders in two categories: points for price and points for specific goals.[157] The maximum number of points that may be allocated to a tender in each of these two categories and the formula that is applicable is determined by the estimated value of the intended contract. If the estimated value of the intended contract is below a determined threshold, a specified formula (hereafter the "80/20 formula") is applicable, and if it is above the threshold, a different formula (hereafter the "90/10 formula") is applicable.[158] The estimation of the value of the tender must be

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153 Par 5.4.7.

154 S2 of the PPPFA. The *PPPFAR* prescribe the use of the preference points system for all tenders, including price quotations for procurement values above R30 000. Below the value of R30 000 an organ of state may apply the preference points system "if and when appropriate".

155 S2(b) of the PPPFA.

156 S2(f) of the PPPFA. The conditions under which the contract is not awarded to the highest tenderer is discussed under the *selection process*.

157 S2(b) of the PPPFA. Specific goals are not defined in the PPPFA. Two examples of specific goals are provided in s2(d) of the PPPFA: contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and goals implementing the programmes of the Reconstruction and Development Programme.

158 S2(b) of the PPPFA. The threshold values that determine the point allocation formula is regulated by National Treasury. The current threshold value in the *PPPFAR* applicable to the estimated value of the intended contract in R1 000 000 (including VAT). If the value of the intended contract is equal to, or above, this threshold, the 90/10 system must be used which allocates a maximum of

properly and accurately determined before an invitation to tender is made, and the formula that will be used must be clearly stipulated in the invitation to tender.[159] Whether the *80/20* or *90/10 formula* is applicable to a particular tender process, the formula used will assign a total number of points, to a maximum of 100 points, to each tender.

The *PPPFAR* specify how the issuing body must deal with the evaluation in the event the estimated value of the intended contract has mistakenly indicated the use of either the *90/10 formula* or *80/20 formula* when, in the light of the tender prices received, the other formula should have been specified. If the *80/20 formula* was specified in the tender documents and if the pricing of all received tenders exceeds the threshold for the use of the *80/20 formula*, then the tender must be cancelled. The *PPPFAR* also specify that if at least one of the acceptable tenders received is below the threshold then all tenders must be evaluated under the *80/20 formula*.[160] The situation is regulated *mutatis mutandis* when the *90/10 formula* has been specified.[161]

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90 points for price and a maximum of 10 points for specific goals. If the value of the intended contract is below this threshold, the 80/20 formula must be used, which allocates a maximum of 80 points for price and a maximum of 20 points for specific goals. The formulas are as follows:

(a) above or equal to R30 000 and below R1 000 000, points are allocated to a tender according to the following formula (the 80/20 formula):
$80\left(1-\frac{Pt-P\min}{P\min}\right)$, where P_t is the price of the tender and P_{min} is the price of the lowest acceptable tender; and

(b) above or equal to R1 000 000 the points are allocated to a tender according to the following formula (the 90/10 formula):
$90\left(1-\frac{Pt-P\min}{P\min}\right)$, where P_t is the price of the tender and P_{min} is the price of the lowest acceptable tender.

Note that while the estimated value of the tender is used to determine which formula is to be used, if the price of all tenders received falls above or below the R1 000 000 threshold when the estimated value of the intended contract determined otherwise, the tender must be cancelled. See the further discussion in footnote 160 below.

159 Reg 3 of the *PPPFAR*.

160 Reg 8(1) and 8(2) of the *PPPFAR.* For the reason that there should be no store placed in the pricing of unacceptable tenders, it is submitted that the condition that "all tenders" (as emphasised in reg 8(1)) received must exceed the threshold should read "all acceptable tenders". If this were not the case, it would also leave a gap in the regulations when reg 8(2) read together with reg 8(1) were to deal with the situation where an unacceptable tender was below the threshold and all other tenders were above the threshold. The tender would not be cancelled but it would not be clear whether to apply the *80/20 formula* or the *90/10 formula*.

161 Reg 8(3) and reg 8(4) of the *PPPFAR.*

As concluded above regarding ranking methods,[162] the prescribed method combines attributes of different types, reducing them to a common points system. The method uses an internal reference point, the minimum tendered price, to convert a monetary value to the common points system and uses as external absolute reference system for the conversion of a tenderer's B-BBEE status to the common points system.

6.5.7.1 Price

To determine the price for use in the applicable formula – the comparative price - the public body is instructed to make adjustments for 'non-firm' factors and must take into account any unconditional discounts.[163] A detailed analysis of the possibilities for adjustment in this regard is beyond the scope of this study, save to recognise that the adjustments necessary to achieve comparative pricing may be non-trivial, subjective and not all are permissible.[164] The situation where it is not possible to determine "comparative pricing" is not dealt with in the *PPPFAR* and it is presumably left to the issuing body's discretion to specify in its policy or in the specification of the *transactional system*.[165]

Price is implicitly defined as the price that the public body is projected to pay to the tenderer. The public body is not instructed to evaluate, or to make adjustments to account for difference in the projected cost of making an award to a particular tenderer.[166] In terms of the regulations, the public body is only permitted to make adjustments in respect of non-firm aspects of pricing and may not make adjustments

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162 Par 5.4.7.3.

163 Reg 11(2) of the *PPPFAR*. Reg 1(f) of the *PPPFAR*. The 'comparative price', is defined as "the price after the factors of a non-firm price and all unconditional discounts that can be utilized have been taken into consideration". Reg 1(j) of the *PPPFAR*. A "firm price" is defined to mean the price that is only subject to changes in duties and taxes in terms of law. See also *PPPFA Implementation Guide* 13. The tender must receive the benefit of unconditional discounts, but may not receive the benefit of conditional discounts. Conditional discounts must be implemented "when payment is effected". Presumably, this is in the event that the tender is awarded the contract and the conditions for the discount are met.

164 See for example, *Sanyathi Civil Engineering & Construction and Another v eThekwini Municipality and Others, Group Five Construction v eThekwini and Others* 1 All SA 2011 (KZP) 84.

165 For example, where a critical parameter such as the inflationary pricing adjustment rate is omitted or the effects of rate of exchange need to be considered for a comparative price.

166 For example, where the solution offered in a tender may provide cost savings to the public body that are not in the form of discounts.

for differences in cost that the public body would incur, or for external financial effects on third parties that may result from the award to a particular tender.

6.5.7.2 Specific goals

What is intended by the term 'specific goals' is not defined by the PPPFA, although it can be deduced from the specific examples given in the statute is that the intention of the legislature is for specific goals to mean specific horizontal goals. The broad interpretation of specific goals and examples given in the PPPFA with the *PPPFAR 2001* and the discretion afforded for their application within the framework was significantly narrowed in the *PPPFAR* of 2011.[167] The *PPPFAR* provide only for points for specific goals to be awarded related to the B-BBEE status of a tenderer.[168]

A tenderer must complete SBD 6.1[169] in order to claim points for the specific goals. The method for allocating point is a simple translation table,[170] which accords a score of between 20 and 0 for the *80/20 formula* and between 10 and 0 for the *90/10 formula* based on a tenderer's B-BBEE status. In the event that a tenderer:

(a) is considered a non-compliant contributor;[171]
(b) has not completed the required portions of the SBD;[172]

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167 Regs 4(2) and 5(2) of the *PPPFAR 2001* provided for points (either 10 or 20, depending on whether the *90/10 formula* or *80/20 formula* is in use) to be awarded to a tenderer for "being an HDI and/or subcontracting with an HDI and/ or achieving any of the specified goals in regulation 17". Reg 17 of the *PPPFAR 2001* provided for the following to be regarded as specific goals: promotion of South African-owned enterprises; promotion of export-oriented production to create jobs; promotion of SMMEs; creation of new jobs or intensification of labour absorption; promotion of enterprises in a specific province, region or municipality for work to be rendered in that province, region or municipality respectively; promotion of enterprises location in rural areas; empowerment of the work force; development of human resources; and upliftment of communities.

168 Regs 5 and 6 of the *PPPFAR*. "Points must be awarded to a tenderer for attaining their *B-BBEE* status level …" The *B-BBEE* status is determined by any accredited rating agency for an entity based on the entity's performance in terms of s9 of the B-BBEEA.

169 Regs 5(2) and 6(2) of the *PPPFAR*.

170 SBD 6.1. The translation table allocates points in the indicated range for the *B-BBEE* status of the bidder.

171 Regs 5(2) and 6(2) of the *PPPFAR*.

172 SBD 6.1.

(c) has not made the requisite declaration;[173]

(d) is contemplating subcontracting more than 25% of the contract by revenue to an entity with a lower B-BBEE status;[174] or

(e) has not submitted a B-BBEE certificate issued by an accredited verification agency, or registered auditor or accounting officer,[175]

then such tenderer will not be allocated points for specific goals. No explicit provisions exist permitting rectification of formal requirements to realise points, such as the completion of SBD6.1, to establish the true position with regard to the achievement of the intended outcomes.

A score of zero for specific goals does not affect the tenderer's qualification or the tender's compliance; the consequences are limited to placing the tender at a numerical disadvantage in terms of its total allocation of points and to its ranking as determined by the *ranking process*.

6.5.7.3 Score aggregation for ranking purposes

The scoring of tenders is the sum of the points allocated for price and the score achieved for specific goals.[176] The calculation of points must be rounded off to the nearest two decimal places.[177]

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173 Reg 11(1) of the *PPPFAR*. The regulation is phrased broadly "Only a tenderer who has completed and signed the declaration part of the tender documentation may be considered". It is submitted with regard to the preference points claim declaration, that this should mean that the tenderer should only be considered for the allocation of points for specific goals and not that the tenderer is not to be considered further in the process if the declaration has not been completed and signed. See also reg 13 of the *PPPFAR* that deals with fraudulent claims, which if detected during the tender process, provide that the tenderer may be disqualified.

174 Reg 11(8) of the *PPFA Regulations*. Note that a lower *B-BBEE* status means an inferior achievement of the B-BBEEA goals.

175 Reg 10 of the *PPPFAR*.

176 Regs 5.4 and 6.4 *of the PPPFAR*.

177 Reg 11(4) of the *PPPFAR*. This implies the calculation of price points must be performed to this level of accuracy. Currently the points allocated for specific goals can only result in a whole number.

6.5.7.4 Discretion in the *ranking process*

The process set out by the PPPFA for the *ranking process* is peremptory. The discretion permitted by the *PPPFAR 2001* to include considerations of functionality under a modified formula was confirmed to be *ultra vires*[178] in terms of the PPPFA and that the definition of price cannot extend to include factors that do not fall within such meaning.[179] The subsequent *PPPFAR* and the PPPFA *Guidelines* have provided legal certainty regarding in the *ranking process*, explicitly disallowing any deviation from the specified methods allocating points for a tenderer's B-BBEE status and for a tender's price.

6.5.7.5 Ranking process summary

The *regulatory system* compels the *transactional system* to use one of two particular formulae, determined by the anticipated value of the contract, to calculate a numerical value to express the quantum of merit that ranks tenders. The merit is determined by a weighted balance of the tender price and the *B-BBEE* rating of the tenderer.

In terms of the proposed model for cost-effective decision-making, the optimal choice must be made from the available courses of action. The *ranking process* formulae compelled by the *regulatory system* define a particular balance of outcomes embedding a potential trade-off between price and *B-BBEE* outcomes. The factors that may determine optimality exclude risk, quality and considerations of cost wider than that of the comparative price. Optimality is therefore determined by two factors and all other factors are regarded as equal. The exclusion of any consideration of the direct outcome in principle does not accord with the general model for cost-effective

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178 *Sizabonke Civils* 9-11. See also *TBP Building & Civils (Pty) Ltd vs East London Industrial Development Zone (Pty) Ltd* 2009 (230/09) ZAECGHC 7 (ECG) 26-27. Froneman J stated that, *in casu*, the regulations did not apply to the public body and that to use functionality in both the *qualification process* and *ranking process* in general would not be "offensive", and further that such use would pass constitutional muster.

179 *Sizabonke Civils* 10. Gorvin J stated, "[i]n the present matter I can see no reason to regard the word “functionality” in the impugned regulations as superfluous. In addition, on the plain grammatical meaning of the words, price does not include functionality. They are entirely distinctive concepts".

decision-making as the direct outcome was concluded always to carry some weight in the determination of optimality.[180]

6.5.8 Selection process

The *selection process* is the final step in the overall evaluation process that will decide if there is to be a winner of the contest and, if so, who the winner of the contest will be. The *selection process* is regulated by subsection 2(1)(f) of the PPPFA, which references subsections 2(1)(d) and 2(1)(e) of the PPPFA.

Subsection 2(1)(f) of the PPPFA stipulates that, after determining the number of points allocated to each tender,[181]

> the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;

Subsection 2(1)(d) refers to particular examples of specific goals, being:[182]

> (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and
> (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994.

Subsection 2(1)(e) specifies that:

> any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

The provisions of section 2(1)(f) of the PPPFA are peremptory and instruct that a two-step enquiry is performed in this stage of the evaluation process. First the product of the *ranking process* must be examined and then the public entity must determine

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180 Par 5.5.5.
181 S2(1)(f) of the PPPFA.
182 S2(1)(f)(i) and s2(1)(f)(ii) of the PPPFA.

whether objective criteria, in addition to those contemplated in subsections 2(1)(d) and 2(1)(e), justify the award to a bidder other than the highest ranking bidder.

6.5.8.1 Objective criteria

No further regulatory guidance is provided as to what objective criteria should be considered or under what circumstances such objective criteria may justify an award. The *PPPFAR* make reference to the possibility of an award to a tenderer not scoring the highest number of points but merely refer back to the circumstances contemplated in subsection 2(1)(f) of the PPPFA.[183]

The objective criteria that may be considered are limited by the phrase "in addition to those contemplated in paragraphs (d) and (e)".[184] In *Grinaker LTA Ltd and Another v The Tender Board (Mpumalanga)*,[185] De Villiers J held that: (1) specific goals and criteria are "differing concepts", (2) the phrase "contemplates objective criteria over and above those contemplated in paragraphs (d) and (e)" and (3) that specific goals were intended by the legislation to be accounted for in allocating points to the maximum of ten points.[186] The objective criteria that may justify an award to a tender not scoring the highest points therefore may not include specific goals.[187]

Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd and Another [188] considered the question of whether the objective criteria considered in an application of subsection 2(1)(f) were required to be disclosed in the tender

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183 Reg 9 of the *PPPFAR 2001* specified the grounds for the award to a tenderer who did not score the highest number of points to be on "reasonable and justifiable grounds". This was considerably different, and arguably wider than the grounds permitted by the PPPFA.

184 S2(1)(f) of the PPPFA.

185 2002 3 All SA 336 (T) 59-60.

186 In this case, the *90/10 formula* was applicable.

187 See also *RHI Joint Venture v Minister of Roads and Public Works and Others* 2003 5 BCLR 544 (Ck) 32-33.

188 2016 1 All SA (SCA). (Hereafter "Westinghouse").

documents. It was held that if they fell outside the published bid criteria then it is clear that the public body would act "beyond its powers, and thus unlawfully".[189]

Bolton[190] reasons that it would be impossible to provide a closed list of objective criteria and therefore discretion to introduce criteria should be permitted. On the other hand, objective criteria that would reduce a tenderer's prospect of winning, for example by excluding a tender if its tenderer had already benefitted from contracts,[191] should be transparently disclosed in the interests of fairness to enable the tenderer to decide whether to bid or not.[192]

In light of the decision in *Westinghouse*, it is submitted that a decision based on criteria that are not disclosed or are apparent from the tender documentation would be procedurally unfair and unlawful. The converse should therefore also hold: the non-application of objective criteria in the execution when published as part of the *transactional system* could similarly be said to be unfair and unlawful.

Specific objective criteria that have been the subject of disputes, considered with approval of the courts[193] and suggested in academic writing include:

(a) ability of the supplier to perform the work in accordance with the tender specifications;[194]

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189 *Westinghouse* 34. See also *Allpay* 38. There is no room for departure from the provisions of the legal provisions together with the tender invitation including the evaluation criteria, or the *transactional system*.

190 Bolton *Analysis of Criteria* 6. See *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province & others; Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province & others; Star Asphalt/Kgotsong Civils Joint Venture & another v MEC for the Department of Transport and Roads, North West Province & others* 2007 JOL 19022 (B) 33, 36. Objective criteria are "those goals which are not specified and not contained in the PPPFA and which would usually become apparent when the tenders are considered and weighed against each other"

191 *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another* 2013 5 SA 461 (KZD) 12.

192 Bolton *Analysis of Criteria* 7, 9.

193 It should be noted that these decisions were all made under the *PPPFAR 2001*. See also footnote 204 below.

194 *Simunye Developers CC v Lovedale Public FET College and Another* 2010 (3059/2010) ZAECGHC 121 (ECG) 34.

(b) track record of the supplier;[195]

(c) relevant experience;[196]

(d) available infrastructure and financial resources;[197]

(e) possession of the necessary skills and experience;[198]

(f) good financial standing;[199]

(g) capacity;[200]

(h) criteria to facilitate the rotation of work, such as the value of contracts recently awarded to the same tenderer as a criterion not to award;[201]

(i) protection of the environment;[202] and

(j) an abnormally low-priced tender.[203]

The first seven examples in the list overlap with the factors to be taken into account for the 'measurement' of functionality in the *qualification* and *compliance*

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195 *Simunye Developers CC v Lovedale Public FET College and Another* 2010 (3059/2010) ZAECGHC 121 (ECG) 34; *Lohan Civil - Tebogo Joint Venture and Others v Mangaung Plaaslike Munisipaliteit and Others* 2009 (508/2009) ZAFSHC 21 (O) 57.

196 *First Base Construction CC v Ukhahlamba District Municipality and Others* 2006 JOL 16724 (E) 29.

197 *Simunye Developers CC v Lovedale Public FET College and Another* 2010 (3059/2010) ZAECGHC 121 (ECG) 34.

198 *Lohan Civil - Tebogo Joint Venture and Others v Mangaung Plaaslike Munisipaliteit and Others* 2009 (508/2009) ZAFSHC 21 (O) 61. *First Base Construction CC v Ukhahlamba District Municipality and Others* 2006 JOL 16724 (E) 28-30.

199 *Lohan Civil - Tebogo Joint Venture and Others v Mangaung Plaaslike Munisipaliteit and Others* 2009 (508/2009) ZAFSHC 21 (O) 46-47, 61.

200 *Lohan Civil - Tebogo Joint Venture and Others v Mangaung Plaaslike Munisipaliteit and Others* 2009 (508/2009) ZAFSHC 21 (O) 46-47, 61.

201 *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another* 2013 5 SA 461 (KZD) 12. Rotation of work may be a legitimate objective, but it would have to appear in the invitation to bid.

202 Bolton *Analysis of Criteria* 11.

203 Bolton *Analysis of Criteria* 12-14. See also *Q CIVILS (Pty) Ltd v Mangaung Metropolitan Municipality and Others* (A48/2016) [2016] ZAFSHC 159 (8 September 2016) 51. A 15% deviation from a prior estimate or the average bid price is an objective factor cannot be faulted as an objective criterion. These facts were distinguished from *Westinghouse* as the tenderers were made aware of the application of the criterion in principle even if not of the precise percentage, because it had been "used by the Municipality in several other similar tender processes". This judgement can be criticised from the point of view that the figure of 15% must have been known to the evaluation committee prior to the proceedings.

processes.[204]. In *Rainbow Civils*[205] the public entity was judged to have erred for not having considered functionality directly as an objective criterion. This decision has been criticised from the viewpoint that functionality's direct application as an award criterion would be a departure from the intention of the legislature and executive[206] and that such an application would have the effect of changing the operation of the preferential points system.[207] It is submitted that the criticism and cautions raised regarding the use of criteria that form part of functionality, or indeed the use of the functionality score directly, as award criteria under subsection 2(1)(f) are valid. The discretion afforded by subsection 2(1)(f) to trump the *ranking process* should therefore not extend to the use of functionality criteria. If such criteria are required, these must be implemented through appropriate calibration of the functionality method.[208]

The examples of (h) and (i) in the list above are horizontal criteria and may represent a wider class of specific goals that could be considered. If these criteria were to be used in the *selection process*, they would be known to the public entity as criteria prior to tender issue and therefore must be disclosed in the tender documents to effect the requirements of fairness and transparency.[209]

An abnormally low tendered price, in general, will assure a tender of being the most highly ranked because of the significant weighting of points allocated to price in the

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204 Par 6.4. Bolton *Analysis of Criteria* 25. Bolton argues that these were "less problematic" because these factors were considered as acceptable objective criteria under the *PPPFAR* 2001 when the regulation did not enforce a strict separation of functionality as a first stage of the evaluation process.

205 2013 (21158/2012) ZAWCHC 3 (WCC) 110–114.

206 See Quinot *Role of Quality* 1128-1132. Quinot's view is that the policy choice of the legislature and executive is that price is the most important factor and therefore "cannot be labelled as non-compliant with the principles of section 217 of the Constitution". This issue is revisited in Chapter 8, specifically from the perspective of cost-effectiveness. Quinot's view could be criticised from the standpoint that policy choice is still subject to the five requirements of *Section 217* unless the policy choice is serving s217(2)(a) and/or (b). It is not readily apparent how the exclusion of quality would be required to serve either of these subsections.

207 Bolton *Analysis of Criteria* 22. *Nexus Forensic Services (Pty) Ltd v Chief Executive Officer of SASSA and Others* (14708/2015) 2016 ZAGPPHC 579 (21 June 2016) 21-26. Van Niekerk AJ reasoned that subsection 2(1)(e) enjoins the decision maker not to reconsider those criteria which have already been considered and must consider factors over and above those.

208 Bolton *Analysis of Criteria* 25. See also the discussion in footnote 127 in Chapter 5.

209 Bolton *Analysis of Criteria* 26.

ranking process.[210] Other than through an application of subsection 2(1)(f) of the PPPFA, this circumstance is not provided for.[211] The peremptory nature of subsection 2(1)(f) together with the decision in *Westinghouse* implies that (1) it must be considered and (2) must be a published provision of the *transactional system*. The grounds for excluding an abnormally low bid from selection would be that the price has been assessed as unsustainable and that consequently the risk of delivery or price variation is too great. Therefore, this could be considered a *post-compliance process*.

The *PPPFAR* deal with two other exceptions to the award to the most highly ranked bidder: (1) where more than one tender achieves the greatest number of points and (2) conditions under which no award is made.

6.5.8.2 Indeterminate ranking

The *PPPFAR* instruct that the calculation of points in the *ranking process* must be rounded off to the nearest two decimal places.[212] By implication, the ordering of tenders must also be made to the second decimal place. While unlikely, more than one tender may achieve exactly the same score to this precision. In the event of a tie, the tied tender with the highest *B-BBEE* preference points must prevail. If this fails to produce a result and if functionality is part of the evaluation process, the tied tender with the highest functionality must prevail and if this fails to produce a result, the successful tender must be determined by the "drawing of lots".[213] The *PPPFAR* therefore provide a tiebreaker mechanism for deciding the "successful tender" among the highest-scoring tenders. While this is considered under the *selection process*, it could equally be treated as an extension of the method of the *ranking process*.[214]

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210 Par 5.4.7.3.

211 See par 6.5.5.2.2 on the prohibition on the use of cost benchmarks. Care would have to be taken in determining that low pricing is objectively determined to be abnormal. As Bolton suggests, the tenderer should be afforded the opportunity to be heard before being overlooked as the tenderer with the most highly ranked tender. Bolton *Analysis of Criteria* 13.

212 Reg 11(4) of the *PPPFAR*.

213 Reg 11(5) of the *PPPFAR*.

214 Par 5.4.8(c).

6.5.8.3 Cancellation

The *PPPFAR* explicitly deal with four circumstances under which a tender may be cancelled:[215]

(a) because of changed circumstances, the goods, products or services are no longer required;
(b) funds are no longer available; or
(c) no acceptable tenders are received; [216] or
(d) where the price of no tender falls within the regulated band of values for the ranking formula as published.[217]

The regulation does not explicitly limit the circumstances under which the tender may be cancelled to these conditions. It leaves the question open as to whether a public body has the discretion to include additional conditions in *transactional system* under which a tender may be cancelled.[218]

6.5.8.4 Selection process summary

The *selection process* permits an award to be made to a tender other than the highest-ranking tender on wide grounds, namely that objective criteria - aside from those considered for the achievement of specific goals - must justify such an award. Judicial and academic interpretation generally concur that: (1) tenderers must be informed of such criteria that would be considered in the *selection process*; and (2) criteria that the legislature had clearly intended to be evaluated in a different way may not be considered, such as functionality and specific goals. The decision not to award to the tender with the highest number of points, depending on the objective criterion may amount to an extension of the *ranking process* or a *post-compliance process*. The

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215 Reg 8(4) of the *PPPFAR*. It should be noted that phrasing of the regulation permits cancellation under these conditions to be made at any time prior to award. This is therefore not a consideration only to be made during the *selection process*.

216 Bolton *Dispensing with Public Tender Procedures* 16. This situation would constitute grounds for considering some other procurement method including non-competitive processes.

217 Par 6.5.7.

218 For example, all pricing received exceeds a predetermined benchmark.

framework defines a tiebreaker mechanism in the event that the *ranking process* has not determined a winner uniquely which can be considered an extension of the *ranking process*. The framework also permits the cancellation of a tender, under four conditions, although does not limit the grounds for cancellation of a tender to these four conditions.

In terms of the proposed model for cost-effective decision-making, an optimal and worthwhile choice must be made from the available courses of action. If objective criteria are identified during the *selection process*, which initiate an extension of the *ranking process*, then this should be argued to improve the optimality. If these initiate a *post-compliance process*, it will ensure the selection is worthwhile.

The discretion not to award at all, in the case of funds not being available, no acceptable tenders received or for the reason that the originating need has changed or no longer exists, can generally be said to support the test for cost-effective decision-making, as no available course of action would be worthwhile.[219] The requirement to cancel a tender after an inspection of the actual tender pricing discloses that the *transactional system* had specified the incorrect ranking formula is on the one hand a formal matter of fairness but on the other hand, provides the means for avoiding the application of incorrect weighting factors toward the balance of intended outcomes.[220]

6.6 Local Government Framework

6.6.1 Provisions of the Municipal Systems Act

The MSA provides for a municipality to provide its services though external mechanisms after assessment of its internal capabilities and the impact of various factors including development, job creation, human well-being and safety and the capability of prospective service providers.[221] If the municipality decides to provide services externally then the process of selecting a supplier must be subject to the

219 Par 5.5.6.
220 Par 5.5.5.
221 S76(b) and s78 of the *MSA*.

constitutional standards and applicable national legislation and is therefore subject to the provisions of the PPPFA. The MSA specifies that the municipality may determine a preference for categories of service providers in order to advance the interests of persons disadvantaged by unfair discrimination, provided quality, coverage, cost and developmental impact of service are not compromised or limited.[222] The additional considerations potentially conflict with the PPPFA and are taken to have no force in the *regulatory system*. The provisions of the MSA therefore do not introduce additional considerations or criteria in the regulatory framework for the evaluation of municipal services tenders further to those discussed in the *National and Provincial Framework*.

6.6.2 Provisions of the MFMA

Chapter 11 of the MFMA sets out the provisions for supply chain management for municipalities and municipal entities for the procurement of goods and services other than in circumstances contemplated in Chapter 8 of the MSA.[223] The MFMA prescribes that every municipality and municipal entity must have a supply chain management policy that gives effect to the provisions of the MFMA.[224] Such supply chain management policies must provide for tender, quotation and 'other types of competitive bidding' processes.[225] When such processes are used, these must be "open and transparent pre-qualification processes for tenders or other bids";[226] "competitive bidding processes in which only pre-qualified persons may participate";[227] and such processes must contain "procedures and mechanisms for the evaluation of bids to ensure best value for money".[228] The processes must provide for the exclusion of persons convicted for fraud, who wilfully neglected reneged on or failed to comply with the terms of a government contract during the past five years, or who are not tax-compliant.[229]

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222 S83(2) of the *MSA*.
223 As discussed in par 6.6.1.
224 S111 of the MFMA.
225 S112(1)(a) of the MFMA.
226 S112(1)(e) of the MFMA.
227 S112(1)(f) of the MFMA.
228 S112(1)(h) of the MFMA.
229 S112(1)(l) of the MFMA.

Provisions analogous to those in the PFMA assign accountability to the accounting officer of a municipality or municipal entity for the implementation of the supply chain management policy.[230]

6.6.3 Regulations determining bidding procedures

6.6.3.1 Bidding procedures

The Municipal Supply Chain Management Regulations[231] prescribe that the procurement of goods and services may be conducted by way of a petty cash process; quotation process, either written or verbal or by way of a bidding process, depending on the value of intended procurement.[232] The *MSCMR* also explicitly provide that a municipal supply chain management policy may allow a two-stage bidding process.[233]

6.6.4 Regulations pertaining to evaluation processes in general

6.6.4.1 Criteria for bid documentation

The *MSCMR* require that a municipal supply chain management policy must ensure that bid documentation and evaluation and adjudication criteria are consistent with applicable legislation.[234] Applicable legislation is explicitly defined to include the PPPFA, the B-BBEEA and the CIDBA.[235] Invitations to tender issued in the local

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230 S115 of the MFMA.

231 GN 868 of 2005 (hereafter the "MSCMR").

232 Reg 12 of the *MSCMR*. The current threshold values for the processes for the procurement of goods, works or services are below R2 000 procurement can be performed by way of petty cash; below R10 000, by means of verbal or written quotations; below R200 000, by means of formal written price quotations. Above R200 000 or for long-term contracts, the policy must provide for a competitive process. The SCM policy may allow accounting officers to lower the thresholds, but may not increase them. Reg 14 of the *MSCMR* also specifies that the policy must provide that the accounting officer maintain a list of accredited service providers for the solicitation of written, verbal or formal written price quotations. Reg 16 of the *MSCMR* provides that verbal or written quotations and formal written price quotations must be obtained from at least three listed providers or, if not actually listed, then one that satisfies the criteria for being listed.

233 Reg 25 of the *MSCMR*.

234 Regs 2(1)(d) and 11(2)(d) of the *MSCMR*.

235 Reg 1 of the *MSCMR*. Note that "other applicable legislation" is defined. The phrase "applicable legislation" as used in Reg 11(2)(d) of the *MSCMR* is read to include "other" applicable legislation

government sphere must therefore include all criteria in the invitation, or bid documentation.[236]

6.6.5 Qualification process

Unlike the provisions governing the framework for bidder qualification in the *National and Provincial Framework* a number of statutory provisions are contained in the MFMA with additional provisions in the *MSCMR*.[237]

6.6.5.1 Bidder qualification provisions in the MFMA

The MFMA stipulates the following requirements for the *qualification process*:

(a) Requirement to include screening processes and security clearances for prospective contractors.[238]
(b) Requirement to provide for competitive bidding processes in which "only pre-qualified persons may participate".[239]
(c) Requirement to exclude prospective contractors in the event of a disclosure of conflict of interest.[240]
(d) Requirement to bar persons from participating in a bidding process who were "convicted of fraud or corruption during the past five years"; "wilfully neglected, reneged on of failed to comply with a government contract during the past five years"; or whose tax matters are not cleared by SARS.[241]

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as well as any other legislation that may be applicable. Applicable legislation includes subordinate legislation issued in terms of the legislation.

236 As required by reg 4(3) of the *PPPFAR*.

237 Sections 78 to 83 of the *MSA* make reference to governing standards for what could be seen as qualificationary provisions but does not add detail beyond which are provided in other applicable legislation and is therefore not analysed further.

238 S112(1)(e) of the MFMA.

239 S112(1)(f) of the MFMA.

240 S112(1)(j) of the MFMA.

241 S112(1)(l) of the MFMA.

6.6.5.2 Bidder qualification provisions in regulations to the MFMA:

The *MSCMR* stipulate the following requirements for a municipality or municipal entity's supply chain management policy regarding the *qualification process:*

(a) Requirement for a bidder to furnish the bidder's full name, identification or registration number, tax number and VAT registration number, if any.[242]

(b) Requirement for a bidder to have authorised the municipality or municipal entity to obtain a tax clearance from SARS.[243]

(c) Requirement for a bidder to have indicated whether he or she, or if a juristic person, whether its directors, manager, principal shareholders or stakeholders, or close family members of such are, or have within the past 12 months' been, in the service of the state.[244]

(d) if the value of the transaction is expected to exceed Ten Million Rand:

   i. Requirement, if the bidder is required by law to prepare annual financial statements, to furnish three years' audited financial statements, or, if only established for a shorter period, financial statement for the shorter period.[245]

   ii. Requirement that the bidder must certify it has no undisputed commitments toward a municipality or any other service provider in respect of which payment is overdue for longer than 30 days.[246]

   iii. Requirement that the bidder submits particulars of any contracts awarded to the bidder by any organ of state during the past five years including any particulars of material non-compliance or dispute.[247]

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242 Reg 13(a) of the *MSCMR*.

243 Reg 13(b) of the *MSCMR*. Note that the regulation requires the SCM policy only to require that authorisation must be supplied and not actual proof that the bidder is tax compliant.

244 Reg 13(c) of the *MSCMR*. Note that the requirement is for a declaration of such relationship(s) and does not disallow such bidders from qualifying based on the content of the declaration.

245 Reg 21(d)(i) of the *MSCMR*.

246 Reg 21(d)(ii) of the *MSCMR*.

247 Reg 21(d)(iii) of the *MSCMR*. Note that in respect of consultancy services, the requirement is not only a requirement if the anticipated procurement is greater than R10 000 000, but for all values. Reg 35(3) of the *MSCMR* requires that the bidder provide details of all consultancy services and any similar consultancy services to an organ of state in the last five years.

iv. Requirement that the bidder submits a statement indicating whether a portion of the goods or services is to be sourced from outside the Republic and, if so, what portion and whether any payment would be transferred from the Republic.[248]

(e) Requirement that the bid evaluation committee "check in respect of the recommended bidder whether municipal rates and taxes and municipal service charges are not in arrears".[249]

(f) Discretion to reject a bidder, if the bidder or any of its directors, according to the National Treasury's database is listed as a person prohibited from doing business with the public sector".[250]

(g) Discretion to reject any bid from a bidder if municipal rates and taxes or municipal charges that are owed by the bidder or any of its directors to any municipality or municipal entity are in arrears for more than three months.[251]

(h) Discretion to reject any bid from a bidder who during the past five years has failed to perform satisfactorily on a contract with any organ of state after written notice was given to the bidder that performance was unsatisfactory.[252]

(i) Discretion to reject the recommendation for award of a bidder, or its directors, who committed a corrupt or fraudulent act during the competitive process.[253]

(j) Discretion to reject the bid of any bidder if it, or any of its directors, has abused or committed "any improper conduct" the supply chain management system of the municipality or municipal entity.[254]

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248 Reg 21(d)(iv) of the *MSCMR*.

249 Reg 28(1)(c) of the *MSCMR*. Note that while the requirement to check for this condition is phrased a mandatory requirement, no action is specified. It is presumed that disqualification of the bidder in the event of such outstanding charges is discretionary. If this requirement is a qualificationary condition, it would mean that the tender submitted by such a bidder is not 'acceptable' and therefore should not be evaluated in terms of the PPPFA. It is submitted that this is an anomaly and the bidder's status in this regard should be checked prior to the *ranking process*.

250 Reg 38(1)(c) of the *MSCMR*. Note that the phrasing of reg 38 if that the policy must "enable the accounting officer" to perform the qualificationary actions under reg 38. The regulation does not require that the SCM policy of the municipality or municipal entity must reject bidders under the conditions specified. This applies to all requirements specified in reg 38 below.

251 Reg 38(1)(d)(i) of the *MSCMR*.

252 Reg 38(1)(d)(ii) of the *MSCMR*.

253 Reg 38(1)(d)(ii) of the *MSCMR*.

254 Reg 38(1)(g)(i) of the *MSCMR*.

(k) Discretion to reject the bid of any bidder if it, or any of its directors, has been convicted for fraud in the past five years.[255]

(l) Discretion to reject the bid of any bidder if it, or any of its directors, has "wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years".[256]

(m) Discretion to reject the bid of any bidder if it, or any of its directors, is listed in the Register for Tender Defaulters.[257]

(n) Requirement not to award to a bidder whose tax matters are not in order.[258]

(o) Requirement not to award to persons, or juristic persons whose director, managers, principal shareholder, or stakeholder, are in the service of the state or who is an advisor or consultant contracted with the municipality or municipal entity.[259]

(p) Requirement for a bidder to be registered on the *CSD.*[260]

6.6.5.3 Bidder qualification provisions of the PPPFA and regulations

The provisions of the PPPFA are applicable to municipalities and municipal entities. The analysis of the qualificationary framework provisions in paragraph 6.5.4.3 with regard to the *National and Provincial Framework* are applicable to the *Local Government Framework* without change.

6.6.6 Compliance, shortlisting, ranking and selection processes

As observed above regarding the provisions governing the *qualification process*, the *Local Government Framework* must implement supply chain management policies consistent with "other applicable legislation".[261] The regulatory framework for Local

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255 Reg 38(1)(g)(ii) of the *MSCMR*.

256 Reg 38(1)(g)(iii) of the *MSCMR*.

257 Reg 38(1)(g)(iv) of the *MSCMR*. As defined in s29 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

258 Reg 43 of the *MSCMR*. This only applies to an award of over R15 000. If SARS does not respond within seven days, a presumption that the tax affairs are in order may be made.

259 Reg 44 of the *MSCMR*.

260 Par 6.5.4.1(g). The provisions of the National Treasury apply to all organs of state.

261 Reg 2(1)(d) of the *MSCMR*. Reg 1 of the *MSCMR* defines "other applicable legislation" to include the PPPFA, B-BBEEA and CIDBA.

Government does not prescribe a framework for the *compliance process*, other than its reference to "other applicable legislation" and specifically with regard to the evaluation that the points system used must be as prescribed by the PPPFA.[262] Therefore the PPPFA framework, and its operation as discussed above,[263] applies without change in the *Local Government Framework* with regard to these evaluation processes.[264]

6.6.7 Summary

The *qualification process* in the *Local Government Framework* prescribes mandatory and discretionary criteria that differ from those in the *National and Provincial Framework*. In particular, these extend the set of qualificationary responsibility criteria to barring of persons convicted of fraud or corruption during the past five years, persons who have wilfully neglected or reneged on government contracts in the past five years, and those in the service or advisor to the state. Discretion is granted to reject bidders with outstanding obligations toward the municipal body, or even if its office-bearers have outstanding obligations toward the municipal body. The conclusions reached regarding the cost-effectiveness of decision-making including qualificationary responsibility criteria are applicable to these additional requirements.[265]

As provisions of the PPPFA apply to the evaluation of local government tenders: the evaluation of functionality is permitted in *transactional systems*. Qualificationary criteria may therefore be evaluated within the evaluation of functionality as part of the two-stage evaluation process as regulated by the *PPPFAR*.

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262 Reg 28(1) of the *MSCMR*.

263 Pars 6.4, 6.5.5, 6.5.6, 6.5.7 and 6.5.8.

264 A procedural exception to the above is the peremptory provision s84(1) of the MSA, which instructs a municipality to negotiate "the final terms and conditions of the service delivery agreement" with the selected service provider. The provision in the MSA contemplates the revision of the terms and conditions, provided the revisions do not materially affect the bid in a manner that contemplates the integrity of the bidding process. If the negotiations do not result in agreement, the municipality is permitted to commence the negotiation process with the next-ranked tenderer. See also par 4.1.6.2 for a more detailed discussion on the conditions under which post-award negotiations may be conducted.

265 Par 6.5.4.5.2.

The analysis of the operation of evaluation processes made for the *compliance*, *shortlisting*, *ranking* and *selection processes* in the *National and Provincial Framework* are directly applicable to the *Local Government Framework*. The one exception being in the case of procurement of external municipal services where mandatory negotiations must be conducted prior to award.

The conclusions regarding the cost-effectiveness of the *regulatory system* in the *National and Provincial Framework* apply without any significant change.

6.7 Construction Works Framework

6.7.1 Provisions of the CIDBA

The CIDBA charges the *CIDB* to promote the standardisation of procurement processes of construction works within the procurement framework of government policy,[266] and specifically charges the *CIDB* is required to establish and maintain a national register of the contractors to facilitate public sector procurement.[267] In discharging its duty with regard to the standardisation of processes, the *CIDB* has published standards for uniformity[268] and a series of best practice guidelines.[269] As discussed above,[270] decision-making in public procurement processes rests on standards, rules and established best practices. While published best practices occupy a subordinate role to the legislative and regulatory framework, certain of the evaluation procedures set out in the guidelines of the *CIDB* are observed to conflict with provisions of the PPPFA.[271] It is beyond the scope of this study to examine the

266 See discussion in par 6.5.2.
267 Par 6.5.2.
268 The latest being Board Notice 86 of 2010 in GG 33239 of 28 May 2010. (Hereafter the "CIDB Standard for Uniformity").
269 CIDB Best Practice Guidelines #A1, #A2, #A3, A#4, A#5, A#6, A#7, #A8, #B1, #B2, #C1, #C2 and C#3.
270 Par 2.2.5.
271 Anthony *Construction Regulation* 199. Anthony notes the use of certain qualification criteria, shortlisting processes and *selection process* which implement preferential mechanisms that are not implemented in terms of national legislation as required by s217(3) of the *Constitution*. See also the notice on the withdrawal of certain methods of evaluation by the *CIDB*. CIDB 2010 http://www.cidb.org.za/documents/corp/news/corp_news_cidbpositionpaper_evalbestvaluemoneytenders_4aug2010.pdf.

compliance of the practices set out in the publications of the *CIDB*. The analysis of the *CIDB* evaluation provisions is therefore limited to the qualification of the contractor, the criteria employed in the evaluation of functionality and other provisions to the extent they may restrict, but not conflict with, the PPPFA framework.

6.7.2 Qualification process

6.7.2.1 Pre-qualification process

A distinct feature of the CIDBA specifying the structure of the regulatory framework for the construction industry is that the *CIDB* must "establish and maintain a national register of contractors which provides for categories of contractors in a manner which facilitates public sector procurement".[272] The *CIDB* requires every organ of state to apply the register of contractors to its procurement process within a framework prescribed by the Minister.[273]

The regulations to the CIDBA[274], as amended from time to time, specifically require that the solicitation of competitive tenders or expressions of interest in the construction industry must be performed, if applicable, in accordance with the PFMA or the MFMA and the *CIDB Standard for Uniformity*.

The *CIDR* regulate the registration process and the qualification criteria applicable to different classes of construction works and the grading requirements for construction projects of certain values. A class of construction works is defined to be one of general building, civil engineering, electrical engineering, mechanical engineering and

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272 S5(2)(d) of CIDBA.

273 S16(4) and s(16)(3) of the CIDBA. The "Minister" is the Minister of Public Works. In s18(2), the CIDBA goes further than only prescribing this as a requirement for the regulatory framework for public procurement and creates an offence if a contractor attempts to perform construction works under a public sector contract without being registered with the *CIDB*.

274 GN 692 in GG 26427 of 9 June 2004 as amended by GN. R1333 in GG No. 26991 of 12 November 2004, GN. R751 in GG 27831 of 22 July 2005, GN R842 in GG No. 29138 of 18 August 2006, GN. R1121 published in GG 30510 of 23 November 2007 and GN. R.1224 in GG No. 31603 of 14 November 2008 and GN R464 in GG 36629 of 2 July 2013. (Hereafter the "CIDR").

specialist works.[275] A prospective bidder for construction works must register by applying for registration in one or more classes and must show the following:

(a) the requisite financial capability;[276]
(b) a satisfactory track record;[277]
(c) works capability;[278]
(d) for certain classes, possession of required licences and professional registrations[279] in order to be registered and graded in one of nine designations;
(e) tax compliance;[280] and
(f) other formal requirements.[281]

Successful registration by a contractor in a class at a particular designation will deem such contractor capable of undertaking contracts in that class of up to a value determined appropriate for that designation.[282] Such contractor may then, and only then, participate in public tender processes for such contracts.[283]

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275 The definitions of each of the classes are provided in detail in Schedule 3 of the *CIDR*. The class "specialist works" is divided into a further 13 sub-classes.

276 Regs 12(1), 12(2) and 12(3) of the *CIDR*. The financial capability is determined by a method assessing the applicant's Employable Capital, based on net asset value, bank rating factor and financial sponsorship.

277 Reg 12(1) of the *CIDR*. The track record is assessed by the applicant's minimum average annual turnover over the last two years and the maximum value of a single contract value over the past five years.

278 Reg 12(4) of the *CIDR*. The works capability was determined by the number of full-time equivalent qualified persons as determined per class of work and the maximum value of a single contract within the class of works. A person was defined to be a qualified person in reg 12(8) in terms of various acts governing the membership of professional bodies, for example the Engineering Profession Act 48 of 2000. This requirement has been removed in the amendment of 2 July 2013.

279 Regs 12(5) and 12(6) of the *CIDR* specifically require that the contractor seeking registration for the class Electrical Engineering Works must be in possession of an electrical contractor licence as issued by the Electrical Contracting Board of South Africa and a contractor seeking registration in the class "Specialist Works : Building of Homes" must be registered as a home builder in terms of the Housing Consumer Protection Measures Act 95 of 1998.

280 Reg 4(e) of the *CIDR*. An original tax clearance certificate must be submitted with the application for registration, or proof of tax compliance in the country of origin in the case of a foreign enterprise, which has not yet performed work in South Africa.

281 For example, reg 4(d) of the *CIDR* for registration number, certificate of incorporation and reg 4(f) of the *CIDR* for certified copies of the principals etc.

282 The value of contracts for which a registered contractor in any particular class is considered capable of undertaking is set out in reg 17 of the *CIDR*.

283 Reg 25(1A) permits the evaluation of a contractor's tender is the contractor is "capable of being registered" prior to the evaluation, or in the case of an expression on interest, must be so registered within 21 days of the closing date of submissions. Various other regulations provide for relaxations of the registration and participation conditions for joint ventures, for example, reg 25(5)(a) provides

The CIDBA also provides for registration by a contractor as a "potentially emerging enterprise".[284] A public body may regard a contractor registered as a potentially emerging enterprise as qualified for works one designation higher than the designation of the contractor,[285] if the public body satisfies itself that the contractor has the potential to develop to qualify in the higher designation.[286]

The *CIDR* provide that, at the discretion of the public body, the public body may evaluate and award a tender offer to a registered contractor who tenders for works outside the designated tender value range. This subject to the conditions that the margin is reasonable, the award does not pose undue risk, the tender offer complies in all other respects with the *CIDR* and that such an award is reported to the *CIDB*.[287]

The registration process is conducted independently of any invitation to tender for any particular work. A prospective tenderer for any construction works must submit itself to the registration evaluation based on criteria relating to attributes of the tenderer. The registration evaluation process therefore has the effect of either qualifying or disqualifying a prospective tenderer prior to any particular construction works tender process and therefore is a pre-qualification process.[288]

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for joint ventures to bid for tenders if every member of the joint venture is a registered contractor and the lead partner has a designation of not lower than one level below the required designation for the tender. Reg 25(6) provides for the sum of turnover and capital available to members of the joint venture in the calculation of turnover and available capital for grading purposes.

284 S1 of the *CIDBA*. An emerging enterprise is “an enterprise which is owned, managed and controlled by previously disadvantaged persons and which is overcoming business impediments arising from the legacy of apartheid”. This mechanism clearly falls under the provisions of subsection 217(2)(b) of the *Constitution* and is enacted in this national legislation.

285 Reg 25(8) of the *CIDR*.

286 Reg 25(8)(a) of the *CIDR*. Although not a qualificationary condition, reg 25(8)(b) specifies a further condition, that the public body must ensure that support is provided to the contractor to execute the contract successfully.

287 Reg 25(7A) of the *CIDR*.

288 See the exception listed in footnote 283 above.

6.7.2.2 Other qualification processes required by the CIDR

The *CIDR* specify a further mandatory *qualification process* prior to the award of a tender. Regulation 25(9) specifies that notwithstanding a tenderer's registration status, the public body must further satisfy itself that the tenderer is registered and not prohibited in terms of any legislation from submitting a tender, that it has demonstrated it has the resource capacity and capability specific to the contract concerned and that it has the capacity to perform the construction work awarded.[289] The *CIDR* do not specify how the public body must make such further determinations but in this respect specifies a separate and mandatory *qualification process*.[290]

6.7.2.3 PPPFA qualification provisions in the construction industry

The provisions of the CIDBA are subject to the PPPFA.[291] Tender evaluation, including any further *qualification process*es, must be carried out within the framework specified by the PPPFA. The analysis of the provisions of the PPPFA concluded that it permits a *qualification process* for competency criteria in the *transactional system* under framework of functionality.[292] The *CIDB Standard for Uniformity* specifies additional standards and rules for such criteria in the context of the construction industry:

(a) Mandatory exclusion of "social considerations, such as the composition of workforces in terms of race, gender or disability";[293]
(b) Mandatory exclusion of matters relating to the basic capability or capacity of the tendering entity to execute the contract;[294] and
(c) Discretion to include criteria such as "organization, logistics and support resources relevant to the scope of work"; "qualification and demonstrated experience of the key staff (assigned personnel) in relation to the scope of work";

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289 Reg 25(9) of the *CIDR*.
290 The evaluation of functionality provides the mechanism for the public body to satisfy itself of certain of these criteria. See par 6.7.2.3.
291 Par 6.5.4.3.
292 Par 6.4.
293 Par 4.3.4 (a) of the *CIDB Standard for Uniformity*.
294 Par 4.3.4 (b) of the *CIDB Standard for Uniformity*.

and "demonstrated experience of the tendering entity with respect to specific aspects of the project / comparable projects".[295]

The *CIDB Standard for Uniformity* therefore specifically excludes the evaluation of basic capabilities and capacities of a tenderer from evaluation in functionality, but permits the evaluation of criteria relating to the track record, capacity and capability of a tenderer in relation to the scope of work of the specific tender.[296] The *regulatory system* for construction works restricts qualification criteria in *transactional systems* to a narrower set than for the other two groups.

6.7.2.4 Qualification process summary

The *Construction Works Framework* specifies a mandatory pre-qualification process by maintaining a register of qualified contractors that have been graded in terms of their capability to perform different classes of works and value of works. The class and value of works required by a public body will determine which registered contractors are qualified. The standardisation of the pre-*qualification process* introduces direct system-wide control of aspects of the *qualification process* by the CIDB. This can be argued to lower procedural cost and enforce criteria aimed at macro outcomes by removing discretion from the public bodies. Certain discretion is permitted in the execution of the *transactional system* to qualify contractors from a tier below the designation required provided additional considerations of risk are conducted. The *Construction Works Framework* therefore provides some flexibility in ensuring the rigidity of standardisation is not to the detriment of macro-level cost-effectiveness.

The *regulatory system* permits a further *qualification process* under the framework of functionality evaluation but imposes restrictions on competency qualification criteria for functionality, specifically excluding the evaluation of basic capabilities and capacities of a tenderer and limiting the criteria only to those related to the scope of

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295 Par 4.3.3 of the *CIDB Standard for Uniformity*.

296 The reason for the exclusion of the evaluation of basic capability and capacity criteria is presumed to be that this evaluation would already have been performed during the general pre-qualification (registration) process.

work of the specific tender.[297] The specific prohibition of qualification criteria not related to the direct outcomes can be seen to promote cost-effective decision-making for the transaction by seeking to retain a wide set of offers.[298]

6.7.3 Compliance process

The evaluation of the compliance of tenders is dealt with comprehensively in the *CIDB Standard for Uniformity*. As noted above, the framework defined by the prescripts of the CIDBA is subject to the PPPFA. In terms of the process, the evaluation of quality[299] is aligned to the framework for evaluation of functionality in the PPPFA. The standards required for criteria relating to the substantive responsiveness aspects of the *compliance process* are that they:[300]

(a) relate directly to the goods, services or engineering and construction works that are being procured and to matters that cannot directly be expressed in monetary terms;
(b) are justifiable in terms of projected procurement outcomes;
(c) enable the most economically advantageous offer to be established;[301] and
(d) to the extent practicable, are objective and quantifiable.

The framework expressly permits the criteria to include:[302] technical merit, response to (ability to relate to) the proposed scope of work/project design, aesthetic and functional characteristics, safety and environmental characteristics, quality control practices and procedures which ensure compliance with stated employer's requirements, reliability, durability, organisation, logistics and support resources relevant to the scope of work, qualifications and demonstrated experience of the key

297 The reason for the exclusion of the evaluation of basic capability and capacity criteria is presumed to be for the reason that this evaluation would already have been performed during the general pre-qualification (registration) process.
298 Par 5.5.2.3.
299 Defined as being equivalent to the concept of functionality in par 3.11 of the *CIDB Standard for Uniformity.*
300 Par 4.3.2 of the *CIDB Standard for Uniformity.*
301 It is unclear how (1) criteria in a compliance process could enable optimality; and (2) this could be enabled without consideration of at least the balancing cost element.
302 Par 4.3.3 of the *CIDB Standard for Uniformity*.

staff to be assigned in relation to the scope of work, demonstrated experience of the tendering entity with respect to specific aspects of the project or comparable projects, running costs, after-sales service and technical assistance, delivery date and delivery period or period of completion.

6.7.3.1 Compliance process summary

The *compliance process* required by the *Construction Works Framework* therefore prescribes additional standards for substantive responsiveness criteria used in the *compliance process* over and above those permitted in the *National and Provincial Framework* or the *Local Government Framework*.

The explicit provisions listing compliance criteria in the *regulatory system* could be seen to be compelling the evaluation of tenders against criteria toward a complete consideration of risk. As the *Construction Works Framework* deals with the delivery of a narrower scope of performance, it is to be expected that the consideration of risk can be more effectively directed by the *regulatory system*.

6.7.4 Shortlisting process

A *shortlisting process* is contemplated under the *Construction Works Framework*, which provides for a procedure similar to the selection of providers under the quotation process in the *National and Provincial Framework*. [303] The observations made regarding the possibility of a *shortlisting process* being accommodated under the evaluation of functionality are equally valid in the context of the *Construction Works Framework*.[304]

6.7.5 Ranking and selection processes

Section 16(3) of the CIDBA, provides that the Minister must prescribe the manner in which public sector construction contracts may be invited, awarded and managed

[303] Otherwise known as a nominated procedure.
[304] Par 6.5.6.

within the framework of the register and within the framework of the policy on procurement.[305] Although the *CIDB*'s various guidelines specify different methods of *ranking* and *selection processes,*[306] the framework for the *ranking process* and the *selection process* for public sector construction procurement is governed by the PPPFA and *PPPFAR*.[307] Further analysis of the methods for these two evaluation sub-processes is not necessary as the analysis and conclusions drawn regarding the *National and Provincial Framework* above apply directly and, without change, to the *Construction Works Framework*.

6.8 Summary and conclusions

The *regulatory system* governing the tender evaluation process was determined to consist of a framework consisting of various statutes that have application in three mutually exclusive groups:[308]

(a) *National and Provincial Framework* governing the procurement of goods and services by national and provincial departments, constitutional entities, national and provincial public entities, major public entities and national government enterprises;
(b) *Local Government Framework* governing the procurement of goods and services by municipalities and municipal entities; and the
(c) *Construction Works Framework* governing the procurement of construction works by all public entities.

Figure 9: Regulatory system below provides an overview of the structure of the *regulatory system* and the three framework groups defined.[309]

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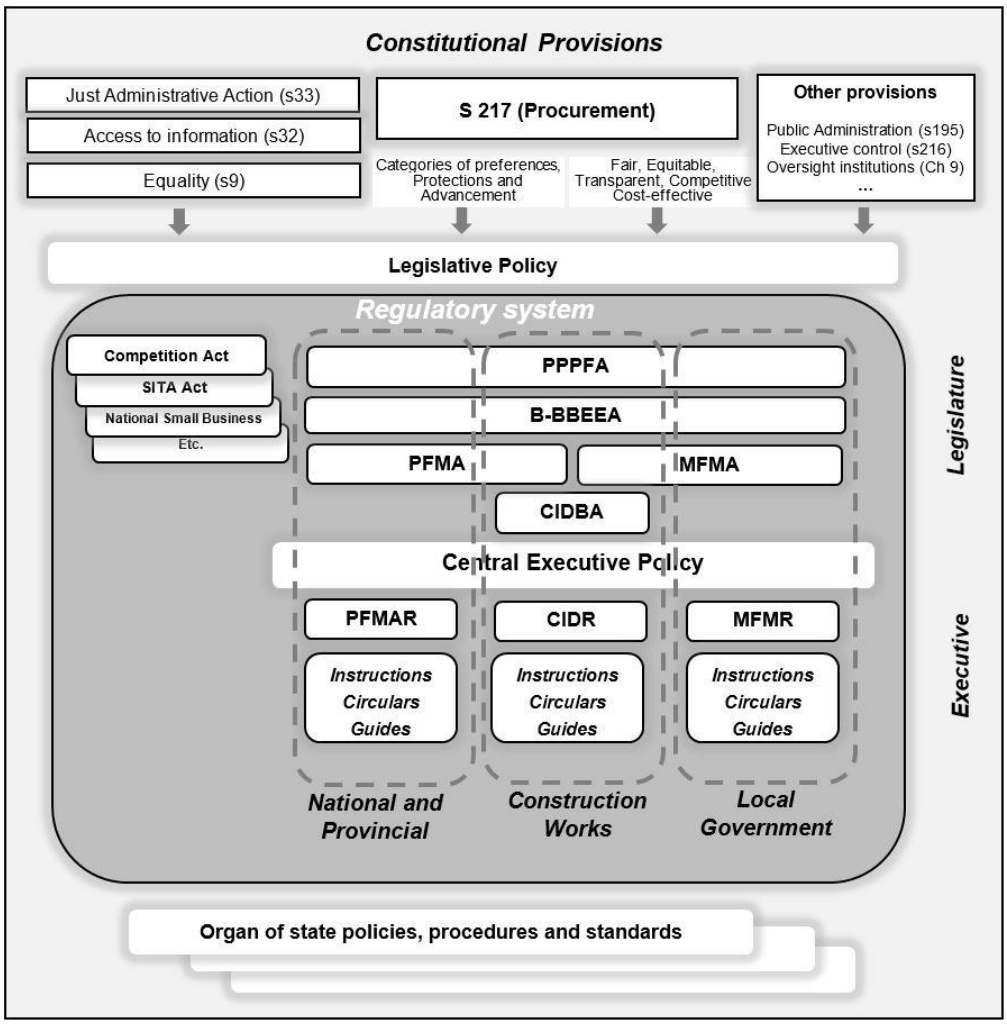
305 Section 16(3) of the CIDBA.
306 Pars F.3.11.2 – F.3.11.5 of the *CIDB Standard for Uniformity* list the "Financial offer", "Financial offer and preference", "Financial offer and quality" and "Financial offer, quality and preferences". Of these, only the "Financial offer and quality" method is compliant with the *PPPFAR*.
307 Note that the draft reg 30.7.4 of the PFMA Draft Treasury Regulations GN 1005 GG 35939 of 30 November 2012 provide that quality may evaluated as other objective criteria in terms of s2(1)(f) of the PPPFA.
308 Par 6.3.
309 The schematic provides the detail to the *regulatory system* component of *Figure 1: Constitutional Framework for public procurement*.

Figure 9: Regulatory system



The functions of provisions governing the tender evaluation decision-making processes were classified in terms of the decision-making sub-processes and analysed in terms of the general conclusions regarding cost-effectiveness.

6.8.1 Qualification processes

6.8.1.1 Formal responsiveness

The *regulatory system* in the three framework groups prescribes that the public body has the discretion to disqualify a tenderer on formal grounds: the non-submission of required documents and certificates. In the case of the omission of certain forms, a grace period for submission is permitted. Exclusion on formal grounds was generally

seen not to support cost-effectiveness.[310] Limiting the effect of formal exclusionary grounds by permitting rectification in certain instances is seen to support cost-effectiveness. The blanket requirement for registration of suppliers on the *CSD*, and in the case of the *Construction Works Framework,* for construction work contractors was concluded to alleviate formal aspects of qualification and reduce unnecessary disqualifications.

6.8.1.2 Responsibility

The *regulatory system* in the three framework groups provides peremptory provisions for the disqualification of a tenderer if it is not tax compliant or if it is generally prohibited from conducting business with the public sector. Although argued not to support cost-effective decision-making, the grounds for exclusion required by the *regulatory system* appear to fall within a reasonable and justifiable set of circumstances.[311] In the *Local Government Framework*, responsibility criteria are extended to include compliance with local government ordinances and standing in respect of obligations toward the local body. The criteria examine outstanding obligations not only relating to the person of the bidder, but to it office bearers.

Under the current instructions, set-asides based on the classification of a tenderer and more generally, in terms of guidance provided, the qualificationary criteria not related to the performance of the contract, are prohibited. This directs the exclusion of such qualification criteria in *transactional systems,* and thereby excluding the possibility of unnecessarily limiting the production of solutions.[312]

6.8.1.3 Competency

The *regulatory system* requires *qualification process* criteria to be related to the capability, resources, technical capacity and ability of the tenderer, and proscribes the inclusion of criteria related to the category of the bidder. The *Construction Works Framework* requires - more generally - that criteria must relate to the subject matter of

310 Par 5.5.2.1.
311 Par 5.5.2.2.
312 Par 5.5.2.2.

the tender. The *regulatory system* therefore limits qualification criteria to be of the class that will exclude tenderers based on an assessment of risk related to their ability to perform.

The *Construction Works Framework* regulates a mandatory pre-qualification process independent of any particular tender with limited discretion and requires certain other qualificationary processes prior to award.[313] Procedural cost-effectiveness is sought through the standardisation of the *qualification process*.[314] The criteria for pre-qualification relate to the risk of performance and to the direct outcomes sought by construction tenders. A degree of flexibility with additional consideration of risks specific to a particular tender to include tenderers who may produce an optimal solution in respect of macro outcomes. The *Construction Works Framework* therefore provides measures to ensure the procedural cost-effectiveness gained through standardisation is not rigidly enforced to the detriment of macro-level cost-effectiveness.[315]

Limiting the inclusion of qualification criteria in the *transactional system* to those related to capability of the tenderer to perform the work supports procedural cost-effectiveness, transactional cost-effectiveness and macro-level cost-effectiveness.[316] However, if included, competency qualification criteria must be considered under the framework of functionality, which potentially constrains the method to a complex compensatory method combined with the *compliance process.*

6.8.2 Compliance process

6.8.2.1 Formal responsiveness

The conclusions regarding formal responsiveness for the *qualification process* apply generally and equally to the *compliance process.*

313 Par 6.7.2.1.
314 Par 5.4.4.1.
315 Par 5.5.2.3.
316 Par 5.5.2.3.

6.8.2.2 Substantive responsiveness

The *regulatory system* contains various provisions promoting the broad production of solutions, for example the requirement to reference national or international standards and avoiding constraining solutions to particular brands.[317] The criteria are not limited and include those related to its practicality, usefulness, working or operating capability, quality, viability, reliability and durability. The *Construction Works Framework* provides a narrower but largely overlapping set of standards that the criteria must relate to the contract performance, justified in terms of the outcomes and be objective and quantifiable to the extent practicable.

The requirement for tenders to meet minimum local content thresholds as a compliance criterion effectively compels the promotion of local industry content 'at any cost'. The *regulatory system* excludes any test for the optimality of solutions directed toward the outcome of promoting local industry in balance with other outcomes and therefore relies on process outside the procurement system to balance the cost.[318]

The blanket prohibition of the use of maximum cost benchmarks in the *compliance process* was seen not to support cost-effectiveness for the reasons that: (a) a published reserve price may optimise the production of solutions and (b) the earlier exclusion of a tender that is not worthwhile would support procedural cost-effectiveness.

While the consideration of substantive compliance criteria is not mandated, if a public body decides to include such a *compliance process* in the *transactional system*, the *regulatory system* prescribes the procedure and method for the *compliance process* within the framework of functionality. Compliance criteria for the scoring of functionality must be related to the performance of the contract although the operation of the weighting and scoring method are not prescribed. The complexities associated with compensatory methods such as weighted multi-attribute methods impose a significant constraint on the design and assembly of the *transactional system*. This limitation

317 Par 5.5.3.
318 Par 5.5.3.

imposed on the *compliance process* by the *regulatory system* could be seen to increase the risk of misalignment in the production of solutions as well as the risk of unwarranted exclusions and therefore could be concluded to place constraints on cost-effective decision-making.[319]

6.8.3 Shortlisting process

A *shortlisting process* is not directly provided for in the frameworks. The provisions regulating the evaluation of functionality may accommodate a *shortlisting process* by using a method based on relatively determined criteria. Prior to the examination of cost, it would not be possible to determine whether a contender for the most meritorious tender may have been excluded through the process. The absence of shortlisting procedures beyond those for simplified procedures does not compromise cost-effectiveness.

6.8.4 Ranking process

The three framework groups compel the *transactional system* to use one of two particular formulae to calculate a numerical value expressing merit for the ranking of tenders. Which formula is to be used is determined by the anticipated contract value. Merit is determined by a compensatory method balancing the tender price and the *B-BBEE* rating of the tenderer.

In terms of the proposed model for cost-effective decision-making, the optimal choice must be made from the available courses of action. The regulated factors determining optimality exclude elements of risk, quality and of cost wider than that of the offered price. The exclusion of any consideration of the direct outcome does not accord with the argument that in general the direct outcome should always carry some weight in the determination of optimality and therefore excludes critical elements of the general model for cost-effective decision-making in public procurement.[320]

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319 Par 5.5.3.
320 Par 6.5.7.5.

6.8.5 Selection process

The *selection process* in the three framework groups permit an award to be made to a tender other than the highest-ranking tender on wide grounds, namely that objective criteria, aside from those considered for the achievement of specific goals, which must justify such an award. Judicial and academic interpretation generally concur that: (1) potential tenderers must be informed of the criteria that would be considered in the *selection process* if such criteria can be anticipated by the public body and (2) criteria that the legislature had intended to be evaluated in a different way should not be considered, such as functionality or specific goals.[321]

The framework defines a tiebreaker mechanism in the event that the *ranking process* cannot determine a winner uniquely which can be considered an extension of the *ranking process*.

The framework also permits the cancellation of a tender under four conditions, although does not expressly limit the grounds for cancellation of a tender to these conditions. In the case of funds not being available, no acceptable tenders received or for the reason that the originating need has changed or does not exist, these can generally be said to support the test for cost-effective decision-making, as no available course of action would be worthwhile. The requirement to cancel a tender after an inspection of the actual tender pricing has disclosed that the *transactional system* specified the incorrect ranking formula could be argued to improve optimality albeit at significant procedural cost.

6.8.6 Concluding remarks

The legal framework of provisions comprising the *regulatory system* was analysed in terms of the five essential decision-making processes for the overall tender evaluation process. The principle-based observations made regarding the cost-effectiveness of the *regulatory system* are taken forward to the comparative analysis in Chapter 8.

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321 Par 6.5.8.1.

7 The regulatory system for public tender evaluations in the UK

7.1 Introduction

The *EU* is a union of member states established with the fundamental objective of improving the living and working conditions of their citizens through expansion, balanced trade and fair competition.[1] The European Union has its history in the establishment of various communities in Europe, the most significant being the European Economic Community established by the Treaty of Rome in 1953.[2] Accession to successors of the Treaty of Rome has broadened the membership from the founding six members of the European Economic Community to the 28 members of what is now called the European Union.[3] The treaties governing the *EU* were consolidated into two core treaties in the Treaty of Lisbon in 2009: the Treaty on the European Union and the Treaty on the Functioning of the European Union.[4]

The Treaty on the Functioning of the European Union[5] (hereafter referred to as the "TFEU") and secondary legislation, directives and regulations made in terms of the *TFEU*, contain the provisions most relevant to public procurement regulation in the *EU*. The legislative instruments for public procurement regulation in the *EU* are founded in the principles of the *TFEU* and a series of directives. While regulations have general application, binding in their entirety and directly applicable upon the member states,[6] directives are binding as to the result to be achieved, and leave the choice of form and methods to the individual national authorities.[7] The *EU* procurement directives fall into the latter category and their implementation into the national regulatory frameworks by *EU* member states must therefore achieve the results intended by the directives.

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1 Preamble to the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
2 Treaty establishing the European Economic Community (TEEC) (Rome) 1957.
3 The most significant being the Treaty on European Union (Maastricht) 1992
4 Consolidated Version of the Treaty on European Union [2010] OJ C83/13 and Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
5 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
6 Art 288 of the *TFEU.*
7 Art 288 of the *TFEU.*

The aim of this chapter is to examine the regulatory framework for public procurement in the *UK* to ascertain the attribution of regulatory features to cost-effectiveness in the procurement phase.[8] As the *UK is* a member of the *EU*, the regulatory framework of the *UK* is an implementation of the supranational *EU* directives and the principles underlying public procurement in the *EU* therefore form part of the investigation.

The context of the examination is to enable a comparative analysis of South African *regulatory system* for the tender evaluation process with a reference system. The examination is therefore limited to regulations pertaining to the *qualification, compliance, shortlisting, ranking* and *selection processes* in relevant regulated procedures of the *UK* system.[9] Observations are made regarding the effect of the selected regulatory provisions on the cost-effectiveness of the system, and the analysis of selected provisions is conducted in more detail in Chapter 8.

7.2 EU Procurement Directives

In 2014, the European Parliament and Council of the European Union issued public procurement directives. The relevant directives are:

(a) Directive 2014/23/EU of the European Parliament and of the Council,[10] which regulates public procurement in the award of public concession contracts for works and services;
(b) Directive 2014/24/EU of the European Parliament and of the Council,[11] which regulates public procurement in the award of public contracts (the *EUCD)*; and
(c) Directive 2014/25/EU of the European Parliament and of the Council,[12] which regulates the procurement by entities operating the water, transport and postal services sectors. The reason for the special regulation of procurement made by utilities is the "influence of national authorities on such utilities" and "closed

8 See the limitations to the meaning of the *UK* for the purposes of this study in footnote 37 below.
9 Par 7.5 sets out the reasons for limiting the investigation to this procedure only.
10 *EU Concessions Directive*.
11 *EUCD*.
12 *EU Utilities Directive.*

nature of the markets … due to the existence of special or exclusive rights granted by Member States".[13]

While these instruments constitute the framework of public procurement regulation for *EU* member states, for the purpose of the comparative study with the South African framework only the implementation of the *EUCD* in the *UK* will be considered.[14]

7.3 EU procurement principles

In the procurement context, the objectives of the *EU Procurement Directives* are to ensure the principles of the *TFEU* are upheld, in particular "the free movement of goods, freedom of establishment and the freedom to provide services, as well as principles derived therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency".[15] These principles provide context to the objectives of procurement regulation in the *EU*:

(a) Free movement of goods. Within the internal market of the *EU*, the movement of goods is ensured by the provisions of the *TFEU*, among others, prohibiting duties, and charges having the effect of such duties, on imports and exports between member states.[16]
(b) Freedom of establishment. In principle, this prohibits restrictions on nationals of one member state "to take up and pursue activities as self-employed persons and to set up and manage undertakings" in another member state subject only to conditions that may apply to the other state's own nationals.[17]

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13 Section (1) of the preamble of the *EU Utilities Directive*.
14 The directive dealing with public contracts in general is considered sufficient to extract essential features for comparison between the *UK* and South African framework for goods, works and services.
15 Par 4 of the Preamble to the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014. Par 1 of the Preamble to the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014. Par 2 of the Preamble to the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014.
16 Arts 26 and 28 of the *TFEU*.
17 Art 49 of the *TFEU*.

(c) Freedom to provide services. Restrictions on nationals who are established in one member state to provide services in another member state are prohibited.[18]

(d) Equal treatment. Equal treatment refers specifically to the equal treatment of men and women in matters of employment and occupation.[19] The principle of equal treatment includes measures to promote representation and participation of an underrepresented gender.[20]

(e) Non-discrimination. Member states are bound to combating discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[21] Discrimination on the grounds of nationality is explicitly prohibited.[22]

(f) Mutual recognition. Member states are mutually bound to recognise their respective formal qualifications to promote the take-up and pursuit of activities as self-employed persons.[23]

(g) Proportionality. Legislative acts of the *EU* must take into account the burden, financial or administrative, that fall on any party and such burden must be commensurate with the objective to be achieved.[24]

(h) Transparency. The references to transparency in the *TFEU*, in the main, relate to the institutions and the functioning of the *EU*. The ordinary meaning of the principle of transparency can be inferred in the procurement context.

It is not required that the *EU Procurement Directives* are enacted word for word in national legislation but a national transposition must approximate the directives to give full effect to the intention of the requirements.[25] The *EU Procurement Directives* set out the principles and standards for procurement in the *EU.* Of relevance to this study, the *EU Procurement Directives* require that:[26]

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18 Art 56 of the *TFEU*.
19 Art 157(3) of the *TFEU*.
20 Art 8 of the *TFEU*. Art 157(4) of the *TFEU* specifically refers to the equal treatment of men and women in respect of employment.
21 Art 10 of the *TFEU*.
22 Art 18 of the *TFEU*. Art 45 of the *TFEU* specifically deals the prohibition of discrimination based on nationality as regards conditions of employment.
23 Art 53 of the *TFEU*.
24 Art 5 of the *TFEU*.
25 Art 114 of the *TFEU*.
26 Paragraph 90 of the preamble to the *EUCD*.

> Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.

The principles of transparency, non-discrimination and equal treatment must be ensured. Tenders for contracts should be compared in "conditions of effective competition" to ascertain, based on objective criteria, the "most economically advantageous tender". As proposed by Arrowsmith,[27] "the main purpose of the rules on award criteria is to secure transparency in the application of the award criteria so that, in particular, discriminatory decisions cannot be concealed". "Most economically advantageous" provides both the basis for an objective criteria as well as the implicit specification of economically advantageous as being an underlying goal.

7.3.1 Most economically advantageous

Article 67 of the *EUCD* sets out requirements for the implementation of "most economically advantageous":[28]

> The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing … and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

Although the *EUCD* does not specify that most economically advantageous must be assessed from the point of view of the contracting authority, Article 67 sets out the requirement from this aspect.[29] The other important requirement is the provision limiting non-pricing criteria to those connected to the subject matter of the contract.

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27 Arrowsmith *Contract Award Procedures* 168. If mandatory criterion for award of "most economically advantageous" would also serve this this purpose as well as the achievement of value for money in the system.

28 Art 67 of the *EUCD*.

29 See Art 94 of the *EUCD* "This [the most streamlined way to present award provisions] can be obtained by using the terminology 'most economically advantageous tender' as the over-riding concept, since all winning tenders should be chosen according to what individual contracting entities consider to be the economically best solution among those offered." See also Recital 89 of the *EUCD*.

Recital 91 of the *EUCD* provides some guidance in answering the question of what is the scope of 'value for money' in its reference to green procurement:[30]

> This Directive clarifies how the contracting entities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

The implication of Recital 91 is that the protection of the environment and sustainable development would not be included in the assessment of value; otherwise, it would have been unnecessary to specify the contribution to the specified horizontal objectives while separately obtaining value for money.[31] However, in circumstances where price is not a factor, Recital 93 of the *EUCD* states:[32]

> it remains possible to assess value for money on the basis of other factors than solely the price or remuneration. Depending on the service or product concerned, such factors could, for instance, include conditions of delivery and payment, aspects of after-sale service (e.g. extent of advisory and replacement services) or environmental or social aspects (e.g. whether books were stamped on recycled paper or paper from sustainable timber, the cost imputed to environmental externalities or whether the social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract has been furthered).

These provisions set out examples of the wider range of factors related to the subject matter of the contract in an assessment of value, including environmental and social aspects and cost-externalities where price is not a factor.[33]

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30 The *EU Public Sector Directive* contains the same wording at recital (5).

31 For a view that contemplates a wider sense of "value for money" that includes horizontal objectives, see par 4.1.3.5. See also De la Harpe *Public Procurement Law* 371.

32 Recital 93 of the *EUCD.* In situations where the price is fixed by law or by the nature of certain services.

33 Recital 36 of the *EUCD.* Member states are able to reserve the right to participate to workshops or businesses that have the main aim of promoting the integration of disabled, disadvantaged persons or groups or reserving the performance of contracts to the context of sheltered employment programmes. Helmrich *Equality-oriented horizontal policies* 69. Helmrich notes the shift away from the basis for award being exclusively economically advantageous, in the narrow sense of value for money, toward permitting a limited class of horizontal policies.

Recital 90 of the *EUCD* indirectly explains "most economically advantageous" with reference to cost-effectiveness:[34]

> It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost-effectiveness only.

The definition of "most economically advantageous" in the *EU Directives* specifies price-quality as one option and "price or cost-effectiveness only" in the alternative. This appears to differentiate a cost-effectiveness assessment from a price only and a price-quality ratio assessment.

It is concluded that the provisions of the *EUCD* require the award to be based on the most economically advantageous tender, where factors other than price may be considered, but must include consideration of price or cost unless this will not differentiate tenders. The factors other than price may include life-cycle costing elements, quality, social and environmental factors if they are linked to the subject matter of the tender. All the elements should be considered from the view of the issuing contracting authority.

Cost-effective decision-making is made on a cost-outcome basis, which prospectively should include the assessments of risk, expected outcome(s) and cost.[35] Conceptually, the decision to select the "most economically advantageous" tender includes the elements required for transactional cost-effectiveness and may include horizontal factors that are indirectly linked to the direct outcomes of the contract. The

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34 Recital 90 of the *EUCD.* Also see Recital 55 of Directive 2004/17/EC The context of this definition of "most economically advantageous" has its history in the previous directives, where the public entity was permitted to evaluate tenders on the basis of either the lowest priced tender or the most economically advantageous tender. The choice was subject to the criterion being predetermined and that tenderers were informed which criterion was being applied. The new directives broadened the meaning of "most economically advantageous" to include both bases and a further option, that of 'cost only'.

35 Par 4.1.1.

"point of view of the contracting authority" would appear to exclude system-wide horizontal factors.

7.4 Implementation of EU Procurement Directives in the UK

Section 2(2) of the *European Communities Act* 1972[36] of the *UK* empowers the designated Minister to make regulations with the purpose of implementing *EU* obligations. In terms of this provision, the *Public Contracts Regulations* 2015[37] were put before Parliament, being the transposition in the *UK* of the *EUCD*. The stated approach to the transposition was to "copy out" the *EUCD* in order to expedite the implementation of flexibility offered in the new directives as opposed to making extensive national adaptation.[38] Owing to its recent adoption, literature analysing and interpreting the *UK Regulations* is somewhat limited but the "copy out" approach makes academic analysis of certain of the *EUCD* provisions directly applicable.

7.4.1 Scope of the UK Regulations

The *UK Regulations* have application to all "contracting authorities"[39] for public works contracts, supply and service contracts.

The *UK Regulations* define the "procurement documents" to be the documents produced by the contracting authority setting out the procedure, notices, specification, conditions of contract and other obligations of tenderers. The *UK Regulations*

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36 European Communities Act 1972 Chapter 68 as amended by the Legislative and Regulatory Reform Act 2006 and the European (Amendment) Act 2008.

37 The Public Contracts Regulations 2015 No. 102 of 5 February 2015. (Hereafter the "UK Regulations"). The *UK Regulations* exclude Scotland from their application. The Scottish transposition is the Public Contracts (Scotland) Regulations 2015 SSI 2015/446. For the purposes of this study, it is sufficient to consider the regulatory framework as it applies to England, Wales and Northern Ireland. References to the *UK* will therefore exclude Scotland.

38 Butler *Exclusion, Qualification and Selection* 2. Butler criticises the copy-out method in that further guidance will be necessary to obtain clarity to effect actual implementation in a number of provisions. See also Henty *Implementation of the EU Directives* NA75.

39 Reg 2(1) of the *UK Regulations.* Contracting authorities mean the state, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity.

therefore specify the *regulatory system* and the "procurement documents" set out the *transactional systems.*

7.5 Regulated procurement procedures and techniques

When a contracting authority intends to make an award of a public contract, one of five procedures in the *UK Regulations* may be applicable:

(a) Open procedure. Under the open procedure, any supplier may submit a tender in response to a tender advertisement;[40]

(b) Restricted procedure. Only certain selected suppliers who have responded to a tender invitation are subsequently invited to submit a tender;[41]

(c) Competitive procedure with negotiation. As with the restricted procedure, only certain selected suppliers who have responded to a tender invitation are invited to submit a tender - after which the contracting authority may then commence negotiations to seek improved offers;[42]

(d) Competitive dialogue procedure. After a selection is made of suppliers who have responded to a tender advertisement, the contracting authority enters into dialogue with the selected suppliers to develop specifications for solutions for which the selected suppliers may then submit a tender;[43] and the

(e) Innovation partnership procedure. While similar to the competitive procedure with negotiation, invited suppliers submit ideas for a solution where there is no ready solution or product in the market.[44]

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40 Reg 27 of the *UK Regulations.* This is essentially a first-bid sealed-bid auction procedure.

41 Reg 28 of the *UK Regulations.* This is a two-stage procurement procedure in which a pre-*qualification process* is performed prior to the submission and evaluation of tenders. Contracting authorities have a free choice to use the restricted or open procedures.

42 Reg 29 of the *UK Regulations.* This is a two-stage procurement process in which the qualification, selection and award criteria are published. The negotiation process may not modify the award criteria. This procedure is reserved for complex contracts.

43 Reg 30 of the *UK Regulations.* The procedure consists of three parts: the qualification of participants, the refinement of the specification through competitive dialogue and the invitation to participants to submit final tenders. The final evaluation of the tenders must still be made on award criteria published in the initial advertisement. This procedure is reserved for complex contracts and is essentially a hybrid procedure consisting of both negotiation and auction procedures.

44 Reg 31 of the *UK Regulations.* The procedure consists a *qualification process*, a *compliance process* and an optional *shortlisting process*. The essential difference from other procedures is that in this procedure, the contracting authority may then contract with more than one of the participants to conduct further research and innovate solutions, including the manufacture of

Procurements that are projected to have a value falling below thresholds set by the *EUCD* for various categories are subject only to national regulation, although still subject to the general standards of public procurement in the *EU*.[45] While these are enacted in the *UK Regulations,* save for the fact that simplified procedures are provided for by the *regulatory system*, the cost-effectiveness of simplified procedures are not investigated in any detail in the study.

Procedures that may be undertaken in special circumstances, which do not require public advertisement, follow the form of the negotiated procedure without prior publication.[46]

The *UK Regulations* provide for a number of specific "techniques and instruments" to be used for enhancing the procurement process.[47] These include the use of framework

products in order to determine the specifications for a final evaluation process. Based on a final tender process, the contracting authority may then decide the final award. The contracting authority may undertake negotiations with the selected participants, except in the final tender process.

45 Art 4(a), 4(b), 4(c) and 4(d) of the *EUCD*. Where supply and service contracts in the field of defence are awarded, the thresholds only apply to a limited list of products that appear in Annex III of the *EUCD*. Reg 4 of the *UK Regulations* deal with the determination of applicable thresholds in cases of mixed types of procurement. Reg 111 of the *UK Regulations* prohibits the use of a pre-qualification stage for sub-threshold procurements but permit the assessment of a tenderer's suitability for the contract, provided the assessment questions are relevant to the subject matter of the procurement and that such questions are "proportionate". Butler *Exclusion, Qualification and Selection* 32 It is unclear whether this removes the possibility of posing questions relating to the suitability of tenderers in a separate process or if it must be dealt with simultaneously. Save for the fact that thresholds exist, below which simplified procurement regulations apply, neither the quantum of the thresholds nor the details of the simplified procurement processes are relevant to the scope of the comparative analysis.

46 Reg 32 of the *UK Regulations.* The circumstances under which these procedures may be undertaken include those where: (i) no acceptable tenders have been received in a prior tender process, (ii) there is only one supplier due to allowable factors and (iii) emergency conditions exist that were not foreseeable by the economic operator and not attributable to the economic operator.

47 Section 4 of the *UK Regulations*.

agreements,[48] dynamic purchasing systems,[49] electronic auctions,[50] electronic catalogues,[51] centralised purchasing[52] and joint procurements.[53] The procedures involve iterations of the decision-making processes and the re-use of decisions in multi-transaction procurement, variously reducing the unnecessary repetition of procedures and in some cases allowing for optimisation of solutions.[54]

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48 Reg 33 of the *UK Regulations*. Framework agreements are entered into with one or more economic operators that for a period, not exceeding four years, to procure a quantity of goods, services or works within the limits as laid down in the terms of the agreement. This allows the contracting authority to award a tender without the details of, for example, goods being specified in the framework agreement procurement document. The basis for the final awards must nevertheless be made in terms of the same award criteria as specified in the framework agreement procurement documents. The procedure is to promote the efficiency of the procurement process in repeated procurements.

49 Reg 34 of the *UK Regulations*. Dynamic purchasing system procurements are for goods, works or services commonly available in the market. The procedure to be followed is based on the restricted procedure where an economic operator may be admitted to the system during the period of the dynamic purchasing system's validity provided it satisfies the selection criteria. The number of participants may not be limited or shortlisted. The award of must be to the participant submitting the best tender as adjudged based on criteria as set down in the contract notice of the dynamic purchasing system. The procedure is to promote the efficiency of the procurement process in repeated procurements of common goods, works or services.

50 Reg 35 of the *UK Regulations*. The electronic auction technique may be used in open, restricted or competitive procedures by preceding the award of the tender with an electronic auction in which new prices or new values relating to tenders may be submitted by their tenderers. Electronic auctions may not be used for categories of intellectual services and works contracts that cannot be ranked using automated means. Other than being restricted in the *ranking process* to automated means, the evaluation processes are essentially is the same as for the open procedure. Permitting improved offers is aimed at improving the intensity of competition and cost-effectiveness.

51 Reg 35 of the *UK Regulations*. The submission of electronic catalogues may be used in conjunction with framework agreements and dynamic purchasing systems. This technique substitutes the submission of a tender under these systems with the submission of an electronic catalogue to promote the efficiency of the procurement process in repeated procurements.

52 Reg 35 of the *UK Regulations*. A contracting entity may procure goods, works or services through contracts awarded, dynamic purchasing systems operated, or framework agreements concluded by a central purchasing authority. A contracting authority that procures in such a way will be deemed to have complied with the regulations. Procuring in this way does make for more efficient procurement although could be seen to be reducing competitiveness. Reg 39 of the *UK Regulations*. Subject to certain conditions, contracting authorities may use central purchasing authorities of other member states.

53 Reg 35 of the *UK Regulations*. Contracting authorities may conduct occasional joint procurement. The contracting authorities remain jointly responsible for the procedure except for parts of the procedure conducted in the name of a particular contracting authority and on its own behalf.
Reg 39 of the *UK Regulations*. Subject to certain conditions, contracting authorities may conduct joint procurements with contracting authorities of other member states.

54 Framework agreements and dynamic purchasing arrangements essentially perform one *qualification* and *compliance process* with multiple iterations of the *ranking and selection process*es. Electronics auctions are a variant of the open procedure with an iterative *ranking process* prior to the selection process. See par 5.3.5.1. Centralised and joint procurements simply aggregate the requirements of multiple contracting authorities and at that level do not affect the decision-making processes.

The evaluation process in these procedures involves different combinations and variants of the decision-making sub-processes defined in Chapter 5. The open procedure, being the most formal of the regulated procedures is most similar to the tender procedures regulated by the South African framework and from a decision-making perspective a first-bid sealed-bid procedure. The features of the evaluation sub-processes, as they are regulated in the open procedure, will therefore be examined for the purposes of the comparative study.[55]

7.6 Regulatory framework for the open procedure

7.6.1 Qualification process

The *UK Regulations* broadly classify the criteria for qualification into the following categories: mandatory exclusionary criteria;[56] discretionary exclusionary criteria;[57] and selection criteria,[58] relating to attributes of the candidate tenderer or tenderer.[59]

7.6.1.1 Formal responsiveness

As the formal aspects of both the *qualification process* and *compliance process* are not separated in the *UK Regulations,* they are dealt with together.

The *UK Regulations* do not explicitly define the requirements for formal responsiveness. However, conditions for considering tenders that are formally "irregular" are defined to be tenders which "do not comply with the procurement documents" or "which were received late".[60] The contracting authority is not generally

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55 See par 6.5.4.2. The restricted procedure, or two-stage bidding, is not covered in any detail in the South African regulatory framework. The procedures involving negotiation and competitive dialogue are only expressly permitted in limited circumstances in the South African framework. S84(1) of the *MSA* is dealt with in par 6.6.6.

56 Reg 57 of the *UK Regulations.*

57 Reg 58 of the *UK Regulations*.

58 Reg 59 of the *UK Regulations.* Note that the use of the term selection in the *UK Framework* refers to the competency-based filtering process in terms of the nomenclature adopted in this study.

59 Depending on the procedure, an economic operator may not yet be considered a tenderer and only a potential, or candidate, tenderer. For simplicity, both will be referred to as a "tenderer".

60 Reg 26(6) of the *UK Regulations.* The definition of irregularity also includes the substantive issues of evidence of collusion or corruption and abnormally low pricing.

obliged to disregard irregular tenders by the *UK Regulations*.[61] The context of the definition of an irregular tender is that in the event of only irregular and unacceptable tenders being received, the contracting authority may initiate a procedure involving negotiation or competitive dialogue.

In the event that required information or documentation is missing from a tender, or if incomplete or incorrect in a tender, the *UK Regulations* provide that the contracting authority may request the tenderer to "submit, supplement, clarify or complete the relevant information or documentation within a reasonable time limit".[62] The contracting authority is given the discretion to allow such rectification to meet formal responsiveness criteria but must do so in "full compliance with the principles of equal treatment and transparency".[63]

7.6.1.2 Mandatory exclusionary criteria

The contracting authority is required to exclude a tenderer on grounds, including: conspiracy, corruption, bribery and fraud affecting the European Community's financial interests; breach of obligations relating to the payment of taxes or social security contributions,[64] and that the breach has been established by a judicial or administrative decision having final and binding effect.[65]

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61 It is obligatory not to consider irregular, unacceptable or unsuitable tenders when using the electronic auction technique. Regs 35 (10)-(12) of the *UK Regulations*.

62 Reg 56(4) of the *UK Regulations*. Graells *Exclusion, Qualitative Selection and Short-listing* 104. The *EUCD* contains significantly wider latitude for the contracting authority to seek clarification within the provisos of equal treatment and transparency than its predecessors did.

63 Reg 56(4) of the *UK Regulations*.

64 Henty *Use of public procurement* NA28. This follows the relatively recent drive in the *UK* to use public procurement to promote tax compliance. This may rely on a self-declaration mechanism. Butler *Exclusion, Qualification and Selection* 26-27. Exclusion may result from a negative response to a question. Butler *Exclusion, Qualification and Selection* 24. The mandatory exclusion for non-payment of taxes or social security contributions only applies to the person of the economic operator and not to a member of the administrative management or supervisory body of the contractor.

65 Reg 57(1) of the *UK Regulations.* Reg 57(2) of the *UK Regulations* states that the obligation to exclude a tenderer on these grounds also extends to the situation where person who is a member of the administrative, management or supervisory body of the tenderer or has powers of representation, decision or control in the tenderer.

Certain exceptions may be made in respect of mandatory exclusions relating to a breach of payment of taxes or social security contributions on an exceptional basis for reasons relating to the public interest, or where mandatory exclusion would be clearly disproportionate.[66]

The contracting authority is required to exclude a supplier from participation on becoming aware of, and having established, non-compliance with the mandatory exclusionary criteria at any time during the procurement procedure.[67] In the case of the open procedure, the contracting authority may defer verification of mandatory exclusionary criteria until after inspection of the tenders, provided the verification is carried out in a manner that does not allow qualification where the tenderer would otherwise have been excluded.[68]

7.6.1.3 Discretionary exclusionary criteria

Discretionary grounds for excluding a tenderer from participating in a procurement procedure are where:[69]

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66 Regs 57(6) and 57(7) of the *UK Regulations.* Butler *Exclusion, Qualification and Selection* 24. *UK* Guidance has been that the public interest could only be in the "most serious of circumstances" such as a national emergency. Priess *Rules on Exclusion* 23. The *EUCD* is silent as to whether this may apply to a conviction outside the *EU*. Reg 57(11) the exclusion period is set at the maximum of five years permitted by the *EU* unless otherwise set by the judgment. See also Butler *Exclusion, Qualification and Selection* 5.

67 Reg 56(3) of the *UK Regulations*. Graells *Exclusion, Qualitative Selection and Short-listing* 99. The *EUCD* permits the checking to be conducted at any time during the evaluation process. The *UK* transposition has left this flexibility in the *UK Regulations*. The position anticipates the problem that verification after the *ranking process* may be subject to the inclination to "twist" exclusion to retain the best offer. Graells also points out that it would be rare for the *ranking process* to be less costly than to verify compliance and questions why a body would undertake a post-qualification exercise. Telles and Butler *Public Procurement Award Procedures* 7. Telles and Butler take the view that this development reduces what was previously a two-stage process to a single stage process with greater efficiencies. Graells *Exclusion, Qualitative Selection and Short-listing* 100. The explicit discretion to perform qualification verification later does have the advantage of avoiding claims by a tenderer that it had an expectation of not having been excluded for the reason that its tender was evaluated.

68 Reg 56(3) of the *UK Regulations.*

69 Priess *Rules on Exclusion* 114. The wording of the *EUCD* is such that member states may make any of the discretionary exclusions mandatory. The *UK* copy-out approach has left the discretion to the contracting authorities.

(a) the contracting authority can demonstrate by "any appropriate means" that the tenderer is in breach of its obligations relating to payment of taxes or social security contributions;[70]

(b) the contracting authority can demonstrate a violation of obligations in the fields of environmental, social and labour law established by *EU* law or listed international law provisions;[71]

(c) the tenderer is bankrupt or the subject of insolvency proceedings;[72]

(d) the contracting authority can demonstrate by appropriate means that the tenderer is guilty of grave professional misconduct, which renders its integrity questionable;[73]

(e) the contracting authority has plausible indications of collusion;[74]

(f) a conflict of interest, or a distortion of competition by reason of a tenderer's prior involvement in the preparation of the procurement procedure, cannot be dealt with less intrusively;[75]

(g) the tenderer has shown "significant or persistent deficiencies" in the performance of a prior public contract which led to early termination or award of damages or other comparable sanction;[76]

(h) the tenderer is guilty of serious misrepresentation in supplying information for the verification of exclusion or selection; [77] or

(i) the tenderer has: undertaken to influence the decision-making of the contracting authority unduly; undertaken to obtain confidential information that may give it

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70 Reg 56(4) of the *UK Regulations.*

71 Reg 56(8)(a), together with reg 56(2), of the *UK Regulations.* Butler *Exclusion, Qualification and Selection* 6. This is a new provision placing emphasis on compliance with environmental, social and labour provisions in law.

72 Reg 56(8)(b) of the *UK Regulations.*

73 Reg 56(8)(c) of the *UK Regulations.* Butler *Exclusion, Qualification and Selection* 8-11. This departs from previous grounds for discretionary exclusion of "conviction for an offence concerning professional conduct". As Butler notes, it would be difficult for a contracting authority to employ discretion in proceeding to award a contract to a supplier where it had knowledge of previous convictions. The new *UK Regulations* include an additional requirement for exclusion that it must render the integrity of the economic operator questionable, which may require supplementary guidance in its implementation.

74 Reg 56(8)(d) of the *UK Regulations.*

75 Regs 56(8)(e) and (f) of the *UK Regulations.*

76 Regs 56(8)(g) of the *UK Regulations.*

77 Regs 56(8)(h) of the *UK Regulations.* Butler *Exclusion, Qualification and Selection* 18. This is an important provision given the self-declaration procedures.

undue advantage; or has negligently provided misleading information that may influence decisions during the evaluation process.[78]

The contracting authority may exclude a supplier from participation on becoming aware of, and having established, non-compliance with the discretionary exclusionary criteria at any time during the procurement procedure.[79] As with mandatory exclusionary criteria, in the case of the open procedure, the contracting authority may defer examination of the discretionary exclusionary criteria until after inspection of the tenders.[80]

7.6.1.4 Self-cleaning

Where a ground for the exclusion of a tenderer exists, the tenderer may provide evidence to the contracting authority to show that it has taken measures to demonstrate its reliability.[81] The contracting authority may consider such evidence and, if considered sufficient, the tenderer may not be excluded.[82] If the evidence is not considered sufficient, the contracting authority must provide reasons for its insufficiency.[83]

7.6.1.5 Discretionary competency criteria

The *UK Regulations* grant the discretion to contracting authorities to impose requirements for participation that are related to a tenderer's suitability to pursue a professional activity, its economic and financial standing or its technical and

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78 Regs 56(8)(i) of the *UK Regulations.* Butler *Exclusion, Qualification and Selection* 29. *UK* policy is that it is legitimate to consult with participants prior to launching a tender provided it is on an equal treatment basis.

79 Reg 56(10) of the *UK Regulations*. See footnote 67 above.

80 Reg 56(3) of the *UK Regulations.*

81 Reg 56(13) of the *UK Regulations*. Butler *Exclusion, Qualification and Selection* 28. This does not apply to a conflict of interest or distortion of competition from prior involvement. The *UK Regulations* limit the assessment of self-cleaning to the contracting authority only. With regard to tax compliance, mitigating factors may include corrective action, taken or planned; changes in personnel or ownership; or an isolated incident.

82 Reg 56(14) of the *UK Regulations*. Reg 15 of the *UK Regulations* set out the requirements of such proof. Reg 16 of the *UK Regulations* sets out the factors to be considered in weighing up an exemption from exclusion.

83 Reg 56(17) of the *UK Regulations*.

professional ability.[84] This discretion is granted subject to the general standards that such requirements must be limited to ensuring that a tenderer meets the requirements to perform the intended contract and that the requirements are related and proportional to the subject matter of such contract.[85] The discretion to impose requirements to establish a tenderer's suitability is only permitted to the extent of these standards.[86]

The contracting authority has the discretion to require that a tenderer must be enrolled in one of the professional or trade registers listed in the *UK Regulations*.[87] Where the intended contract relates to services that require the authorisation from, or membership of, an organisation, the contracting authority may require proof of such authorisation or membership.[88]

The requirements for economic and financial standing may include a certain minimum annual turnover, which may include a sub-minimum turnover within an area of the intended contract, the provision of annual accounts showing certain ratios and an appropriate level of profession indemnity insurance.[89] The contracting authority has discretion to apply a qualification requirement for a minimum annual turnover not exceeding twice the estimated value of the intended contract.[90] Where the contracting authority requires the provision of annual accounts for the purposes of calculating

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84 Reg 58(1) and 58(2) of the *UK Regulations*. These are termed "Selection criteria" in the *UK Regulations.* For the reasons set out in Chapter 5, this relates to a filtering process and not a selection process in terms of the nomenclature adopted in this study.

85 Regs 58(3) and 58(4) of the *UK Regulations.*

86 Reg 58(2) of the *UK Regulations.* Graells *Exclusion, Qualitative Selection and Short-listing* 114-115. Graells suggests that the *EU* attempts to create a *numerus clausus* of selection criteria but given the open-ended wording of the criteria listed, provided they are within the broad standards, they are not in fact limited. Butler *Exclusion, Qualification and Selection* 36. The criteria must be formulated in such a manner that the contracting authority can verify them effectively.

87 Reg 58(5) of the *UK Regulations*.

88 Regs 58(5) and 58(6) of the *UK Regulations.*

89 Reg 58(8) of the *UK Regulations*. Where the contract has been divided into lots, or if the contract is of a framework nature or a dynamic purchasing agreement, the contracting authority is further instructed in regs 58(11)-(14) of the *UK Regulations* as to the how the minimum turnover requirement must be calculated.

90 Reg 58(9) of the *UK Regulations.* This maximum requirement may be exceeded, provided the contracting authority furnishes reasons in the procurement documents. Crown Commercial Service 2014 http://bit.ly/1bp8R7V. This is to encourage contracting authorities to break contracts into lots to encourage the participation of SMME's. Butler *Exclusion, Qualification and Selection* 35. While it is unclear form the wording whether the maximum is the total value or the total annual value, Butler argues it is the total value of the contract.

indicator ratios, the contracting authority may only consider such ratios if the methods and criteria applicable are specified in the procurement documents and that the methods are "transparent, objective and non-discriminatory".[91]

Contracting authorities are specifically granted the discretion to impose requirements to ensure that tenderers have the necessary "human and technical resources and experience to perform the contract to an appropriate quality standard" and may require the demonstration of such by requiring references from past contracts.[92] The contracting authority is further given the discretion to assume that a tenderer does not possess the required professional abilities if the contracting authority has established that the tenderer has "conflicting interests that may affect the performance of the contract".[93] In the case of siting, installation, services or works contracts, the professional abilities of tenderers may be evaluated with regard to their "skills, experience and reliability".[94]

As with exclusionary criteria, in the case of the open procedure, the contracting authority may defer examination of the competency criteria until after inspection of the tenders.[95]

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91 Reg 58(10) of the *UK Regulations*.

92 Regs 58(15) and 58(16) of the *UK Regulations*. Reg 60(9)(a)(i) of the *UK Regulations* states that for works, the contracting authority may only consider works carried out over the last five years. This requirement may be relaxed if necessary to ensure adequate competition. For services, reg 60(9)(a)(ii) of the *UK Regulations* requires that the contracting authority may only consider main services provided over the last three years. This requirement may also be relaxed if necessary to ensure adequate competition. Regs 60(9)(b)–(k) broadly permit the following information to be used in assessing a tenderer's qualification: indication of the technicians or technical bodies involved, especially those in quality control; the technical facilities and measures used in quality control; study and research facilities; supply chain management systems; production capacities or technical capacities as assessed by a competent county authority; educational and professional qualifications of the tenderer; environmental management measures; annual average manpower and managerial staff over the last three years; tools, plant or technical equipment available; subcontracted portion; samples, descriptions or photographs of products; and certifications by official quality control institutes. Butler *Exclusion, Qualification and Selection* 38. Case law has permitted the exclusion of a contractor because of inadequacies of health and safety policies, which were argued to be part of a contractor's technical ability.

93 Reg 58(17) of the *UK Regulations*. Butler *Exclusion, Qualification and Selection* 36. For example, if the tenderer has other contractual obligations, it may lead to a conflict in prioritising the assignment of resources.

94 Reg 58(18) of the *UK Regulations*.

95 Reg 56(3) of the *UK Regulations.*

The regulations also define "unacceptable" tenders as being tenders submitted by tenderers that do not possess the required qualifications. The context of the definition of unacceptable is that in the event of only irregular and unacceptable tenders being received, the contracting authority may apply a procedure involving negotiation or competitive dialogue. It is not mandatory that the contracting authority pursues an alternative procedure and it would be presumed that if it elected not to, it would be obliged to cancel the process. It is also presumed that unacceptable tenders would be disregarded in the event that not all tenders were unacceptable.

7.6.1.6 Set-asides

The *UK Regulations* grant the discretion to contracting authorities to reserve the right to participate in procedures to "sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons". The regulations provide that if such a reservation is to be made, a minimum of 30% of the employees must be disabled or disadvantaged.[96]

7.6.1.7 Regulated means of proof

The *UK Regulations* set out a framework detailing permissible means of proof for contracting authorities for the *qualification process*. The *UK Regulations* require a contracting authority to accept a self-declaratory instrument, the European Single Procurement Document (hereafter the "ESPD") as preliminary evidence of a tenderer's compliance with qualificationary criteria.[97] The tenderer's *ESPD* declaration must contain references to bodies from whom supporting documentation can be obtained and, in the event of an award being made to the tenderer or before such time, the tenderer must provide up-to-date supporting documentation.[98] Various other

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96 Reg 20(1)(a) of the *UK Regulations.*

97 Reg 59(1) of the *UK Regulations*.

98 Reg 59(9) *UK Regulations.* Graells *Exclusion, Qualitative Selection and Short-listing* 108. Graells points out that an inability to produce the supporting documents would be a grave misrepresentation of the tenderer's suitability or qualification.

provisions in the *UK Regulations* specify the form of proof that must be used for quality assurance, environmental standards[99] and the recognition of certification bodies.[100]

7.6.1.8 Qualification process summary

The *UK Regulations* contain a number of provisions that require or permit the inclusion of formal responsiveness, responsibility and competency qualification criteria. The framework provides for a general standard that qualifying criteria must be published with the invitation to tender. The features of the *regulatory system* governing the *qualification process* discussed above are summarised with observations regarding their attribution to cost-effectiveness as determined in Chapter 5.

7.6.1.8.1 Procedural aspects

The *qualification process* may be undertaken at any time during the overall evaluation process with regard to responsibility and competency criteria. The *ESPD* provides a means for performing a preliminary *qualification process* to balance the effort of a full verification with the effort of evaluating of tenderers who would not qualify. [101] This flexibility may enable procedural cost-effectiveness in the execution of the *transactional system* in certain circumstances but may carry additional risks.[102]

7.6.1.8.2 Formal responsiveness

The *UK Regulations* generally prescribe that the public body has the discretion to disqualify a tenderer on formal grounds.[103] The contracting authority is given the discretion to allow rectification of tenders to meet formal responsiveness criteria but must do so in "full compliance with the principles of equal treatment and transparency".[104]

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99 Reg 62 of the *UK Regulations*.
100 Reg 64 of the *UK Regulations*.
101 Par 7.6.1.7.
102 Par 7.6.1.2.
103 Par 6.5.4.1. Discretion is permitted by the regulation not to disqualify a bidder in certain circumstances.
104 Par 7.6.1.1.

Exclusion on formal grounds was generally seen not to support cost-effectiveness. Provision for rectification, within the requirements of equal treatment and transparency will minimise solutions from being excluded on formal grounds. Explicitly providing for the exercise of discretion with regard to rectification should promote public trust in the system by providing certainty with regard to its permissibility provided and given adherence to the principles of equal treatment and transparency.

7.6.1.8.3 Responsibility

The *UK Regulations* require the mandatory exclusion of tenderers for offences such as conspiracy, corruption, bribery or fraud affecting the European Community's financial interests or a breach of obligations relating to the payment of taxes or social security contributions if they have been established by a judicial or administrative decision having final and binding effect.[105]

The contracting authority has the discretion to exclude a tenderer on a closed list of conditions if the contracting authority can demonstrate the existence of such conditions, including payment of taxes, violations of environmental, social and labour law, collusion, misrepresentation, conflict of interest, grave professional misconduct and persistent deficiencies in the performance of prior contracts, which renders its integrity questionable.[106]

Exclusion for non-compliance to generally applicable legal norms related to the delivery services was argued to maintain public trust in the public procurement process. The grounds required by the *regulatory system* for exclusion relating to the lawfulness of a tenderer's operation relate to the maintenance of public trust in the procurement system, while the latter grounds could be argued to present sufficient risk to the achievement of the direct outcome to warrant exclusion without further examination of the substance of the tender.

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105 Par 7.6.1.2. Certain exceptions may be made in individual circumstances in the public interest or if clearly disproportionate.

106 Par 7.6.1.3.

The closed list of *qualification process* criteria removes the possibility criteria in the *transactional system* outside this list, and thereby reducing the possibility of unnecessarily limiting the production of solutions.

The contracting authority has the discretion to specify set-asides only for sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. As concluded above, this establishes the paramountcy of the indirect horizontal outcome and may exclude worthwhile or optimal solutions.

7.6.1.8.4 Competency

The *UK Regulations* require *qualification process* competency criteria to be related to the capability, resources, technical capacity and ability of the tenderer, and proscribes the inclusion of criteria that are not related to a prospective tenderers capability to perform the contract. The approach in the *UK Regulations* is for the *regulatory system* to specify a closed list of criteria and the specification of criteria in the assembly of the *transactional system* must lie strictly within these constraints. Limiting the inclusion of qualification criteria in the *transactional system* to those related to capability of the tenderer to perform the work supports procedural cost-effectiveness and transactional cost-effectiveness. As the exclusion of tenderers or potential tenderers can only be made on criteria related to their ability to perform the work, exclusions would simply be removing tenderers who cannot perform the work, or those for which risk exceeds an acceptable threshold toward the achievement of the direct outcome.

7.6.2 Compliance process

The *compliance process* examines formal responsiveness and substantive responsiveness aspects of the tender. The general principle regulating the tests for compliance requires the contracting authority to verify that:[107]

[107] Reg 56(1) of the *UK Regulations.* Reg 45 of the *UK Regulations* covers the submission of variants. This is briefly discussed in par 7.6.2.2.

the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;

7.6.2.1 Formal responsiveness

The formal aspects of the *compliance process* were discussed in paragraph 7.6.1.1 as the regulation of formal aspects of both the *qualification process* and *compliance process* are not separated in the *UK Regulations*.

7.6.2.2 Substantive responsiveness

The criteria for substantive responsiveness are contained in technical specifications, which must set out the required characteristics of the goods, works or services in the procurement documents.[108]

The *UK Regulations* set out a wide, but limited, set of categories that may be included in the technical specifications, which includes:[109]

(a) Levels of environmental and climate performance;
(b) Design for all requirements (including accessibility for disabled persons);
(c) Procedures concerning quality assurance;
(d) Terminology, symbols;
(e) Testing and test methods;
(f) Packaging, marking and labelling;[110] and
(g) Conformity assessment.[111]

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108 Reg 42(1) and 42(2) of the *UK Regulations*.

109 Reg 42(4)-(6) of the *UK Regulations.* The regulations set out distinct technical specifications for works, supply and services. For the purposes of this study is not necessary to elaborate on the differences.

110 A requirement for labels can only be specified under restricted circumstances set out in reg 43 of the *UK Regulations* to ensure fair use of such a requirement.

111 The requirement for a conformity assessment is limited to the conditions sets out in reg 44 of the *UK Regulations* to ensure fair use of such a requirement.

The inclusion of requirements in the technical specification is subject to general standards. These must afford equal access to the procurement procedure by suppliers,[112] the technical standards must not have the effect of creating unjustified obstacles to opening up competition[113] and the parameters must be sufficiently descriptive for tenderers and contracting authorities to determine what is required and enable the contracting authorities to determine compliance of a tender for award.[114] The way in which the requirements are specified must be limited to those complying with these general standards or by reference to national standards transposing European standards, European Technical Assessment, common technical specifications, international standards, technical reference systems established by European standardisation bodies or - if none of the previous exist - to national standards and specifications.[115] Unless the subject matter of a tender justifies the reference to a specific make, source, or particular process by a specific operator, trademarks, patents, types or specific origin or production that may favour or eliminate certain tenderers, the technical specifications may not make reference to such requirements. Even if it is justified, such references must be accompanied by the words "or equivalent".[116]

The contracting authority is specifically permitted by the *UK Regulations* to allow or require the submission of variants.[117] Variant solutions may only be accepted if so indicated in the procurement documents.[118] The minimum criteria for acceptance of variants must be specified and, on being met, a variant must be considered by the contracting authority.[119]

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112 Reg 42(10) of the *UK Regulations*.
113 Reg 42(10) of the *UK Regulations*.
114 Reg 42(11)(a) of the *UK Regulations*.
115 Reg 42(11)(b) of the *UK Regulations*. Latitude is granted for a tenderer to specify alternative, equivalent certifications in its tender, provided it is so shown by the tenderer.
116 Reg 42(13) of the *UK Regulations*. It may be justified on an exceptional basis only "where a sufficiently precise and intelligible description of the subject-matter of the contract … is not possible".
117 Reg 45(1) of the *UK Regulations*.
118 Reg 45(2) and 45(3) of the *UK Regulations*.
119 For example, a tender may not be rejected on the ground that it may lead to a service contract rather than a supply contract and *vice versa.* This indicates the wide range of variants permitted in the production of solutions.

The *compliance process* may be undertaken by the contracting authority before the *qualification process*.[120] In this event, the contracting authority must ensure that a subsequent *qualification process* is carried out in an impartial and transparent manner so as not to include a tenderer who would otherwise have been excluded during the *qualification process*.[121]

A further substantive aspect of a tender is its price. The regulations define "unacceptable" tenders as being tenders whose price exceeds the contracting authority's budget.[122] The context of the definitions of unacceptable is that in the event of only irregular and unacceptable tenders being received, the contracting authority may apply a procedure involving negotiation or competitive dialogue. This could be therefore be inferred to be required as compliance criterion.[123]

7.6.2.3 Horizontal performance requirements

The *UK Regulations* grant the discretion to contracting authorities to require that contracts are to be performed in the context of sheltered employment programmes where in terms of such a programme, a minimum of 30% of the employees must be disabled or disadvantaged.[124] It is not explicitly specified in the regulations whether this would represent a contractual condition but presumably, non-acceptance of the condition would result in non-compliance.

7.6.2.4 Compliance process summary

The *UK Regulations* specify a wide but limited set of categories for compliance criteria. Specifications, in general, may only refer to published standards and any reference to brand specifications that would otherwise limit the production of solutions must specify

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120 Reg 56(3) of the *UK Regulations*. By the nature of the procedures, this is only relevant in the open procedure.

121 Reg 56(4) of the *UK Regulations*. By affording flexibility in the timing of the qualification and *compliance process*es, the contracting authority would presumably elect to execute the least onerous process first for reasons of efficiency.

122 Reg 26(7)(b) of the *UK Regulations*.

123 Par 7.6.1.5.

124 Reg 20(1)(b) of the *UK Regulations.*

that equivalent solutions may be offered. Only compliance criteria that relate only to the direct outcomes in the performance of the contract are permitted but these may include the requirement that the contract must be performed in the context of sheltered employment programmes. The contracting authority is expressly permitted to include the solicitation and evaluation of variants of the specified solution in the *transactional system*.

Aside from this exception, the *UK Regulations* limit the basis for excluding tenders to criteria related only to the direct contract performance outcome. The restriction on the *transactional system* to these compliance criteria ensure a wide set of solutions for the direct outcomes of the transaction.

7.6.3 Shortlisting process

In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, a shortlisting procedure may be used to limit the number of participants progressing from a step to a subsequent step of the process.[125] The criteria and rules, the minimum number to be selected for the shortlist and, where applicable, the maximum number must be indicated in the procurement documents.[126]

The *shortlisting process* criteria for these procedures are further regulated by specifying minimum numbers that must be shortlisted together with an overriding provision that the number shortlisted must be sufficient to ensure genuine competition.[127] If the number of potential tenderers falls below the minimum numbers after the mandatory exclusions and discretionary selection criteria have been applied, the contracting authority may open the shortlist to those who have the required

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125 Reg 65(1) *UK Regulations.* Shortlisting is not contemplated for the open procedure.

126 Reg 65(2) *UK Regulations.*

127 Regs 65(3)-(5) *UK Regulations.* For the restricted procedure, the minimum number is five. For the competitive dialogue procedure and the innovation partnership procedure, the minimum number is three.

capabilities.[128] In this way, the regulated *shortlisting process* has a safeguard for ensuring competition while pursuing the efficiency of the evaluation process.

The regulations require that in competitive negotiations and dialogue procedures such shortlisting must be made by applying the award criteria [129] This provision has the effect of ensuring that the *shortlisting process* will not exclude a tender that may otherwise have been awarded the contract after the *ranking* and *selection processes*. No minimum numbers for the shortlist are specified in iterative procedures but must "make for genuine competition" in the final stage.[130]

7.6.3.1 Shortlisting process summary

A *shortlisting process* is not directly provided for in the *UK Regulations* for the open procedure. The requirement for shortlisting in other procedures is that criteria used for shortlisting must be the award criteria; thus ensuring the most meritorious tender is not excluded at that stage of the procedure and retaining the optimal solution within the solutions available for selection in later stages. A regulated minimum number of tenders must be retained to preserve genuine competition in the final stage of iterative procedures.

7.6.4 Ranking process

The objective of the *ranking process* is to order tenders in terms of their relative merit to identify the most meritorious tender.

The *UK Regulations* set out, at the highest level, the standard for the *ranking process*:[131]

> 67.- (1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

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128 Reg 67(7) *UK Regulations.*

129 Reg 67(1) *UK Regulations.*

130 Reg 66(2) of the *UK Regulations.* The nature of the procedures is iterative and competition must be preserved up to the final stage.

131 Regs 66(1) and (2) of the *UK Regulations.* The reference to regulation 68 is to the factors that may be included in the assessment of life-cycle costing.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

By requiring that the award of a public contract must be based on the most economically advantageous tender, the *ranking process* must employ methods, criteria and weightings that will identify such a tender on that basis. The concept "economically advantageous" was discussed in general in Chapter 4[132] with the conclusion that the meaning of the term would depend on the viewpoint taken. The *UK Regulations* explicitly set out the viewpoint as being that of the contracting authority.[133] However, a method specifically permitted by the framework, that of life-cycle costing, includes "costs borne by the contracting authority and other users"[134] and "costs imputed to environmental externalities".[135] The meaning of "point of view of the contracting authority" could include aspects for which the contracting authority may be accountable.

Narrowing economically advantageous to the point of view of the contracting authority generally excludes the possibility of the *regulatory system* compelling system-wide outcomes through the *ranking process* but provides for the possibility of including the assessment of outcomes indirectly related to the need and for which the contracting authority is accountable.

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132 Par 4.1.3.6.

133 Reg 67(1) of the *UK Regulations.*

134 Reg 68(1)(a) of the *UK Regulations.*

135 Reg 68(1)(b) of the *UK Regulations.* See Faustino *Award Criteria* 126. Faustino concludes that the externalities are limited to those "directly or indirectly linked to the product, service or works in question and their monetary value determined and verified". Oxford Dictionaries 2017 https://en.oxforddictionaries.com/definition. The definition of an "externality" in the context of economics is "a consequence of an industrial or commercial activity which affects other parties without this being reflected in market prices" or more generally "the fact of existing outside the perceiving subject".

7.6.4.1 Criteria and weighting

The *UK Regulations* also set out general standards limiting discretion in the choice and use of the *ranking process* criteria. The criteria chosen for the *transactional system* may not have the effect of granting the contracting authority freedom of choice in execution.[136] The criteria must ensure that effective competition is possible.[137] Specifications must accompany the criteria that will allow information provided by tenderers to be verified against the criteria.[138]

A particular method for ascertaining the most economically advantageous tender is not prescribed in the *UK Regulations*, however, the regulations are specific as regards what criteria may be used and how weightings are to be attached to such criteria in such a method.[139] The presence of regulatory requirements relating to the weighting of criteria implies that the method must take into account the relative importance of each criterion and combine a tender's level of achievement against each criterion in some manner to present a tender's aggregated weighted achievement against all the criteria. Where price-quality ratio method is used, it must be assumed the price would be a weighted criterion among quality-related criteria.

The criteria that may be used are generally limited to those linked to the subject matter of the intended contract.[140] "Limited to the subject matter of the intended contract" is defined to include criteria that relate - not only the works, supplies or services that may be the subject of the intended contract - but also:

(a) the specific process of production or trading of those works, supplies or services; and

(b) a specific process for another stage of their life cycle,

even where those factors do not form part of their material substance.[141]

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136 Reg 67(6) of the *UK Regulations.* For example, if the criteria were specified in such a way that the contracting authority could score tenders based on subjective preferences.

137 Reg 67(7)(a) of the *UK Regulations.*

138 Reg 67(7)(b) of the *UK Regulations.*

139 It is therefore presumed that the choice of method is left to the discretion of the contracting authority. A brief overview of such methods is set out in par 5.4.7.3.

140 Reg 67(2) of the *UK Regulations.*

141 Reg 67(5) of the *UK Regulations.*

The *UK Regulations* therefore explicitly contemplate not only the use of criteria that are directly related to the subject matter of the contract but also those indirectly related to how goods are produced, traded and those related to processes that are performed earlier or later than the stage directly related to the subject matter of the contract. The regulations permit the contracting authority to take into account factors relating to how a tender proposes, for example, to source raw materials or decommission and dispose of goods post-contract.

7.6.4.2 Price, cost and quality

The way in which the most economically advantageous tender is identified must be based on a tender's price or cost using a cost-effectiveness approach.[142] The method may include the "best price-quality ratio" based on criteria linked to the subject matter of the intended contract.

Contracting authorities have a wide discretion to determine how cost is established, provided it uses a cost-effectiveness approach. A specific example of cost determination, life-cycle costing, is provided for in the regulations.[143] The approach to determining the life-cycle costs of a tender is to include all or part of the costs over the life-cycle of a product, service or works, such as those relating to acquisition; usage costs; maintenance; and disposal costs, such as collection and recycling. While the contracting authority is not limited to using the list of cost-related factors provided, specific discretion is afforded to include costs related to environmental externalities, such as costs mitigating climate change.[144] The discretion to use life-cycle costing may be limited to a particular method if it has been mandated by a legislative act of the

142 Reg 67(2) of the *UK Regulations.*

143 Reg 68 of the *UK Regulations.*

144 Regs 68(1)(b), 68(2) and 68(3) of the *UK Regulations.* The inclusion of costs imputed to environment externalities on in life-cycle costing is limited to cases where such costs are based on objectively verifiable criteria and where it does not have an established application they may not favour or disfavour particular suppliers. The method must be accessible to interested parties, and the data required to establish such costs must be able to be provided with reasonable effort.

EU.[145] Whichever method is used for determining cost, the data required from the tenderers and the method to be used must be indicated in the procurement documents.

Specific examples of permitted quality criteria that may be taken into account are:[146]

> 67(3) (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
> (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
> (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Permitted criteria include those of a horizontal nature related to the subject matter of the contract. Accessibility refers to criteria relating to characteristics, for example, accessibility by disabled persons.[147] Criteria relating to social characteristics may include "trading and its conditions", which may refer to the fair trade origin of a product.[148]

Further quality-related criteria that may be included are those relating to attributes of the tenderer in the *ranking process*. These criteria must not be related to general attributes of the tenderer but may relate to attributes of the tenderer that "can have a significant impact on the performance" of the intended contract.[149] The limited criteria related to attributes of a tenderer that may be considered in the *ranking process* are

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145 Reg 68(5) of the *UK Regulations.* The only directive listed is the *Directive 2009/33/EC of the European Parliament and of the Council*. This directive sets out the methodology for the calculation of operational lifetime costs for energy consumption, CO_2 emissions and pollutant emissions for promoting clean and energy-efficient road transport vehicles.

146 Reg 67(3) of the *UK Regulations.*

147 Crown Commercial Service 2015 http://bit.ly/2isNMlv 4.

148 Crown Commercial Service 2015 http://bit.ly/2isNMlv 4. This is a permitted criterion, horizontal in character, which may include the requirement to pay a minimum price and a price premium to producers.

149 Reg 67(3)(b) of the *UK Regulations.* Crown Commercial Service *Public Contract 2015 Guidance* 4. This was prohibited in the *EU Procurement Directives* prior to 2014. Being able only to consider the general skills and experience of the tenderer during the qualification process was seen as an undue limitation. The specific skills and experience of staff actually assigned to the contract may have significant implications for the prospects of the performance of the contract.

distinguished from criteria relating to general attributes of the tenderer that are permitted in the *qualification process*.[150] In particular, certain of the more general attributes of the tenderer that are permitted in the *qualification process* - namely, the consideration of educational and professional qualifications of the tenderer or those of its managerial staff - are explicitly impermissible as criteria for decision-making in the *ranking process*.[151]

The weighting of criteria in whichever scoring method is used is subject to certain standards. The weighting assigned to each criteria must be specified in the procurement documents.[152] Weightings may be expressed as a range with a maximum spread[153] or, if it is not possible to assign weightings for "objective reasons", the weightings of the criteria may be indicated by being listed in decreasing importance.[154] It is not necessary to publish details of the sub-criteria weightings, although it is argued that the transparency requirement should compel their disclosure.[155]

7.6.4.3 Ranking process summary

The *UK Regulations* permit the use of a wide range of ranking methods with the general standard that the method used must be based on the assessment of most economically advantageous tender. While "most economically advantageous" is specified to be from the contracting authority's point of view, this was concluded to cover the consideration of externalities for which the contracting authority could be accountable.

The criteria used in the ranking method must be based on price or cost, using a cost-effectiveness approach including life-cycle costing, qualitative factors, environmental and social aspects linked to the subject matter of the intended contract.

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150 Par 7.6.1.5.
151 Reg 60(9)(f) of the *UK Regulations.*
152 Reg 67(9) of the *UK Regulations.*
153 Reg 67(10) of the *UK Regulations.*
154 Reg 67(11) of the *UK Regulations.* An appropriate scoring method would have to be chosen to deal with such a specification of weightings.
155 Faustino *Award Criteria* 131. *EU* case law would suggest that the use of (relative) weightings and sub-criteria must not be used if they have not been disclosed.

The qualitative factors that may be considered include technical merit, aesthetic and functional characteristics, social, environmental and innovative aspects. The consideration of factors relating to the tenderer are limited to those attributes that have a direct impact on the level of performance, or factors that present risk to the performance.

The *UK Regulations* exclude the possibility of horizontal objectives unrelated to the performance of the contract in the *ranking process,* although permit criteria indirectly related to the performance of the contract. The optimality determined by the method may include balancing the full life-cycle costing including the consideration of externalities with risk and quality of outcomes related to the performance of the contract. The discretion in defining the method for the *transactional system* is regulated only by the standard that it must identify the most economically advantageous tender using the permitted criteria and that transparency in method, criteria and weighting of criteria is required in the publication of the *transactional system*.

7.6.5 Selection process

The *selection process* is the final step in the overall evaluation process that decides whether there is to be a winner of the contest and, if so, the identity of the winner.

The *UK Regulations* require an award to be made to the most economically advantageous tender as determined by the *ranking process*.[156] Certain mandatory and discretionary regulatory conditions are specified prior to making such award and therefore form part of the *selection process*.

[156] Reg 67(1) of the *UK Regulations*.

7.6.5.1 Abnormally low tenders

A contracting authority must obtain an explanation from a tenderer where the price or cost of its tender appears to be abnormally low in relation to the works, supplies or services.[157] The contracting authority must assess the explanation and may take into account: the economics of the manufacturing process or services or construction method;[158] technical solution;[159] originality of the work, supplies or services;[160] compliance with obligations in the field of environmental, social and labour law;[161] obligations with regard to subcontractors;[162] and the possibility of the tenderer obtaining state aid.[163] The contracting authority may only reject the tender where the evidence obtained from such an explanation does not satisfactorily account for the low price proposed.[164]

7.6.5.2 Other *selection process* conditions

Once the contracting authority has identified a tender for award, the regulations require the contracting authority to obtain up-to-date supporting documents from the tenderer.[165] Where the contracting authority has elected to examine the tenders before

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157 Reg 69(1) of the *UK Regulations.* The *UK Regulations* do not only place a duty on the contracting authority to examine an abnormally low tender in the event that such a tender is the provisional winner but should be examined for being abnormally low at any stage prior to award. The criteria or mechanism for determining the abnormally low bid is not regulated. For an example of such a mechanism, see the discussion of criteria for identifying abnormally low tenders in Fuentes-Bargues and González-Gaya *Disproportionate tenders* 1-2.

158 Reg 69(2)(a) of the *UK Regulations.*

159 Reg 69(2)(b) of the *UK Regulations.*

160 Reg 69(2)(c) of the *UK Regulations.*

161 Reg 69(2)(d) read together with Reg 56(2) of the *UK Regulations.*

162 Reg 69(2)(e) read together with Reg 71 of the *UK Regulations.*

163 Reg 69(2)(f) of the *UK Regulations.* If the reason for tender being abnormally low is only for the reason that the tenderer has obtained state aid, the tenderer may only be rejected on that ground after consultation with the tenderer and then only if the tenderer is unable to show that the aid is compatible with the internal market. Reg 69(6) of the *UK Regulations.* State aid must be considered compatible with the internal market under specific conditions such as aid having a social character granted to certain consumers or aid granted to the areas of Germany affected by the division. State aid may be considered compatible with the internal market under certain other conditions such as to promote the execution of an important project in a member state. Art 107 of the *TFEU*.

164 Reg 69(4) of the *UK Regulations.*

165 Reg 59(9) of the *UK Regulations.*

verifying the absence of conditions that may exclude a tenderer, then prior to award such conditions must be verified.[166]

The contracting authority is granted the discretion not to award the contract to the most economically advantageous tender identified by the *ranking process* if the tenderer has not complied with its environmental, social and labour obligations established by *EU* law, national law, collective agreements, or by international environmental social and labour law provisions listed in the *EUCD*.[167]

The *UK Regulations* contemplate the cancellation of a call for tenders,[168] however express conditions for the cancellation of a tender are not specified in the regulations. In the event that no acceptable tenders are received, the *UK Regulations* permit discretion to initiate a different procurement procedure.[169] One of the conditions considered is if all tenders exceed the contracting authority's budget as documented prior to the procedure.

The situation where the *ranking process* has not identified a unique winner need not be considered in the *selection process* as the *ranking process* is required to produce the "most economically advantageous tender".[170]

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166 Reg 56(3) of the *UK Regulations.* See also par 7.6.1.2. The verification of the credentials of a tenderer should considered as part of a (post) *qualification process*. Butler *Exclusion, Qualification and Selection* 50. Verification would appear to apply to the qualification and award criteria. Butler notes judicial commentary that a contracting authority "may not use a criterion that it neither 'intends, nor is able, to verify'".

167 Reg 56(2) of the *UK Regulations.* This is in effect a post-qualification process. Whether the decision-making with regard to the verification of these criteria was taken at the start of the procedure or after selection, it should make no difference to the outcome. See footnote 67 above.

168 For example, reg 55(1)(b) of the *UK Regulations*, which sets out the duty to inform candidates and tenderers of "any decision … not to award a contract for which there has been a call for competition".

169 Par 7.6.1.1.

170 See the comment regarding the distinction between the *ranking* and *selection processes* in this situation in footnote 128 in Chapter 5. See also the requirement of Art 93 of the *EUCD* in the context of fixed prices that "given the numerous possibilities of evaluating value for money on the basis of substantive criteria, recourse to drawing of lots as the sole means of awarding the contract should be avoided".

7.6.5.3 Selection process summary

The *selection process* makes few exceptions to awarding the contract to the most highly ranked tender. A procedure is specifically defined for dealing with abnormally low tenders that requires obtaining an explanation from the tenderer, and specifies the factors that may be taken into account in the assessment of such explanation. The public body may only reject the tender upon being given an unsatisfactory explanation. The public body is required to verify up-to-date information and other information it has provisionally accepted. The public body may also decide not to award the contract to a tenderer if it has not complied with its obligations in the fields of environmental, social and labour law.

The *UK Regulations* contemplate the cancellation of a call for tenders, although no explicit conditions are provided. In the event no acceptable tenders are received, the *UK Regulations* permit different procurement procedures to be initiated. The inference can be drawn that the alternative would be to cancel the tender process.[171]

7.7 Summary and conclusions

The *EUCD*, which regulates the evaluation and award of public contracts, is one of three directives adopted by the *EU* regulating public procurement. For the purposes of the comparative analysis of regulatory frameworks for public tender evaluation, the study is limited to the examination of the *UK* transposition of the *EUCD*.

The *UK Regulations* permit the use of five procedures: the open procedure, restricted procedure, competitive procedure with negotiation, competitive dialogue procedure and the innovation partnership procedure. For the purposes of the comparative analysis, only the open procedure was analysed as it is the procedure used in the absence of special circumstances. The *UK Regulations* provide for the use of procurement techniques and instruments: (1) those promoting efficiency and cost-effectiveness of the procurement process - framework agreements, dynamic

[171] Par 7.6.5.2.

purchasing systems, electronic catalogues, central purchasing and joint procurements - and (2) electronic auctions to promote transactional cost-effectiveness.

The examination of the provisions of the *regulatory system* was conducted according the tender evaluation decision-making processes. Observations were made regarding the attribution of features of the *regulatory system* toward cost-effectiveness.

7.7.1 Qualification process

The regulated *qualification process* consists of four fundamental decision-making parts: formal responsiveness, mandatory responsibility exclusionary criteria, discretionary responsibility criteria and discretionary competency qualification criteria.

During the evaluation of formal responsiveness, procedures for rectification are specifically permitted provided they are performed in full compliance with the principles of equal treatment and transparency.

The *UK Regulations* require the mandatory exclusion of tenderers for offences such as conspiracy, corruption, bribery or fraud affecting the European Community's financial interests or a breach of obligations relating to the payment of taxes or social security contributions if they have been established by a judicial or administrative decision having final and binding effect.[172]

The contracting authority has the discretion to exclude a tenderer on a closed list of responsibility criteria including: non-payment of taxes; violations of environmental, social and labour law; collusion; misrepresentation; conflict of interest; grave professional misconduct and persistent deficiencies in the performance of prior contracts, which renders its integrity questionable.[173] The closed list removes the possibility of *qualification process* criteria in the *transactional system* outside this list,

[172] Par 7.6.1.2. Certain exceptions may be made in individual circumstances in the public interest or if clearly disproportionate.
[173] Par 7.6.1.3.

and thereby compelling a limited set of grounds that may reduce the set of solutions available for selection.

The *regulatory system* provides for a self-cleaning procedure allowing a tenderer to provide evidence to show it complies.

The contracting authority has the discretion to include competency qualification criteria in the *transactional system* subject to the general standard that they must be limited to ensuring that a tenderer meets the requirements to perform the intended contract and that the requirements are related and proportional to the subject matter of such contract. Where methods are used, they must be transparent, objective and non-discriminatory.

The contracting authority has the discretion to specify set-asides for participation in a procedure for sheltered workshops and economic operators, whose main aim is the social and professional integration of disabled or disadvantaged persons. These horizontal qualification criteria fall into the general category of being indirectly linked to the performance of the contract.

Transactional systems are not required to perform the *qualification process* prior to other processes and may conduct the qualification of tenderers concurrently with the *selection process*. This flexibility may enable procedural cost-effectiveness of the *transactional system* in certain circumstances but it was concluded, in general, to be of doubtful value in improving efficiencies and may carry additional risks.[174]

7.7.2 Compliance process

During the evaluation of formal responsiveness, rectification is specifically permitted, provided it is performed in full compliance with the principles of equal treatment and transparency.

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[174] Par 7.6.1.2.

The *transactional system* may include substantive responsiveness criteria requiring compliance with a limited list of technical specifications. Such technical specifications must adhere to certain conditions, such as the use of specific standards, and the mandatory inclusion of equivalents to particular makes, sources or origins. The *compliance process* may be undertaken before the *qualification process*. The *transactional system* may include a provision to consider a tender as unacceptable if the tender price exceeds the contracting authority's budget.

The *transactional system* may include a requirement that the contract must performed in the context of sheltered employment programmes Further horizontal compliance criteria may only relate to horizontal aspects of the procurement performance.

7.7.3 Shortlisting process

A *shortlisting process* for the open procedure is not directly provided for in the *UK Regulations*. The requirement for shortlisting in other procedures is that criteria used for shortlisting must be the award criteria thus ensuring the most meritorious tender is not excluded at that stage of the procedure and retaining the optimal solution within the set of solutions available for selection.

7.7.4 Ranking process

The *UK Regulations* permit the use of a wide range of ranking methods with the general standard that the method used must be based on the assessment of the most economically advantageous tender. "Most economically advantageous", while specified to be from the contracting authority's point of view, was concluded to embrace the consideration of externalities, directly or indirectly linked to the contract for which the contracting authority could be accountable.

The *UK Regulations* permit a considerable degree of flexibility in the *ranking process* method. The *ranking process* method may include an assessment of the best price-quality ratio, price only, cost-only or quality-only. The criteria used in the ranking method must be based on price or cost, using a cost-effectiveness approach, including

life-cycle costing, qualitative factors, environmental and social aspects linked to the subject matter of the intended contract. "Linked to the subject matter of the contract" may include factors such as how goods are produced, how they are traded or how raw materials are sourced. The qualitative factors that may be considered include technical merit, aesthetic and functional characteristics, social, environmental and innovative aspects. The consideration of factors relating to the tenderer are limited to those attributes that have a direct impact on the level of performance, or factors that present risk to the performance.

The *UK Regulations* exclude the possibility of horizontal objectives unrelated to the performance of the contract in the *ranking process.* The optimality determined by the method may include balancing the full life-cycle costing including the consideration of externalities with risk and quality of outcomes related to the performance of the contract. The discretion permitted in defining the method for the *transactional system* is regulated by the standard that it must identify the most economically advantageous tender by using the permitted criteria and that the method and weighting of criteria must be transparent.

7.7.5 Selection process

The regulated *selection process* provides for few exceptions to awarding the contract to the most highly ranked tender. A regulated process is mandated for obtaining an explanation or assessing the risk associated with abnormally low tenders. The procedure specified by the *UK Regulations* to consider risk of abnormally low tenders can be argued to promote cost-effectiveness by compelling a procedure for examining risk before selecting a course of action and ensuring that a potentially optimal tender is not disregarded.

The contracting authority may decide not to award the contract to a tenderer if the tenderer has not complied with its obligations in *EU* environmental, social and labour law.

The *UK Regulations* contemplate the cancellation of a call for tenders, although no explicit conditions are provided. In the event that no acceptable tenders are received, the contracting authority may commence alternate procedures. This would include the case where no tender is within the contracting authority's budget.

7.7.6 Concluding remarks

The framework of provisions in the *UK Regulations* was analysed in terms of the five decision-making processes for the overall tender evaluation process. The principle-based observations made regarding the cost-effectiveness of the *regulatory system* are taken forward to the comparative analysis in Chapter 7.

8 Comparative analysis

8.1 Introduction

The previous two chapters examined the South African and *UK regulatory systems* governing the tender evaluation processes in preparation for the comparative analysis in this chapter. The functional elements of the evaluation sub-processes were constructed in Chapter 5 to provide the scheme for comparison between the two *regulatory systems*.

The basic approach to conducting the functional comparative analysis is that if the *regulatory systems* have similar functional provisions then it could be concluded that the comparator system provides no better solution. If functionally dissimilar, conclusions may be drawn deductively as to the attribution of each approach to the achievement of cost-effectiveness through analysis in terms of the models for cost-effectiveness developed in Chapter 4.

In terms of the research method, the comparative analysis will first examine macro-level factors, priorities, policies and objectives of public procurement in the two jurisdictions. This macro-level comparison is only performed to give context and determine influences that dissimilarities at this level may have on the micro-level functional analysis and does not examine the merits of the macro-level factors and objectives themselves. The comparative analysis of provisions of *regulatory systems* undertaken thereafter is structured under headings corresponding to the scheme of evaluation sub-processes as set out in Chapter 5.

8.2 Analysis of underlying principles, priorities and objectives

8.2.1 South African procurement principles, priorities and objectives

The requirements of public procurement in South Africa were concluded to be that the system of public procurement must be fair, equitable, transparent, competitive and cost effective while accomodating and entrenching a specific class of preferential mechanisms and general mechanisms directed toward the objectives of protection and

advancement of persons, or categories of persons, disadvantaged by unfair discrimination.[1]

8.2.2 UK procurement principles, priorities and objectives

The public procurement principles in the *UK* were concluded to be those contained in the *TFEU* and *EU Procurement Directives*, namely that the principles of free movement of goods, freedom of establishment, freedom to provide services, equal treatment, non-discrimination, mutual recognition, proportionality and transparency must be ensured.[2] The requirements for the tender evaluation process is that tenders should be compared in "conditions of effective competition" to ascertain the most economically advantageous tender, based on objective criteria.[3]

8.2.3 Similarities and dissimilarities

8.2.3.1 Fairness, equity, equal treatment and non-discrimination

The requirement for equal treatment can be regarded as an equivalent to the principle of procedural fairness in the horizontal relationship.[4] Equal treatment was concluded to be a requirement narrower than fairness as it does not encompass the notion of substantive fairness, permitting different treatment where circumstances justify such.[5] Non-discrimination is a negative statement of the requirement of equal treatment.[6]

The *EU* framework broadens the requirement for equal treatment to include affirmative measures, at the initiative of the member state, to promote equality between men and women.[7] Specific set-asides are permitted, limiting participation in certain procedures to social businesses and sheltered workshops with the main aim of supporting

1 Par 4.4.1.
2 Par 7.3. The *UK Regulations* are required to give effect to the principles in the *TFEU* and *EU Procurement Directives.*
3 Par 7.3.
4 Par 4.3.1.
5 Par 4.3.1.
6 Par 4.3.1.
7 Par 7.3(d).

disabled and disadvantaged persons.[8] The principles of non-discrimination and fairness in the *EU Directives* therefore embrace the notion of substantive equality measures in specific contexts.

The principles underlying both the South African and *UK regulatory systems* include fairness, both procedural and substantive. Both frameworks include the notion of equity although the systems differ in their explicit priorities and targets in this respect. The *EU Procurement Directives* permit measures within the national systems to promote gender-based equity. The South African system is generally required to be equitable and the explicit discretion to include categories of preference and measures to protect and advantage persons or categories of persons disadvantaged by unfair discrimination emphasise the positive nature of its substantive equality objectives.

8.2.3.2 Transparency

The South African system of public procurement is generally required to be transparent. The requirement for the *UK* system is that contracts are awarded based on objective criteria that ensure compliance with the principle of transparency.[9] In the context of tender evaluation, these can be regarded as equivalent principles.

8.2.3.3 Competitiveness

The South African system of public procurement is required to be competitive. The requirement for the *UK* is that contracts are awarded in conditions of effective competition.[10] In the context of tender evaluation, the frameworks can be regarded as having equivalent requirements for competition.

8 Section 36 of the preamble to the EU Contracts Directive.
9 Par 7.3.
10 Par 7.3.

8.2.3.4 Cost-effectiveness

The South African system of public procurement requires contracting for goods and services in accordance with a system that is, *inter alia*, cost-effective. This requirement was concluded to have meaning in at least three levels in the procurement system: procedural cost-effectiveness, transactional cost-effectiveness and macro-level cost-effectiveness.[11]

The *EUCD* requires that contracts should be awarded to the most economically advantageous tender.[12] This requirement could be regarded as the equivalent of the transactional-level cost-effectiveness in a system of procurement. Economically advantageous was concluded to embrace the notion of outcomes wider than the direct outcomes.[13] The requirement for the award to be made to the most economically advantageous is specifically narrowed to the point of view of the contracting authority. This generally excludes the possibility of compelling indirect system-wide outcomes, but may include outcomes sought by the contracting authority indirectly related to the need.[14] Most economically advantageous from the point of view of the contracting authority can be viewed as the equivalent of macro-level cost-effectiveness where the macro outcomes include indirect outcomes related to the performance of the contract that are sought by the contracting authority.

The cost-effectiveness of the system was concluded to incorporate the requirement for the procurement process to be procedurally cost-effective,[15] whereas the *UK* framework is not explicitly driven by this principle. While not explicit, the *UK* submissions to the *EU* prior to the drafting and adoption of the *EU Procurement Directives* placed emphasis on simplifying procurement procedures to lower the barriers to entry, including transaction costs, from the economic operator's

11 Par 4.6.2.
12 Par 4.1.7.
13 Par 4.1.3.6.
14 Par 7.6.4.
15 Par 4.6.2.

perspective.[16] While procedural cost-effectiveness may not be expressed as a principle, for the purposes of comparing procedures it can be accepted that the *UK Regulations* would not disregard procedural cost-effectiveness within the discretion afforded by the *EU Framework*.

8.2.3.5 Free movement of goods, freedom of establishment and freedom to provide services.

The principles underlying the *UK Regulations* of free movement of goods, freedom of establishment and freedom to provide services, relate directly to a fundamental rationale for the establishment *EU* community of nations, namely to promote economic expansion, balanced trade and fair competition among community members. Neither constitutional provisions nor provisions of the South African *regulatory system* were not found to contain any provisions protecting rights of other nations' suppliers.[17] These principles, fundamental to the regulation of national public procurement in an economic community of nations, have no corresponding principles or requirements for South African public procurement.

The principle of proportionality, a requirement aimed at limiting the burden imposed by supranational regulatory requirements on national public procurement has no correspondence in the South African context.

The requirements for equal treatment, non-discrimination, free movement of goods, freedom of establishment and freedom to provide services as between nations are therefore fundamental dissimilarities in the underlying requirements between the South African and *UK* regulatory frameworks.

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16 Crown Commercial Service 2015 http://bit.ly/2isNMlv 3. Reference is made to the *UK*'s drive to reform *EU* public procurement by streamlining the process by reducing red tape and making the process less costly, especially for suppliers.

17 The presence of minimum local content set-asides for certain categories of goods is an example of a regulatory provision in the South African framework that would not be permitted in the *UK Regulations*.

8.2.3.6 Summary

In summary, it was concluded that there is basic congruence in the requirements for the two frameworks in respect of transparency, fairness and competitiveness.

The requirements of the *UK Regulations* for equity extend to permissive provisions for measures to promote the participation of under-represented groups specifically to achieve gender-based equality. The South African framework requires the procurement system to be equitable, permitting categories of preference and measures to protect and advantage persons or categories of persons disadvantaged by unfair discrimination. The South African framework is therefore required to include broad and positive measures for the achievement of equity as a requirement of the system.

The requirements of the *UK Regulations* for the free movement of goods, freedom of establishment and freedom to provide services within the community of nations was concluded to have no correspondence with the requirements of the South African framework.

The *UK Regulations* are required to possess elements of cost-effectiveness. Procedural cost-effectiveness, although not expressed as a requirement, was concluded to be a desirable characteristic as evidenced by the UK's representations in the consultative process establishing the *EU Framework.* Transactional cost-effectiveness was concluded to be equivalent to the principle or standard in tender evaluation procedures requiring the most economically advantageous tender for award. The interpretation of macro-level cost-effectiveness as the requirement to direct resources optimally at the achievement of macro-level outcomes was concluded to be a requirement of the *UK Regulations* although the outcomes must be directly or indirectly linked to the performance of the contract in the balance determined by the contracting authority and not from the system-wide perspective.

The dissimilarities in the underlying principles driving regulatory design, at a high level, expose the motives and purposes of the jurisdictional contexts. The dissimilarities

between the underlying principles are investigated as possible explanations for dissimilarities in the regulatory provisions where necessary.

8.3 Qualification process

8.3.1 Procedural aspects

8.3.1.1 South African framework features

Registration on the *CSD* is a mandatory requirement for the pre-qualification of suppliers in terms of formal and responsibility-related criteria.

It is mandatory in the *Construction Works Framework* for the consideration of formal, responsibility and competency criteria in a pre-qualification process independent of any particular invitation to tender. To the exclusion of certain competency criteria, further *qualification processes* may be conducted as part of the evaluation of functionality after the tenders have been received and opened.[18]

If further competency criteria are to be evaluated, then they must be considered under the framework of evaluation of functionality, together with the *compliance process*, after the tenders have been opened.[19]

Under the South African framework, the *qualification process* must be undertaken prior to the *ranking process*.[20]

8.3.1.2 *UK* framework features

The *UK Regulations* rely on the declarations made by bidders in standardised documents to permit entry to the competitive process with actual verification that may be performed later in the evaluation process.[21] The *UK Regulations* explicitly permit

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18 Par 6.7.2.3.
19 Par 6.5.4.3.
20 Par 6.7.2.4. Specifically the conclusion in footnote 58 in Chapter 6.
21 Par 7.6.1.7. The *ESPD*, tender documentation standardised across the *EU*.

the verification of compliance with all qualification criteria to be determined at any point in the evaluation process prior to the conclusion of the *selection process*.[22] However, on becoming aware of, and having established non-compliance with mandatory or discretionary qualification criteria, the public body is required to exclude such supplier.[23]

8.3.1.3 Similarities and dissimilarities

There is a fundamentally different approach taken between the frameworks in South Africa and the *UK Regulations*. The reliance of the *UK Regulations* on the self-declaration document permits verification to be done only as a final step before award. The South African *regulatory system* requires the *qualification process* to be performed prior to the *ranking process* and, in the case of the *Construction Works Framework*, for a pre-qualification process to be performed. Decisions taken in the *qualification process* in the South African framework are final and provisional qualification subject to later verification is not provided for in the frameworks.

8.3.1.4 Analysis

The procedural flexibility afforded by the *UK Regulations* may reduce the effort expended on the *qualification process* by limiting verification effort to a provisionally selected supplier. As concluded, the likelihood of the effort and cost to perform the *ranking process* being lower than the effort and cost associated with verifying qualification criteria and the possibility of 'twisting' verification to retain the best offer, make the flexibility offered of doubtful value.[24]

The mandatory requirement of the South African framework for a supplier to be registered on the *CSD* for participation in public tender processes is effectively a

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22 Pars 7.6.1.2, 7.6.1.3 and 7.6.1.7.

23 Par 7.6.1.2.

24 Footnote 67 in Chapter 7. It is also noted that this also implies that the *compliance process* may be undertaken prior to the qualification process. The same comment regarding the actual advantage of the flexibility offered when considering the effort and cost of the *ranking process* apply equally to the *compliance process*.

general pre-qualification process.[25] The requirement may contribute to reducing the effort required in the *qualification process* by centralising the process thereby removing a repetitive burden of such elements of the *qualification process* from individual public bodies.[26] Where a supplier intends competing in a number of invitations to tender, the *qualification process* is only undertaken once, thereby increasing efficiencies for both the supplier and the public bodies in the overall process.

The mandatory pre-qualification process as required by the *Construction Works Framework* extends to competency criteria of the *qualification process*. The same observations are valid in terms of the extended set of qualification criteria.

8.3.2 Formal responsiveness

8.3.2.1 South African framework features

The South African framework does not deal conclusively with the issue of formal responsiveness. However, in the discussion on formal aspects of fairness[27] it was concluded that the approach to formal aspects of the processes, in general, is that actions could be taken to promote the achievement of competitiveness and cost-effectiveness but should not extend to compromising the purpose of peremptory procedures.[28] In the case of certain required documentation, documents may be submitted within a reasonable time after a request has been made for submission.[29]

The requirement that all suppliers tendering must be registered on the *CSD*, or the register of contractors in the case of construction works contractors, has the effect of an asynchronous pre-qualification process, including the formal aspects of such process.

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25 Par 6.5.4.1.
26 Par 6.5.4.1.
27 Par 4.3.3.4.
28 Par 4.3.5.
29 Par 6.5.4.1.

8.3.2.2 UK framework features

In the case of missing or incomplete information, the *UK Regulations* explicitly permit a tenderer, on request by the public body, to "submit, supplement, clarify or complete the relevant information or documentation within a reasonable time limit".[30] The public body is given specific discretion to allow rectification of tenders to meet formal responsiveness criteria but must do so in "full compliance with the principles of equal treatment and transparency".[31]

8.3.2.3 Similarities and dissimilarities

The approach taken in the South African framework is that it is left to the public body to gauge situations in terms of the standard of fairness and transparency for public procurement without the presumption that it may condone or seek rectification. In limited cases, documents may be submitted after a request has been made by the public body. The *UK Regulations* establish a presumption that rectification is permitted. Both frameworks are similar in that they require the standards of fairness and transparency to prevail in dealing with the formal aspects of responsiveness.

Pre-registration of suppliers is a requirement of South African framework, but not of the *UK Regulations*.

8.3.2.4 Analysis

Both the South African framework and the *UK Regulations* require the evaluation of formal aspects of the *qualification process*, establishing that non-compliance with peremptory and procedural requirements is a ground for disqualification.

The explicit and general discretion afforded by the *UK Regulations* may assist a public body in deciding whether to seek rectification of formal aspects of the *qualification process*. The public body would still be required to decide whether the specific

30 Par 7.6.1.1.
31 Reg 56(4) of the *UK Regulations*.

circumstances and actions would be within the standards of equal treatment and transparency.

Given the number of judicial disputes regarding formal aspects of the *qualification process*, and of other evaluation processes, the additional certainty provided by the *UK Regulations* regarding permissible discretion may assist in reducing the number of disputes regarding formal aspects of tender evaluation.

The pre-qualification processes required by the South African framework, namely *CSD* registration, as well as *CIDB* registration in the case of construction works suppliers, may serve to reduce disqualification on formal procedural grounds. The effect of the *qualification process* through registration may be iterative, permitting rectification and supplementation of documentation as it is asynchronous and separate from the tender process.

8.3.3 Responsibility criteria

8.3.3.1 South African framework features

The *National and Provincial Framework* specifies mandatory responsibility criteria including that the supplier or any of its directors are not listed as persons prohibited from doing business with the state,[32] a bidder's status as being tax compliant and declarations that the bidder has submitted its bid independently.

The *Local Government Framework* specifies an extensive list of mandatory responsibility criteria. In addition to the criteria specified in the *National and Provincial Framework*, the *Local Government Framework* includes the requirement that a bidder or one of its directors has no undisputed commitments outstanding for longer than thirty days toward a municipality or any other service provider and the requirement that the bidder does not have a director, manager, principal shareholder or stakeholder

[32] Par 6.5.4.1(g). The effect of the requirement for *CSD* registration is that of a pre-qualification process.

in the service of the state or who is an advisor or consultant contracted by the municipality or municipal entity.

Set-asides based on the classification of a tenderer and, more generally - in terms of guidance provided – qualificationary criteria not related to the performance of the contract are prohibited.

In practical terms, certain of the regulatory requirements are subsumed by the requirement of *CSD* registration by suppliers wishing to participate in public tenders. The centralisation of this aspect of the *qualification process* includes a tax-compliancy check and verification that the potential tenderer does not appear on the register of tender defaulters and of restricted suppliers.

As successful registration by a contractor at a particular designation is mandatory to qualify to bid for construction works up to such designation, the requirements set out in *Construction Works Framework* are mandatory.[33] These include the possession of necessary licences and professional registrations, proof of tax compliance and proof of incorporation.[34]

8.3.3.2 UK framework features

The *UK Regulations* specify responsibility criteria, including mandatory exclusions on the grounds of conspiracy, corruption, bribery, fraud affecting the European Community's financial interests and breach of obligations relating to the payment of taxes or social security contributions where the finding has been made by way of judicial finding or administrative decision of a final and binding nature.[35] The public body has the discretion to exclude a tenderer on these grounds on lesser standards of proof.[36] The public body also has the discretion to exclude a tenderer on certain

33 Subject to certain defined exceptions, see par 6.7.2.1.
34 The mandatory criteria for pre-qualification include both responsibility and competency criteria. The criteria related to competency are discussed later under the competency heading.
35 Par 7.6.1.2.
36 Par 7.6.1.3.

other grounds, for example if the tenderer is bankrupt or the subject of insolvency proceedings.[37] The *UK Regulations* provide a procedure for a tenderer to submit evidence to show that it has taken measures in order to demonstrate its reliability.

The *UK Regulations* grant the discretion to contracting authorities to reserve the right to participate in procedures to "sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons".[38]

8.3.3.3 Similarities and dissimilarities

With respect to statutory compliance related to the tenderer's ability to deliver the services, the South African framework and the *UK Regulations* have common requirements such as compliance with tax obligations and possession of necessary licences. The South African regulations contain a number of specific qualification criteria that go further than legal compliance or legal compliance of the person of the tenderer. For example, the discretion to disqualify a tenderer if it, or any of its directors, are in arrears for municipal rates and taxes for a period of more than three months.[39]

The criteria for deciding whether a tenderer has these common attributes are different. For example, the attribute of being tax compliant in South Africa is demonstrated by the status recorded on the *CSD*.[40] Under the *UK Regulations*, a breach of obligations relating to payment of taxes must have been established by judicial or administrative decision, or at the public body's discretion, by any 'appropriate means'.

With respect to attributes of the tenderer related to general risk to the direct outcome or to the tender proceedings, the frameworks consider similar criteria, absence of

37 Par 7.6.1.3.
38 Par 7.6.1.6.
39 Par 6.6.5.2.
40 Par 6.6.5.2. The Central Supplier Database obtains and records the tax-compliance status as determined by SARS. Certain procedures in the *Local Government Framework* provide for the onus to establish tax compliance by the public body from *SARS* and a presumption of compliance if no response is received from *SARS* within seven days.

collusion, conflict of interest, misrepresentation and previous contract default. The South African framework provides for a central registry of restricted suppliers.[41]

The *UK Regulations* contain a number of specific discretionary qualification criteria that are not explicitly contained in the South African framework, for example violation of obligations in the field of environmental, social and labour law, bankruptcy, and grave professional misconduct that renders its integrity questionable.

The *UK Regulations* explicitly include a procedure for a tenderer to submit evidence to show it has taken measures to address a ground for exclusion. The South African framework provides no such procedure.

The *UK Regulations* permit, at the discretion of the public body, set-asides for a limited set of horizontal objectives, the social and professional integration of disabled or disadvantaged persons. The South African framework does not permit qualificationary set-asides.

8.3.3.4 Analysis

South African and *UK* frameworks appear to correspond in the principle of limiting participation in public tender procedures to tenderers who have complied with legal obligations.

The responsibility criteria relating to legal compliance contained in the *UK* framework are largely contained in the South African framework. The extended responsibility requirements of the *Local Government Framework* have notably more remote objectives than those permitted in the *UK* framework.[42]

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41 Registration for *CSD* requires that a supplier not be listed on the registry of restricted suppliers thereby centralising the verification process, and obviating the need for individual public bodies to establish whether a supplier is listed.

42 It is submitted that disqualification for this reason is too distant for the promotion of trust in the system or fair competition and that it is rather for the horizontal purpose of assisting with municipal debt management.

Responsibility criteria related to general risk are broadly similar. Both the South African and UK frameworks compel the consideration of breaches of obligations as risk to the procedures, for example a record of previous corruption, as well as to the performance, for example previous contract default.

The inclusion of discretionary qualification criteria in the *UK Regulations* relating to a tenderer's compliance with its obligations specifically in the fields of environmental, social and labour law in the *EU* or specific international law is attributed to the requirements of community and international treaty provisions.

The explicit provision of a procedure in the *UK Regulations* for a tenderer to submit evidence to show it has taken measures to render itself responsible, where it would not otherwise qualify, demonstrates a more inclusive regulatory approach by compelling consideration of mitigating factors.

The qualificationary set-asides in the *UK Regulations* relate to a limited set of objectives and are at the discretion of the public body. The set-asides are related to the subject matter of the contract although indirectly.

8.3.4 Competency criteria

8.3.4.1 South African framework features

The *National and Provincial Framework* and the *Local Government Framework qualification process* deal with competency criteria exclusively as part of the discretionary evaluation of functionality.[43] No conclusion was drawn as to whether a pre-qualification process considering competency criteria is either contemplated or permitted by the *National and Provincial Framework* and the *Local Government Framework*. Guidelines suggest a standard for a set of criteria that may be applied in such process would be limited to the capability and resources of the prospective tenderers to perform the particular contract satisfactorily, taking into account their

[43] Pars 6.5.4.3 and 6.6.5.3.

capabilities with respect to their personnel, equipment, construction or manufacturing facilities and financial position.[44] The conflation of the *qualification process* with the evaluation of functionality was concluded to limit the evaluation of competency criteria to a weighted multi-attribute aggregation to be compared to a single threshold value to establish whether qualification has been achieved.[45]

The *Construction Works Framework qualification process* deals with competency criteria in the pre-qualification registration process by examining a potential tenderer's financial capability; satisfactory track record, works capability and for certain categories, professional registrations and membership.[46] Regulated standardised criteria determine a potential tenderer's qualification to tender for classes of contracts according to its level of achievement in terms of these attributes.[47] The *Construction Works Framework* excludes criteria relating to the basic capability or capacity from being considered in the subsequent *qualification process* executed as part of the functionality evaluation step. However, the evaluation of "organization, logistics and support resources relevant to the scope of work" and "qualification and demonstrated experience of personnel to be assigned and the experience of the tenderer with respect to specific aspects of the project or comparable projects" are specifically permitted. Aside from the reduced set of criteria permitted in the evaluation of functionality the observations made for the *National and Provincial Framework* and the *Local Government Framework* regarding the method for evaluating qualification criteria as part of the evaluation of functionality apply equally to the *Construction Works Framework*.

8.3.4.2 UK framework features

The *UK Regulations* permit the consideration of competency criteria in the *qualification process* provided they are limited to ensuring the tenderer meets the requirements to

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44 National Treasury Supply Chain Management A Guide for Accounting Officers / Authorities February 2004 41.
45 Par 6.5.4.3 and footnote 98 in Chapter 6.
46 Par 6.7.2.1. These could be viewed as both legal requirements as well as competency criteria.
47 See footnotes 276, 277 and 278 in Chapter 6.

perform the intended contract and that the requirements are related and proportional to the subject matter of the contract.[48] The criteria are limited to those that relate to a tenderer's suitability to pursue a professional activity, its economic and financial standing; or its technical and professional ability.[49] Further limitations are specified on the thresholds for such criteria, for example the minimum turnover requirement to demonstrate financial capability requirements are limited to twice the value of the intended contract.[50] The use of the performance record of past contracts is permitted as a criterion for demonstrating the experience to perform the intended contract. Membership of professional organisations may be used as criterion for establishing suitability to pursue a professional activity.[51]

8.3.4.3 Similarities and dissimilarities

The approaches taken by the frameworks differ fundamentally, although they both permit the evaluation what appear to be similar attributes of potential tenderers or tenderers.

The *Construction Works Framework* employs mandatory and standardised criteria in the pre-qualification process covering financial capability, track-record, works capability, professional membership and registrations. The permitted criteria in the *UK Regulations* largely correspond with these although not as part of a pre-qualification process.

Beyond providing examples, the *National and Provincial Framework* and the *Local Government Framework* do not appear to limit the competency criteria that may be used in the *qualification process* in the evaluation of functionality. Aside from the *Construction Works Framework's* exclusion of two criteria from consideration in the evaluation of functionality, the criteria that may be used also appear unlimited by regulation. The exemplars provided do bear some similarity to those permitted by the

48 Par 7.6.1.5.
49 Par 7.6.1.5.
50 Par 7.6.1.5.
51 Par 7.6.1.5.

UK Regulations. The unlimited nature of what criteria may be considered in the South African framework is fundamentally dissimilar to the *UK Regulations* as the *UK Regulations* have a narrow and closed list of competency qualification criteria.

The *qualification processes* of the frameworks differ fundamentally in their methods. Aside from the mandatory pre-qualification process for construction works, the evaluation of competency criteria is not mandatory in either of the frameworks. However, if such discretionary criteria are to be considered in South African *transactional systems*, they must be considered as part of the evaluation of functionality. The fundamental dissimilarity is that the *UK Regulations* are silent regarding the method. Competency criteria in *UK transactional systems* may therefore be considered through a wider set of conjunctive, disjunctive, compensatory or other methods.

The South African framework constrains the *qualification process* further by forcing competency qualification criteria to be considered and weighed with compliance criteria in the basket of permitted criteria evaluated as part of functionality. The *UK Regulations* permit a separate process.

8.3.4.4 Analysis

Both the South African and UK frameworks permit filtering through the evaluation of competency criteria in the *qualification process.*

While the *UK Regulations* limit the competency criteria employed to a closed set, it does not constrain public bodies to use a particular method. By contrast, the South African framework permits a wider range of criteria to be employed but constrains public bodies to a single method.

A limited set of permissible criteria narrows the discretion of the public body and, therefore, reduces the possibility of a transgression of the standards and the potential of a challenge to the process. A limited set may also reduce the possibility of excluding a potential tender, therefore increasing the possibility of competition.

The consideration of competency criteria in the pre-qualification process of the *Construction Works Framework* standardises criteria for particular classes of contract subject matter and provides a transparent set of fixed, mandatory and universal criteria to potential construction work tenderers. The central control of designations and associated criteria provide the means for system-wide objectives to be compelled by pre-qualificationary criteria.

Limiting the evaluation of competency criteria to a weighted aggregation method has significant implications for the *transactional system* in the South African framework. The operation of a weighted aggregation method compensates for deficiencies in certain attributes with surpluses in others.[52] This may be a desired method by the design of the public body but the operation of such methods was noted to be complex and their results often difficult to predict.[53] The specific discretion to employ different methods, as permitted in the *UK Regulations*, allows the public body greater freedom to design the *qualification process* of the *transactional system* to ensure the evaluation targets specific attributes.[54]

8.3.5 Cost-effectiveness analysis

Filtering processes, such as the *qualification process* were concluded to limit the production of solutions or reduce the set of courses of actions available for selection by the effect of their publication or by operation of the *transactional system*.[55]

As concluded above, it is essential for the achievement of cost-effectiveness that the *qualification process* does not exclude tenderers who have worthwhile or optimal solutions from the competition.[56] Equally, it is essential that the *qualification process*

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52 Compensatory screening methods. Footnote 94 in Chapter 5.
53 Par 5.4.7.3. The weighted aggregation method is discussed with regard to its use in the *ranking process*, but the conclusions are valid for the operation of multi-attribute decision-making in any evaluation process.
54 These are quoted as being examples of the range of multi-attribute decision-making techniques.
55 Par 5.6.
56 Par 5.5.2.

does not include tenderers with attributes that indicate unacceptable risk.[57] In terms of achieving the desired outcomes of the transaction, this is an important decision-making juncture in the evaluation of risk issues if qualification-related criteria are not considered in subsequent sub-processes of the evaluation process.[58]

8.3.5.1 Procedural aspects

The flexibility of procedures offered by the *UK Regulations* to perform the *qualification process* were noted, in principle, to offer opportunities to improve the cost-effectiveness of the evaluation process although in practice to be of doubtful value.

The mandatory pre-qualification process, required by South African framework through the operation of the *CSD* and the *Construction Works Framework*, was concluded to offer advantages in the procedural cost-effectiveness of the evaluation process for both public bodies and potential tenderers through standardisation and re-use of *qualification process* procedures.

8.3.5.2 Formal aspects

Provided the process of excluding tenderers on formal grounds is fair and transparent, the consequent narrowing of the set of available courses of action available for ultimate selection was justified in maintaining the integrity of the system. The exclusion of tenderers on formal grounds was generally concluded not to promote cost-effectiveness at any span or depth.

The separate pre-qualificationary mechanisms of the *CSD* and the *CIDB* registration in the South African framework offer certain safeguards against aspects of unnecessary disqualification on formal grounds.[59]

The explicit discretion afforded by the *UK Regulations* to seek rectification was concluded to provide a mechanism for limiting unnecessary exclusion of tenderers

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57 Par 5.5.2.
58 This is relevant to the analysis of the *ranking* and *selection processes*. Pars 8.6.4 and 8.7.4.
59 Par 8.3.3.4.

thereby reducing the potential for narrowing the set of available courses of action. The mechanism was further concluded to promote certainty in decision-making regarding formal aspects of the *qualification process*, reducing the probability of disputes and thereby improving cost-effectiveness of the system.[60]

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework may be considered to include explicit provisions for the rectification of formal defects in the *qualification process*.

8.3.5.3 Responsibility aspects

Excluding tenderers because they may not lawfully provide the services required or because they have not complied with generally acceptable legal obligations was concluded to promote public trust in the system and the objective of promoting compliance. The responsibility criteria contained both the South African and *UK* frameworks seek to limit qualification to tenderers that possess, in the main, similar attributes.

The *Local Government Framework* extends responsibility criteria that may unnecessarily limit the production of solutions in the pursuit of remote objectives that may be more effectively achieved by conventional direct interventions.[61]

The provision for a procedure in the *UK Regulations* for a tenderer, who would otherwise not qualify, to submit evidence of measures it had taken that may render it responsible was viewed as a means of retaining the set of available courses of action, although it may have the effect of increasing the effort and cost of the evaluation process.

The provisions and criteria relating to the disqualification of tenderers relating to the presentation of risk in delivery broadly correspond between the frameworks.

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60 Par 8.3.3.4.
61 Par 8.3.3.4.

Exclusionary horizontal criteria in the *qualification process*, or set-asides, were concluded not to support cost-effective decision-making.[62] Unlike blanket set-asides, the set-asides permitted by the *UK Regulations* are discretionary and indirectly related to the performance of the contract. Although not required by the regulations, the cost directed at the achievement of the set-aside objectives in the circumstances of a specific transaction could be determined in order to apply the principles of macro-cost-effectiveness decision-making.

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework that may be considered include:

(a) re-assessing the effectiveness of including responsibility criteria aimed at remote objectives in the balance of excluding potential courses of action without consideration of the cost of such exclusions; and
(b) explicit provisions for a tenderer to submit evidence to show measures that it has taken to qualify where it otherwise would not.

8.3.5.4 Competency aspects

The *UK Regulations* were concluded to limit the evaluation of competency qualification criteria to a closed and narrower set than the South African framework but do not constrain public bodies to any particular method.

The South African constraint to evaluate competency criteria as part of functionality was concluded, in comparison to the *UK Regulations*, not to promote transparency in the operation of the method and to introduce risk by compelling the public body to use a complex method with lower predictability in terms of its outcomes. This was seen both to increase the risk of the process excluding a tenderer who is, in fact, acceptable; and of not excluding a tenderer who is, in fact, not acceptable. The latter risk would be exacerbated if this were the final examination of qualification criteria.

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62 Par 5.6.

Pre-qualification competency criteria applied in the registration process for the construction industry in the South African framework establishes a standardised framework for the assessment of risk. The homogeneity of the scope of works lends itself to standardisation and the regulatory requirements enforce the consideration of risk generally established for the industry.

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework that may be considered include assessing the effect of including competency criteria in a compensatory method together with compliance criteria in evaluation of functionality. The separation of the *qualification process* from the *compliance process* in filtering may enforce greater transparency in the grounds for disqualification, improving the participation and thus the production of solutions.

8.4 Compliance process

8.4.1 Procedural aspects

8.4.1.1 South African framework features

Under the South African framework, the *compliance process* must be undertaken prior to the *ranking process*.[63] Aside from formal responsiveness aspects, the *compliance process* is evaluated as part of the evaluation of functionality and hence must be undertaken together with the evaluation of competency criteria in the *qualification process*.

8.4.1.2 UK framework features

The provisions of *UK Regulations* do not appear to permit undertaking the *compliance process* at any other stage than prior to the *selection process*. Although, as noted above,[64] the *compliance process* may precede the *qualification process.*

63 Par 6.4. Specifically the conclusion in footnote 58 in Chapter 6.
64 Par 8.3.1.4.

8.4.1.3 Similarities and dissimilarities

Procedurally, both the South African framework and the *UK Regulations* require the *compliance process* to be undertaken prior to the *ranking process*. The flexibility offered by the *UK Regulations* with regard to the execution of the *qualification process* has been discussed in the analysis of the *qualification process* above. Although the *compliance process* is not mandatory if it included a *transactional system,* the South African framework requires the *compliance process* to be undertaken together with competency aspects of the *qualification process*.

8.4.1.4 Analysis

Both the South African and UK frameworks require the public body to verify that a tender complies with all material aspects of the tender invitation for further participation. Both frameworks require the *compliance process* to be performed prior to the *ranking process*. Procedurally, undertaking the *qualification process* at the same time as the *compliance process* cannot be said to affect the efficiency of the process materially.

8.4.2 Formal responsiveness

The conclusions regarding formal responsiveness criteria in the *qualification process* apply equally to the *compliance process*. They are not repeated here.[65]

8.4.3 Substantive responsiveness

8.4.3.1 South African framework features

The criteria permitted for the evaluation of substantive responsiveness criteria in the *National and Provincial Framework* and the *Local Government Framework* are those meeting the general standards for such criteria in the *compliance process*; those defined for the discretionary evaluation of functionality; and in the horizontal category, of meeting a minimum local content in designated sectors.[66]

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65 Par 8.3.2.
66 Par 6.5.5 and 6.6.6.

The *National and Provincial Framework* and *Local Government Framework* specifically prohibit the use of cost benchmarks in the *compliance process*.[67]

The *regulatory system* contains various provisions promoting the broad production of solutions, for example the requirement to reference national or international standards and avoiding constraining solutions to particular brands.[68] The criteria are not limited and include those related to its practicality, usefulness, working or operating capability, quality, viability, reliability and durability. The *Construction Works Framework* provides a narrower but largely overlapping set of standards that the criteria must relate to the contract performance, be justified in terms of the outcomes as well as bring objective and quantifiable to the extent practicable.[69]

8.4.3.2 UK framework features

The criteria permitted for the evaluation of substantive responsiveness in the *UK Regulations* are subject to the general standard that technical standards must afford equal access to suppliers, must not have the effect of creating unjustified obstacles to opening up competition and the parameters must be sufficiently precise for tenderers and contracting authorities to determine what is required and enable the public body to determine compliance of a tender for award.[70] The way in which the requirements are specified is limited to those complying with these general standards or by reference to standards recognised in Europe or internationally or to national standards only if none of the aforementioned exists.[71] The technical specifications are prevented from using brand names without the option of an equivalent.[72]

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67 Par 6.5.5.2.2.
68 Par 5.5.3.
69 Par 6.8.2.2.
70 Par 7.6.2.2.
71 Par 7.6.2.2.
72 Par 7.6.2.2.

Expressly permitted criteria include horizontal aspects of compliance such as levels of environmental and climate performance and design for requirements, including accessibility for disabled persons.[73]

Where a tender's price exceeds the contracting authority's budget, a tender must be considered unacceptable.[74]

The *UK Regulations* do not limit the evaluation of substantive responsiveness criteria to a particular method. In accordance with the standards for specifications, the invitation to tender must be sufficiently precise for a tenderer to determine what is required and for the public body to determine the compliance of a tender.[75] In general, a tender must conform to all the specifications specified in the invitation to tender, subject to certain procedures relating to the proof of equivalent solutions or variants.[76]

The *UK Regulations* explicitly grant discretion to the public body to solicit variant solutions, which may be accepted if so indicated in the procurement documents.[77]

8.4.3.3 Similarities and dissimilarities

Both the South African and *UK* frameworks have broad similarities in the standards and limitations for substantive responsiveness criteria. These similarities can be summarised as being the standards:

(a) requiring sufficiently clear requirements for the tenderers to understand what is required and for the public body to evaluate compliance with the criteria;
(b) limitations regarding the use of brand names and the mandatory inclusion of the words "or equivalent"; preference for certain standards bodies; and
(c) the explicit permissibility of other common criteria.

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73 Par 7.6.2.2.
74 Par 7.6.2.2.
75 Par 7.6.2.2.
76 Par 7.6.2.2.
77 Par 7.6.2.2.

The differences can be summarised as being:

(a) the mandatory inclusion of local content thresholds for designated sectors in the South African framework, where local content preferences are specifically prohibited by the *UK Regulations*;

(b) the mandatory exclusion of cost estimates as a compliance criterion in the South African framework where it is contemplated in the *UK Regulations*;[78]

(c) the explicit discretion to include environmental and climate performance and design for requirements, including accessibility for disabled persons in the *UK Regulations*;

(d) the silence in the *UK Regulations* regarding a specific method to evaluate substantive responsiveness criteria as opposed to the specific inclusion of such criteria in the evaluation of functionality in the South African framework; and

(e) the explicit discretion to solicit variant solutions.

8.4.3.4 Analysis

A fundamental principle of the *EU Procurement Directives* is to promote the free movement of goods within the *EU* member states. Set-asides for local content would be fundamentally counter to this principle. There is no analogous constitutional principle prohibiting the objective of promoting local goods in public procurement in the South African context, rather the South African constitutional principles specifically permit policies that provide for categories of preference to promote certain objectives, which were interpreted to include set-asides.[79]

The South African framework is generally silent regarding the inclusion of horizontal compliance criteria relating to environmental factors and accessibility for handicapped persons. As the needs of the public body may determine these to be mandatory requirements for the direct outcomes, the public body would not be prohibited from

[78] It is assumed that the public body's budget is based on some realistic projection of cost.
[79] Par 3.3.8.1.

including such requirements. Indirect green procurement objectives are not included within the scope of the current framework.[80]

The South African framework was concluded to compel the evaluation of compliance criteria within the framework of functionality. As concluded with regard to the *qualification process*, multi-attribute decision methods - such as a weighted aggregation - are complex and their effects difficult to predict. As noted for the *qualification process*, in terms of achieving the desired outcomes of the transaction this is a critical juncture in the evaluation of the substance of performance to be delivered.[81] The discretion afforded by the *UK Regulations* to establish the method whereby compliance criteria are evaluated permits the *transactional system* to align the method to the filtering sought by the *compliance process* transparently.

The solicitation of variant solutions is not explicitly excluded from the South African framework, while it is explicitly permitted by the *UK Regulations*. The explicit, although discretionary, provision for variants provides greater clarity for dealing with variants, both in the case where they have been solicited or not.

8.4.4 Cost-effectiveness analysis

Filtering processes, such as the *compliance process*, were concluded either to limit the production of solutions or reduce the set of courses of actions available for selection. The alignment of the specification of the tender to the outcome and the process of assessing the compliance of the tender to the specification were concluded to be aspects of the *compliance process* essential for cost-effectiveness.[82]

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80 Par 3.3.8.1 and footnote 68 in Chapter 3. Although it would be permitted by the constitutional provisions, it would require legislative enactment.

81 This is relevant to the analysis of the *ranking* and *selection processes*. Pars 8.6.4 and 8.7.4.

82 Par 5.5.3.

8.4.4.1 Procedural aspects

Both the South African and UK frameworks require the *compliance process* to be conducted prior to the *ranking* and *selection processes*. This was concluded to promote procedural cost-effectiveness by excluding tenders early in the process that in any event would not be eligible for selection.[83]

8.4.4.2 Formal aspects

The explicit discretion afforded by the *UK Regulations* to seek rectification was concluded to provide a mechanism for limiting unnecessary exclusion of tenders thereby reducing the potential for narrowing the set of available courses of action. As with the *qualification process*, the provision was further concluded to promote certainty in decision-making regarding formal aspects of the *compliance process*, reducing the probability of disputes and thereby improving the procedural cost-effectiveness of the system.[84]

8.4.4.3 Substantive responsiveness

The South African and *UK* frameworks explicitly permit the specification and evaluation of substantive responsiveness criteria broadly in the same terms and with regard to certain criteria, such as the use of brand names and adherence to standards, they contain essentially similar limitations.

8.4.4.3.1 Local content set-asides

Set-asides were concluded not to meet the requirement of cost-effectiveness in general and that checks and balances external to a tender process would be required to diminish the prospect of contracting on unsatisfactory commercial terms.[85] The mandatory exclusion of solutions not meeting local content thresholds in the South African framework, while permitted in terms of the legislative and regulatory framework, would not support the achievement of cost-effectiveness in general.

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83 Par 5.5.3.
84 Par 8.3.3.4.
85 Par 5.5.2.

Limiting the set of available solutions to promote local industry prior to the consideration of cost or the direct outcome can be argued not to have considered the cost-outcome balance of all solutions and therefore not optimal. To satisfy the requirements of macro cost-effectiveness viewpoint it would need to be shown that any cost incurred in the pursuit of promoting the local market has maintained the optimal direction of resources to the balance of outcomes.

8.4.4.3.2 Cost benchmark prohibition

A published reserve price was concluded to promote the production of optimal solutions.[86] The exclusion of a tender early in the evaluation process that could not be considered worthwhile because its price exceeded the maximum price would support procedural cost-effectiveness.[87] The *UK Regulations* are silent regarding the publication of pricing benchmarks. No conclusions are drawn other than the general observations for cost benchmarks.

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework may be considered by permitting the publication of cost benchmarks in *transactional system* for promoting the production of worthwhile and optimal solutions and in the *compliance process* as a maximum price for procedural cost-effectiveness.

8.4.4.3.3 Compliance criteria

The only difference in compliance criteria observed between the frameworks was the inclusion of environmental criteria. The common limitation in both frameworks is that criteria must be related to the direct outcome and therefore do not present a different propositions for cost-effectiveness.

86 Par 6.5.3.2.
87 Par 6.5.3.2.

8.4.4.3.4 Compliance method

It is essential for the achievement of cost-effectiveness that the *compliance process* does not exclude tenders that will deliver the outcomes sought by the public body,[88] and, conversely, that the *compliance process* does not include tenders that will not.[89]

UK Regulations do not constrain public bodies to any particular method. The South African framework constrains the *compliance process* to be undertaken as part of the evaluation of functionality. This was concluded to introduce risk by steering the public body to use a complex compensatory method with lower predictability in terms of its results. This was seen both to increase the risk of excluding a tender, which is, in fact, compliant; and of not excluding a tender, which is, in fact, not compliant. This constraint compelled by the South African framework limiting the way in which decisions can be made presents risk in both these aspects and this constraint can be concluded not to be supportive of cost-effectiveness.

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework may be considered in permitting greater discretion in the method for *compliance process*.

8.4.4.3.5 Variant solutions

While variant solutions may increase the set of produced solutions to improve optimality, innovative or the horizontal solutions, it would appear that it is not a frequent inclusion in tender procedures and introduces risks into the process.[90] The explicit provision in the *UK Regulations* as opposed to the silence in the South African framework would therefore not appear to offer a significant practical advantage to the requirement of cost-effectiveness in the system.

88 Par 5.5.3.
89 Par 5.5.3.
90 Telles and Butler *Public Procurement Award Procedures* 26. See also Chen *Economic Approach* 412. The process is complicated and may introduce issues of non-transparency and fairness in the evaluation.

8.5 Shortlisting process

8.5.1 South African framework features

Aside from non-competitive processes and simplified procedures, the South African framework is silent regarding the inclusion of a *shortlisting process*. As was noted above,[91] the criteria defined by the relative achievements of other tenders in the evaluation of functionality may have the effect of a *shortlisting process*. As it is not explicitly contemplated in the regulatory framework, its potential application would be too wide to draw any conclusions.

8.5.2 UK framework features

The *UK Regulations* permit a *shortlisting process* for restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships. No provision is made for a *shortlisting process* in the open procedure.[92] It could be inferred that the absence of specific provisions regarding shortlisting is that it is not considered for the open procedure.

8.5.3 Analysis

As this comparative analysis is limited to the open procedure, the limited provisions regarding the *shortlisting process* in both the South African framework and the *UK Regulations* are not considered of further value to the analysis.

8.5.4 Cost-effectiveness analysis

The contribution of the *shortlisting process* to cost-effectiveness was limited to advancing procedural cost-effectiveness although it was concluded to pose a risk to the elimination of optimal and worthwhile solutions.[93] It can be concluded that the common exclusion of a *shortlisting process* in the open procedure in the South African and *UK* frameworks do not compromise cost-effectiveness.

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91 Par 4.6.7.
92 Par 7.6.3.1.
93 Par 5.5.4.

8.6 Ranking process

8.6.1 South African framework features

Under the South African framework, *transactional systems* are compelled to use one of two particular formulae, determined by a threshold value of price, to calculate a numerical value expressing merit for the of ranking tenders. The merit is determined by a weighted balance of the tender price and the B-BBEE rating of the tenderer.[94]

The criterion of price was concluded to mean the price that the public body projects to pay to the tenderer with adjustments to non-firm aspects of the price.[95] It was concluded that the public body is not permitted to make adjustments for differences in cost that the public body may incur, or external financial effects on third parties that may result from an award to a particular tender.[96] The formulae use the minimum tendered price as an internal reference point to convert the monetary value of the price of a tender to the common points system.

While the term "specific goals" is not explicitly defined, it was deduced, in general, to intend criteria that are horizontal in nature.[97] Current regulations prescribe the evaluation of only one specific goal, the *B-BBEE* status of the tenderer.[98] An external and absolute translation table must be used for the conversion of a tenderer's B-BBEE status to the common points system.[99]

8.6.2 UK framework features

The *UK Regulations* require that the public body must base the award of tenders on the most economically advantageous tender assessed from the point of view of the

94 Par 6.8.4.
95 Par 6.5.7.1.
96 Par 6.5.7.1.
97 Par 6.5.7.2.
98 Par 6.5.7.2.
99 Par 6.5.7.2.

public body.[100] It was concluded that the point of view of the public body could include wider aspects for which the public body was accountable.[101]

The *UK Regulations* permit methods of determining "most economically advantageous tender" that may consider a tender's price only, a tender's cost only, methods that include aspects of the tender's quality, where quality may include horizontal environmental and social factors.[102] A public body is permitted wide discretion in selecting the precise method to be employed in the *ranking process* provided the method used determines the most economically advantageous tender from the point of view of the public body.[103]

The criteria that may be employed in the *ranking process* are limited to those linked to the subject matter of the intended contract.[104] The *UK Regulations* extend this limitation to include certain indirectly linked factors, such as the specific process of production. Quality-related criteria may also include horizontal criteria such as accessibility and fair trading considerations. Criteria assessing the attributes of the tenderer may also be included provided such attributes would have a significant impact on the performance of the contract and not general attributes of the tenderer.[105]

The *UK Regulations* specifically permit a wide interpretation of cost, including the price only, the direct cost or full life-cycle costing.

Public bodies are permitted wide discretion with regard to the weighting of the ranking criteria to express the public body's view of economically advantageous. Subject only to the required specification being expressed in the procurement documents, the weighting of criteria may be expressed in terms of their order of importance only if weighting is not possible for objective reasons.[106]

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100 Par 7.6.4.
101 Par 7.6.4.
102 Par 7.6.4.2. In special cases, aspects of quality only.
103 Par 7.6.4.
104 Par 7.6.4.1.
105 Par 7.6.4.1.
106 Par 7.6.4.1.

8.6.3 Similarities and dissimilarities

The South African framework and the *UK Regulations* differ fundamentally in their approach to the *ranking process*. The dissimilarities can be summarised as follows:

(a) Discretion. The South African framework permits no discretion in the scoring method, criteria or weighting, whereas the ranking method in the *UK Regulations* is based on a standards-driven approach permitting wide discretion in the choice of method and weighting for the *ranking process*.
(b) Criteria. The South African framework considers only price and the B-BBEE status in the scoring method. The *UK Regulations* permits a limited, but wide range of criteria including quality-related criteria, cost-related, and limited horizontal criteria linked to the subject matter of the tender.
(c) Horizontal criteria. While both the South African framework and the *UK Regulations* permit horizontal criteria to be used as ranking criteria, the nature of the criteria differs. The South African framework requires a single mandatory blanket horizontal criterion, the tenderers' B-BBEE status, whereas the *UK Regulations* permit limited horizontal criteria aimed at environmental and social considerations related to the subject matter of the tender with weightings that can be determined by the public body.
(d) Cost. The South African framework limits the consideration of cost to the price of the tender, with limited normalising adjustments. The *UK Regulations* expressly permit the consideration of price, cost or whole-life costing at the public body's discretion.

The two frameworks are fundamentally dissimilar to the extent that examination of dissimilarities at a detailed level is not necessary to advance the analysis.

8.6.4 Analysis

The objective of the *ranking process* is to examine, assess and order tenders in terms of their relative merit in order to determine the most meritorious tender.[107] Both the South African and UK frameworks require the ranking of tenders in terms of a scoring method. Both the frameworks contemplate the use of multi-attribute weighted aggregative methods.

The South African framework enforces a system-wide scoring method that specifies the criteria and the weightings to be applied. The implication of this approach is that a uniform view of what constitutes merit is imposed regardless of the subject matter, scope, view of the public body or circumstances under which a particular tender is conducted. Legislative policy is therefore imposed on this aspect of procurement decision-making, removing all discretion.

By adopting a standards-based approach, the *UK Regulations* permits wide but bounded discretion by the public body in the determination of merit. Within the constraint of being related to the subject matter of the tender, the requirement for determining merit is that it is economically advantageous from the point of view of the public body.

The South African framework expresses the positive commitment of the legislature to the advancement and protection of persons or groups disadvantaged by unfair discrimination. The blanket approach can be justified by the difficulty in the objective apprehension by a public body of the quantum of merit attaching to a single tender in the advancement or protection of persons disadvantaged by unfair discrimination.[108] By contrast, the negative goal of non-discrimination of the *UK Regulations* can be easily apprehended by a public body through standards-based regulation. The limitation of horizontal criteria to those directly or indirectly related to the performance

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107 Par 5.4.7.

108 Par 2.2.2. The merit attached to a tender in advancing or protecting of persons disadvantaged by unfair discrimination is unlikely to be apprehended in the evaluation of a single tender nor in a consistent fashion by individual public bodies.

of the contract can also be reasoned to place the merit attached to such within the apprehension of the public body. The necessity for blanket regulation in the South African framework in this regard can be explained by the jurisdictional policy priorities.

8.6.5 Cost-effectiveness analysis

The *ranking process* was concluded to be a critical sub-process for cost-effectiveness both for the production of solutions and in the determination of optimality within the set of produced and available solutions.[109]

The transparency of the South African framework's uniform, blanket approach to determining merit promotes a general understanding of the requirement by potential tenderers. The fixed nature of criteria and weightings across all procurements reduces the problem of complexity in translation of the method to the production of optimal solutions. Conversely, when viewed across the diverse content of different tenders, merit is simplistically determined by a narrow range of factors. By contrast, the *UK Regulations* permit individual customisation allowing the targeted production of solutions to suit each procurement.

Cost-effective decision-making was concluded to require, among other requirements, the selection of the available course of action that is optimal in terms of its cost-outcomes relationship.[110] Owing to the uniformity of its approach, the South African framework's *ranking process* can be precisely analysed in terms of this requirement. Optimality is determined by the balancing of the price of the tender and the single outcome of broad-based black economic empowerment quantified as an expression of a tenderer's B-BBEE status. The cost-outcomes relationship is expressed in the compensatory method to determine optimality, where up to a 25% price premium can balance the extremes of B-BBEE outcomes or up to an 11.1% price premium in the case of high value transactions.[111] Optimality is thus determined to the exclusion of

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109 Par 5.5.5.

110 Par 4.6.

111 The difference in price to obtain the same number of points assuming a maximum and then a minimum of B-BBEE points.

other factors, notably the exclusion of any other factors relating to the direct outcome. By contrast, the *UK Regulations* permit the determination of optimality in the cost-outcomes relationship to include determinations based on price only, cost only, quality only or cost-quality. The choice and weighting of factors, within these constraints, must only satisfy the condition that it represents the most economically advantageous offer to the public body.

Given that the *qualification* and *compliance processes* must be performed prior to the *ranking process*, it could be argued that factors unrelated to the direct outcomes are the only relevant considerations for optimality as all tenders being ranked are acceptable. This argument denies the possibility of there being differentiating factors relevant to the direct outcome in determining optimality. The existence of factors such as risk and quality render the argument that no differentiating factors could exist for all tender processes untenable.

Under the model of macro-level cost-effectiveness, the outcomes of the procurement system required by policy are included in the cost-outcome relationship. However - as concluded above - in the procurement context, factors relating to the direct outcome are always a consideration and, unless in the particular circumstances of a particular transaction all courses of action have been determined to be equivalent in this regard, must occupy some weight in determining the cost-outcomes relationship.[112] The determination of optimality by the *ranking process* is thus limited by the *regulatory system* to fall short of the cost-effectiveness requirement.[113]

By contrast, the *UK Regulations* permit a public body to decide whether price, cost, quality or a combination should determine the optimality. Especially in the case of complex tenders, aspects of quality were concluded to form an essential part of deciding a tender's proposition for cost-effectiveness.[114]

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112 Par 4.1.3.2.

113 The argument under the model of transactional cost-effectiveness that a shortfall in the requirement for optimality exists is trivial and is not set out in detail.

114 Par 5.4.7.1.

The dissimilarity of the South African framework's regulation of determining the cost of a tender to the flexibility in the *UK Regulations* exposes a further shortfall in the test for cost-effectiveness. The limitation in the South African framework that a public body must only consider the price of a tender after making necessary adjustments for certain variable elements restricts the consideration of cost to one dimension, the amount quoted by the tenderer.[115] Depending on the nature of the transaction, the *transactional system* may only require this single dimension of cost but, as evidenced by the considerations of cost in the *UK Regulations*, a wider set of considerations may be necessary to develop the full picture of cost that will result from the transaction. This is consistent with the conclusion that the cost element in cost-effectiveness of a transaction should not be determined by the price alone.[116] A case could be made for enforcing a simplified view of cost to improve standardisation and efficiency in the evaluation process. There is also a case to be made to balance broader discretion and greater complexity with the capabilities of procurement officials.[117] Both of these arguments may be valid but especially in the case of high-value complex transactions where focused capabilities should be at hand to perform the necessary specification and evaluation activities, the enforced exclusion of potentially significant cost elements may be difficult to justify by the pursuit of simplification. In this respect, the narrow view of cost taken in the South African framework is concluded not to support the model of cost-effectiveness.

In summary, a transparent blanket determination of optimality among the available courses of action is imposed by the South African framework. In terms of the test for the models of cost-effectiveness developed in this study, the determination of optimality in the cost-outcomes relationship excludes essential factors.

In principle, the imposition of blanket weightings in the *ranking process* for determining optimality in the cost-outcomes relationship for system-wide horizontal outcomes is supported in terms of the macro-level cost-effectiveness.

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115 Par 6.5.7.1.
116 Par 4.1.1.
117 Par 2.2.5.

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework may be considered by permitting greater discretion in the following factors determining optimality:

(a) The discretion to consider factors relating to the direct outcomes, for example quality; and
(b) The discretion for the wider consideration of cost beyond the adjusted price of the tender.

8.7 Selection process

8.7.1 South African framework features

The South African framework requires that that the award must be made to the highest-ranking tender unless objective criteria justify such an award, aside from criteria considered for the achievement of specific goals.[118] It was concluded that the objective criteria considered in the *selection process* must (1) be limited to objective criteria that were made known to tenderers and (2) not use criteria for which the legislature had clearly intended to be evaluated in a different way, such as those considered part of functionality and specific goals.[119] It was concluded that examples of such objective criteria could include horizontal criteria, such as those to achieve an equitable distribution in the allocation of contracts or environmental considerations, and to consider factors established and identified through the *ranking process*, for example abnormally low-priced tenders.[120]

The South African framework defines a tiebreaker mechanism in the event that the *ranking process* has not determined a winner uniquely.[121] The South African framework also explicitly permits the non-award, or cancellation, of a tender if

[118] Par 6.5.8.1.
[119] Par 6.5.8.1.
[120] Par 6.5.8.1.
[121] Par 6.5.8.2.

circumstances are such that the goods, products or services are no longer required; if funds are no longer available; if no acceptable tenders are received; or if the published ranking formula was not correct in light of tender pricing received.[122]

8.7.2 UK framework features

The *selection process* makes few exceptions to awarding the contract to the most highly ranked tender. A procedure is specifically defined for dealing with abnormally low tenders that requires obtaining an explanation from the tenderer and that specifies the factors that may be taken into account in the assessment of such explanation.[123] The public body may only reject the tender upon being given an unsatisfactory explanation. The public body may also decide not to award the contract to a tenderer if it has not complied with its obligations in the fields of environmental, social and labour law.[124]

The *UK Regulations* do contemplate the cancellation of a call for tenders although no explicit conditions are provided. In the event that no acceptable tenders are received, however, the *UK Regulations* permit a different procurement procedure to be initiated. As concluded above, if a different procedure were not initiated, the alternative would be to cancel the tender process.[125]

8.7.3 Similarities and dissimilarities

The South African framework requires an examination into the existence of any objective criteria that would justify disregarding the results of the *ranking process* prior to award. The *UK Regulations* only requires an examination of pricing that appears abnormally low prior to award. The South African framework may include an abnormally low price as an objective criterion. Neither frameworks specify a method for identifying an abnormally low price. The *UK Regulations* also provide the discretion

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122 Par 6.8.5.
123 Par 7.6.5.1.
124 Par 7.6.5.2. This could be considered a post-qualification process.
125 Par 7.6.5.2.

not to make an award to the highest-ranking tenderer if the tenderer has not complied with environmental, social and law obligations of the *EU*.

The South African framework explicitly sets out four circumstances under which a tender may be cancelled although the cancellation is not restricted to these conditions. It was concluded that the *UK Regulations* permit cancellation of the tender process if no acceptable tenders are received and that they explicitly permit alternative procedures to be initiated under these conditions.

A procedure for dealing with situations where the *ranking process* has not produced a single highest-ranking tender is specified in the South African framework, whereas this circumstance is avoided in the *UK Regulations* by requiring the *ranking process* to identify a single most highly ranked tender.[126] As observed, the mechanism in the South African framework could be regarded simply as an extension of the *ranking process*.[127]

8.7.4 Analysis

The chief dissimilarity between the South African framework and the *UK Regulations* lies in the criteria that are permitted to justify making an award to a tender other than the highest-ranked tender as identified by the *ranking process*. Given that it has been established that the criteria must be made known to the tenderers, from one perspective this could be seen to promote the rigour with which the most meritorious tender is determined rather than a less flexible reliance on the *ranking process*. From another, the discretion provided in the final decision-making process, including the silence regarding exact procedure, may leave the *selection process* vulnerable to 'twisting' the result as well as providing grounds to challenge the decision when the public body either exercises its discretion or when the public body does not.[128] It is submitted that the potential benefits of providing wide discretion to reconsider the

126 Par 7.6.5.2.
127 Par 6.5.8.2.
128 As was the case in *Rainbow Civils*.

relative merits of a tender after the *ranking process* has already determined a potential winner may be outweighed by the risks it poses to the procedure.

It was concluded that in both frameworks the public body would be obliged to examine abnormally low tenders although neither provides guidance as to how an abnormally low price should be identified. The approach of the *UK Regulations* is to compel such an examination by an explicit provision requiring the public body to investigate an abnormally low bid in terms of a regulated procedure thereby ensuring fairness and transparency in any decision made. The explicit regulatory provision obviates the need for the public body to have informed tenderers that abnormally low tenders will be examined in the tender documents. The South African framework does not require that abnormally low tenders must be examined although it could be inferred from the peremptory requirement to examine all objective criteria.[129] If a public body were to consider rejecting abnormally low tenders under the South African framework, it would be required to publish its intent to do so in the *transactional system*. The South African framework does not specify a procedure to be followed in the event that an abnormally low bid is identified during the *selection process* although a tenderer should be provided the opportunity to explain its pricing prior to any decision.[130]

The approach of the *UK Regulations* to permit an alternative procedure to be initiated when no acceptable tenders are received provides a means to achieve the desired outcomes through more flexible processes. Under the South African framework, while no regulated alternative procedures are explicitly provided, the situation where no acceptable tenders are received is regarded as a ground for dispensing with tender procedures and to consider, for example, restricted or negotiated procedures.[131]

As it was noted in the *compliance process*, under the *UK Regulations* a tender must be considered unacceptable if it exceeds the budget of the public body.[132] Extrapolating this to the situation where all tenders exceed the budget of the public

129 Par 6.5.8.1.
130 Par 6.5.8.1. Footnote 211 in Chapter 6.
131 Footnote 216 in Chapter 6.
132 Par 8.4.3.2.

body, the public body is permitted to embark on alternative procedures or to cancel the tender process. The South African framework specifies the unavailability of funds as a criterion for the cancellation of a tender but is silent regarding the discretion to embark on an alternative procedure. While the 'availability of funds' is not necessarily the same criterion as the 'public body's budget', the provisions in the frameworks express the same intent, that the public body should not be compelled to accept the most meritorious tender if it cannot afford to do so.[133]

8.7.5 Cost-effectiveness analysis

The *selection process* was concluded to be decision-making process to select a particular course of action taking into account:[134]

(a) refinements to the determination of optimality; and
(b) additional considerations emerging from the relative assessment in the *ranking process*,

including the decision that the selection of a course of action, or no course of action, is worthwhile.

Prior to award, both the South African and *UK* frameworks require an examination of abnormally low tenders, a recognised weakness of *ranking processes* where price is highly weighted. The procedure specified in the *UK Regulations* was concluded to provide greater certainty to the public body and tenderers alike. The South African framework would rely on the general standards of fairness of administrative decisions to govern the decision to exclude an abnormally low-priced tender. It is submitted that the approach adopted by the *UK Regulations* supports cost-effective decision-making by (1) compelling the risk associated with abnormally low bids to be considered by its explicit presence in the regulations, (2) ensuring that a procedure is followed to verify that a potentially optimal course of action is not being rejected for the wrong reason

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133 The merits of the different concepts in this context are beyond the scope of this study, although the worthy of further exploration to establish which provisions afford a better outcome for the procurement process.

134 Par 5.5.6.

and (3) reducing the probability of a challenge to the decision by specifying the procedure to be followed.

The South African framework also provides the latitude to consider other objective criteria provided they are published. This discretion can be argued to provide the opportunity for refining the determination of optimality after the *ranking process* although it would not extend to considering criteria in any way different from that intended by regulation.

Although through different mechanisms, both frameworks provide for grounds to cancel the tender process if no acceptable tenders are received and both provide for the discretion to embark on alternative procedures. These provisions were concluded to promote the achievement of cost-effectiveness of the tender process.

Both frameworks provide for grounds for the cancellation of the tender process if the tenders received are unaffordable or cannot be funded. The *UK Regulations* explicitly provide the discretion to embark on alternative procedures. This was concluded to promote the achievement of cost-effectiveness.

Regulatory measures to improve cost-effectiveness of decision-making in the South African framework may be considered by requiring the examination of abnormally low-priced tenders with an associated procedure to ensure fairness in the *selection process*.

8.8 Summary and conclusion

This chapter set out to compare the functional elements of the evaluation process in the South African and UK frameworks as well as to analyse the different provisions of the *regulatory systems* for their cost-effectiveness in terms of the models developed earlier in the study. The purpose of the comparative analysis was primarily to identify dissimilarities that provided indications for regulatory improvement in meeting cost-effective decision-making requirements of the South African system.

The significant regulatory shortfalls in the cost-effectiveness of decision-making indicated by the comparative analysis in the South African system of procurement are summarised - as recommendations for improving the system - below:

(a) Explicit provisions for the rectification of formal defects in the *qualification process* may be considered in the *qualification* and *compliance processes*.[135]
(b) Reassessment of the effectiveness of including responsibility criteria in the *qualification process* aimed at certain remote objectives taking into account the balance of excluding potential courses of action without consideration of the cost of such exclusions.[136]
(c) Explicit provisions for a tenderer to submit evidence to show measures that it has taken to qualify where it otherwise would not in the *qualification process*.[137]
(d) Assessing the effect of including qualification criteria in the compensatory scheme together with compliance criteria in evaluation of functionality. The separation of the *qualification process* from the *compliance process* in filtering may enforce greater transparency in the grounds for disqualification, improving the participation and consequently, the production and inclusion of a wider set of available solutions.[138]
(e) Permitting greater discretion in the methods permitted for the *compliance process*.[139]
(f) Within the fixed blanket weightings for system-wide horizontal ranking criteria, greater discretion should be afforded to include the consideration of factors in the *transactional system* relating to the direct outcomes, for example quality, in the *ranking process.*[140]
(g) The discretion for the wider consideration of cost beyond the adjusted price of the tender in the *ranking process*.[141]

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135 Par 8.3.5.2.
136 Par 8.3.5.3.
137 Par 8.3.5.3.
138 Par 8.3.5.4.
139 Par 8.4.4.3.4.
140 Par 8.6.5.
141 Par 8.6.5.

(h) Provisions should be considered to compel the examination of abnormally low-priced tenders with an associated procedure to ensure full information is obtained are carried out prior to excluding a potentially optimal solution from selection and to ensure procedural fairness of the decision.[142]

Using the provisions of the *UK Regulations* as functional prototypes, the comparative analysis concluded that superior choices might exist in terms of the regulatory design of the tender evaluation sub-processes. In summary, these relate to procedures and methods and in the latitude for discretion to account for particular transaction circumstances in the assembly of *transactional system*. Alternatively, while the comparative analysis concentrated on dissimilarities between the *regulatory systems* with respect to cost-effectiveness, the recommendations could be viewed as the extent of material dissimilarities between the *regulatory systems*. The decision-making sub-processes are regulated by similar constructs in both systems and there is considerable commonality in the detailed provisions

[142] Par 8.7.5.

9 Conclusion

9.1 Introduction

The legal regulation of public procurement activities in South Africa enjoys constitutional status requiring that organs of state procure in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Notwithstanding these requirements, the *Constitution* legitimises and mandates the presence of preferential mechanisms in the system with the specific objectives of protecting and advancing groups disadvantaged by unfair discrimination. The primary objective of this study was to investigate the constitutional requirement that the system is cost effective with regard to its meaning and the effect given to this requirement in the current regulatory implementation. The reason for exploring this particular requirement of the system was motivated by the history of legal disputes exposing potential inconsistencies and weakness in this aspect of the current regulatory framework.[1]

A brief survey of established principles of public procurement system regulation was conducted in the introduction to the study, to establish the foundational context of public procurement regulation and to frame the research questions. The subsequent enquiry naturally fell to being investigated in two parts:

(a) As a principles-based enquiry, a short exposition of the principles of public procurement regulation was conducted. Beyond this foundational work, the objective of the first part was to investigate the system for public procurement as envisaged by relevant provisions of the *Constitution* and to establish the role of cost-effectiveness in the balance of requirements of the system. This required an initial investigation into the meaning of a system, how a system operates at different levels and how the constitutional requirements are intended to apply to a procurement system. The meaning of cost-effectiveness was investigated in various contexts to establish a model for its requirements in the public procurement context congruent with general industry and legal interpretations.

[1] Par 1.3.

This reference model was used to investigate the meaning and extent of the requirement of cost-effectiveness in the balance of the constitutional requirements, thereby addressing the first research question.

(b) The objective of the second part was to examine provisions of the regulatory system that give effect to the cost-effectiveness in the balance requirements referencing the findings of Part 1. This required a preliminary study of the decision-making components of open procurement procedures to structure the examination of regulatory provisions in functional decision-making processes. Using this construct, statutes, regulations and associated instruments of the South African regulatory system were analysed for their attribution to effecting cost-effectiveness. This analysis addressed the second research question by analysing how South African procurement system gives effect to the requirement of cost-effectiveness in the process of evaluation and selection of competitive tenders.

Finally, an analysis of a comparative regulatory system, that of the United Kingdom, was conducted against the same functional decision-making construct to identify alternative regulatory mechanisms as prototypes for possible improvements to the South African system. This addressed the final research question by making recommendations for improvements to the cost-effectiveness of the South African system in the procurement phase using a functional comparative analysis of dissimilarities.

The conclusions and observations made in the two parts of this study are set out in the sequence set out above, concluding with overall remarks and observations.

9.2 Public procurement regulation

The acquisition of goods and services by the state is an established and significant phenomenon of mixed economies. While public procurement activities are essentially driven to satisfy the direct needs for procurement, its goals extend to meet those of economy, efficiency, effectiveness, goals generally required of state conduct and to

achieve horizontal goals of public policy. The goals of public procurement in any jurisdiction are neither universal nor static. Fundamental goals - such as effectiveness, efficiency, value for money, equal treatment and equal opportunity - can be said to exist in all systems, the degree and balance determined by factors attaching to the particular environment, for example, matters of policy, development, skills, external community commitments, or the sourcing of funds. As these factors may change so too may the goals of public procurement in a particular jurisdiction.

The fact that the state is not a unitary body is relevant for public procurement as actions and decisions regarding public procurement are made by procurement agencies within the bureaucracy of state. Internal control by the political arm of state and from within the hierarchy of the bureaucracy over the public procurement activities is required to ensure alignment and the achievement of goals. This form of control through regulation is termed public procurement regulation.

The public procurement environment is susceptible to a number of characteristic weaknesses and threats: informational asymmetries, corruption, bias and inefficiency. Various strategies, instruments and principles have developed in the regulation of public procurement in response to these weaknesses and threats. The mechanism of regulatory control allows the compliance of procurement to be assessed in terms of its adherence to the regulation without the need to assess the achievement of individual transactional outcomes in terms of systemic goals.[2]

The challenge, or meta-goal, for public procurement regulation is to define and achieve an overall equilibrium in the system that balances:

(a) goals by favouring the achievement one by limiting others appropriately; [3]
(b) short term outputs with aggregated long-term outcomes;[4]

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2 Para 2.1.4 and footnote 36 in Chapter 2.
3 Par 2.2.1.
4 Par 2.2.1.

(c) the limitation of discretion with allowance for necessary discretion; and[5]

(d) standardisation with the effects of generalised rules over a wide variety of transactional complexities and features[6]

in a way that is appropriate for the level of development[7] and particular environmental dynamics.[8]

The achievement of the goals of public procurement is dependent on the outcomes determined by the life cycle of public procurement: the planning phase, procurement phase and the contract management phase. As the state's conduct affects external parties and is open to monitoring in the procurement phase it is the subject of most disputes. The procurement phase of the life cycle not only receives the most regulatory attention but the activities and decisions during this phase are key to the outcomes of the instant transaction as well as, from the viewpoint of the system, to the overall outcomes of public procurement.

The development of international and foreign procurement regulation has relevance to regulation in South Africa beyond compliance with established standards of good governance. In terms of their principles, strategies and instruments, foreign and international systems may be useful for improving the South African regulatory system provided account is taken of the dissimilar objectives in adapting provisions for the South African environment and particular balance of public procurement goals.

9.3 Constitutional requirements of a public procurement system

The principles for public procurement are constitutionally entrenched in *Section 217* and have application to public bodies in the widest sense.[9] The scope of the provisions of *Section 217* covers contracting for goods, services and construction works and

5 Par 2.2.4.
6 Par 2.2.5.
7 Par 2.1.2.
8 Par 2.2.3.
9 Par 3.3.2.

could have wider application than procurement of goods and services by public bodies save for the title of the section.[10]

Section 217 requires that whenever a public body conducts procurement activities, a system must exist, the system must be fair, equitable, transparent, competitive and cost effective, and the public body must procure goods and services in accordance with such system. *Section 217* reinforces the principle that a system of public procurement regulation must balance these requirements to accommodate constitutionally permissible policies and, importantly, legitimises and mandates the presence of certain horizontal policies in defining the balance.[11]

The application and execution of the system of procurement must take place within the broader constitutional rights to just administrative action in Section 33 of the *Constitution*. The lawfulness, reasonableness and procedural fairness of the execution of public procurement is informed by its compliance with the system of public procurement and by the requirements of the public procurement system.[12] The fundamental rights of Section 32 of the *Constitution,* giving access to information of held by the state has application to public procurement and the legislative implementation of the right defines relevant procedural content and limitations to the principle of transparency. These constitutional rights should equally shape regulation of the system in the proactive sense.[13]

The restatement of the positive substantive equality measures of Section 9 of the *Constitution,* the right to equality, in the provision of *Section 217* indicates the constitutional intention for public procurement as a specific target for the implementation of such measures.[14]

10 Par 3.3.3.
11 Par 3.3.4.
12 Par 3.4.3.
13 Par 3.4.2.
14 Par 3.6.

A fundamental observation relating to the operation of the constitutional system is that there is a hierarchy of systems: the *regulatory system*, the system of legislation and regulations that regulate public procurement generally; and the *transactional systems*, being the systems of rules and procedures governing the execution of a particular transaction.[15] The *transactional system* is assembled by the procuring bodies within the rules and principles established by the *regulatory system.*

The constitutional requirements were concluded to apply to both levels of systems.[16] If the *regulatory system* could be complete and compliant, the *transactional system* would automatically meet the requirements. It was observed that the *regulatory system* will necessarily not be complete and that discretion will be required on the part of the public body in the assembly of the *transactional system*. However, it was concluded that the rules of the *regulatory system* should completely define the mechanisms for the achievement of long-term systemic objectives of the system and should provide a framework for the assembly and execution of *transactional systems* that both permits and compels the achievement of direct transactional objectives in balance with the other requirements.[17]

Ultimately, the compliance of the system with the requirements of *Section 217* can established by the overall compliance of the *transactional systems.* Non-compliance of the *regulatory system* with *Section 217* can only be tested in respect of provisions that prevent or impede the compliance of the *transactional system*. It could be inferred that failure of the *regulatory system* to compel the compliance of the *transactional systems* would render it a weak system but would not necessarily render it non-compliant.[18]

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15 Par 3.8.1.
16 Par 3.3.5.
17 Par 3.3.5.
18 Par 3.3.5

The product of the overall system is the execution of the *transactional systems*. The constitutional provisions of just administrative action apply to both the assembly of the *transactional system* and the execution of the *transactional system*.[19]

The assertion that the *Section 217* requirements inform the principles for administrative action provides a means for safeguarding the requirement in discretionary decision-making, although retrospectively. Discretion in the execution of the *transactional system* was also concluded to be inevitable for the cost-effectiveness of decisions made in execution and similarly safeguarded by the rights to just administrative action.[20]

9.4 The requirement of the system to be cost-effective

The concept of cost-effectiveness was examined from a definitional standpoint as well as technical applications of the concept to establish its meaning in the general public procurement context. The definition of the term in the public procurement context was concluded broadly to mean "effective or productive in relation to its cost".[21] This broad definition was summarised in terms of a proposed model relating to a course of action that incorporated both endogenous and exogenous means for establishing the comparative standards of worthwhile and optimal.[22]

A course of action is cost effective if it is:

(a) worthwhile in terms of its cost and the value of its outcomes; and/or[23]
(b) the optimal choice from available courses of action in terms of their cost to intended-outcome relationships.

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19 Par 3.4
20 Par 3.4.
21 Par 4.1.7.
22 Par 4.1.3.7.
23 The test should include both endogenous and exogenous conditions to be cost effective. The assertion that the course of action is cost effective will also depend on the wideness of the set of possible courses of action made available for selection.

Decisions prospectively determining cost-effective courses of action were established to rest on the same principles with additional considerations of risk.[24] In practice, and accepted as a basis for legal argument, actual cost-effectiveness need not be determined, and indicators of future costs and quality and risk of outcomes are sufficient to found legal argument regarding the cost-effectiveness of administrative decisions taken to select a course of action.[25]

In this prospective sense, cost-effectiveness relates to the basis for the decision to adopt a course of action and the following model was proposed:[26]

The decision to select a course of action can be said to be cost effective if:

(a) the intended outcomes of the course of action and criteria for its achievement are defined and relevant risks to its achievement are identified; and
(b) a projection of the costs of the course of action is made and relevant risks to its variation are identified; and
(c) taking into account the relevant risks, the course of action is:
    i. worthwhile in terms of its projected cost and the value of its intended outcome; and/or [27]
    ii. the optimal choice from available courses of action in terms of their projected cost-intended outcome relationships.

The concept of cost-effectiveness was concluded not to be limited to any particular span or depth in its application to a system of public procurement. Cost-effectiveness could thus be applied at various levels, having application as a requirement of: the

24 Par 4.1.4.
25 Par 4.1.4.
26 Par 4.1.3.7.
27 The model should include both endogenous and exogenous conditions to be cost effective. The assertion that the course of action is cost effective will also depend on the wideness of the set of available alternative courses of action. Factors that may exclude courses of action from consideration may affect the cost-effectiveness of the selected course of action.

choice of procedure, the contractual outcomes and in terms of outcomes at the macro or system-level.[28]

Using the arguments regarding the span, depth and completeness of the system, a model for a cost-effective system was proposed, with regard for the meta-nature of the system:[29]

> A system is cost effective if the rules and principles of the system have the effect of compelling the selection of cost-effective courses of action with regard to the intended balance of outcomes of the system.

Macro-level cost-effectiveness was observed not to impute any requirement as to the relative merits, or balance, of any macro-level outcomes and only - in terms of the model above - requires that the application of resources toward the achievement of the balance of outcomes is worthwhile and optimal.[30] The requirement of the system to be cost effective in terms of the transactional or direct procurement outcomes, commonly expressed as the goal of value for money, was concluded to be one of the outcomes that could be considered in the determination of macro-level cost-effectiveness.[31] The outcome of fulfilling of the originating procurement need, or the direct outcomes, was concluded always to be present in the balance of outcomes sought and therefore must carry substantial weight in such balance.[32] If the direct outcome were excluded from the balance of outcomes sought, it would suggest the transaction was a simulated transaction and carried out for purposes other than public procurement.

The system requirements for cost-effectiveness were analysed with respect to the completeness in terms of both the *regulatory system* and the *transactional system*. It was concluded that the *regulatory system* was required to be complete with regard to

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28 Par 4.1.4.1.
29 Par 4.1.4.3.
30 Par 4.1.4.1.
31 Par 4.1.4.1.
32 Par 4.1.3.

determining macro-level outcomes but that discretion would be required for cost-effectiveness with regard to transactional outcomes.[33] The assertion that the requirement to be cost effective informs the standards for administrative action provides a means for safeguarding the requirement in discretionary decision-making, although retrospectively.[34] Discretion in the execution of the *transactional system* was also concluded to be inevitable for the cost-effectiveness of decisions made in execution and similarly safeguarded by the legal requirements of administrative action.[35]

The requirement for a competitive system was concluded to support the objective of cost-effectiveness although it is neither necessary nor sufficient.[36] The requirement for competitiveness supports wider objectives of the procurement process such as supporting market economy principles, fairness, transparency, open participation and public confidence in the procurement system. In circumstances where transactional cost-effectiveness and competitiveness may oppose each other, macro-level cost-effectiveness appears to decide the balance in terms of the outcomes sought by competition. In this respect, processes of a less competitive nature may be permitted by reducing the level of participation in the competition to the point where it is macro cost effective.[37]

The requirement of fairness in the procurement system has two aspects: the vertical aspect of fairness, that between the public body and other parties in general and the horizontal aspect of fairness being the fairness in the public body's treatment of parties as between the parties. Public procurement decisions constitute administrative action by their nature and the right to procedural fairness in section 33 of the *Constitution* gives further content to the requirement of fairness. Substantive fairness in decision-making was concluded to have application within the requirement of fairness. The balance established through case law regarding substantive fairness relating to the

33 Par 4.1.4.2.
34 Par 4.1.7.
35 Par 4.1.4.2.
36 Par 4.2.6.
37 Par 4.2.6.

procedure was that it must be limited to decisions that do not materially compromise the purpose of the procedure.[38]

In certain circumstances, upholding fairness in the process may be at odds with the achievement of transactional cost-effectiveness. Fairness was shown to be of importance to the objective of public trust in the system of procurement and therefore should not be compromised for a short-term gain in the cost-effectiveness of a single transaction. This was argued to be an application of macro-level cost-effectiveness in balancing its cost, in terms of the diminution of transactional cost-effectiveness, and the macro-outcome of public trust.[39]

The requirement of the system to be equitable was concluded to require the system to enable positive measures to promote the substantive equality of groups. Specifically, the constitutional provisions for preferential mechanisms and measures for protection and advancement of groups disadvantaged by unfair discrimination in public procurement through organisational policies must be implemented as part of an equitable system.[40] The requirement for transactional cost-effectiveness would be susceptible to being diminished in the pursuit of equitable outcomes. However, the requirement for macro-level cost-effectiveness in the system was argued to embrace the requirement for equitable outcomes with the proviso that the direction of resources toward their achievement is optimal and worthwhile.[41]

Transparency supports the achievement of all other requirements of the system by enabling enquiry into compliance with the requirements.[42] A possible exception observed is the cost associated with measures to achieve transparency and the consequent effect on the achievement of procedural cost-effectiveness. Cost-effectiveness at the macro-level would require that the value of the outcomes sought by transparency are worthwhile in terms of the procedural overhead cost and require

38 Par 4.2.6.
39 Par 4.2.6.
40 Par 4.4.3.
41 Par 4.1.7.
42 Par 4.5.4.

that the means to achieve such outcomes are optimal.[43] Transparency as an instrumental requirement was therefore concluded to be unassailable to the extent it serves its underlying objectives in balancing the constitutional procurement system requirements.[44]

9.5 Functional model of decision-making in procurement evaluations

9.5.1 Decision making processes

The functional decision making elements of the public tender evaluation process were investigated in the general context of problem-solving and decision-making. The key differentiating characteristics of decision-making in the public tender process - among more general procurement problem-solving procedures - were concluded to be the:[45]

(a) predetermination of the procedures and criteria for decision-making;
(b) non-recursive procedures in determining criteria and identifying solutions; and
(c) publication and commitment to the predetermined procedures and criteria.

The functions of decision-making procedures were concluded to consist of filtering, or rejection procedures, and selection procedures.[46] With reference to common literary categorisations and analyses of procurement evaluation processes, five functionally distinct decision-making sub-processes were identified within the tender evaluation process:[47]

(a) Qualification process. The filtering process determining whether a tenderer qualifies to take part in subsequent steps of the tender process.
(b) Compliance process. The filtering process determining whether a tender meets "all material aspects of the tender invitation" and thereby the eligibility of the tender for further consideration.

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43 Par 4.5.4.
44 Par 4.5.4.
45 Par 5.3.5.1.
46 Par 5.4.1.
47 Par 5.4.1.

(c) Shortlisting process. The filtering process limiting the participation in the subsequent processes to fewer tenderers or tenders.
(d) Ranking process. The ordering process of assessing tenders in terms of their relative merit.
(e) Selection process. The decision-making processes in selecting a tender for award.

Depending on the design of the procedure, the sub-processes may be undertaken in a different order; at more than one stage in the decision-making process; together with other sub-processes or some sub-processes may be omitted. Regardless of the procedural design, some of the sub-processes must be undertaken.[48]

9.5.2 Qualification process

The *qualification process* was defined to be the filtering process limiting the set of produced solutions by excluding tenderers not meeting predetermined threshold criteria.[49] The publication of the *qualification process* criteria has the effect of informing decision-making by potential tenderers as to their participation prior to the execution of the *qualification process*.[50] As the *qualification process* excludes tenderers, either by their own decision or by operation of the process, without the consideration of cost, the criteria for qualification must contemplate exclusion without regard for cost.[51] Exclusion on formal grounds and non-compliance with generally applicable legal norms related to the delivery services can be argued to maintain public trust in the public procurement process and in the lawful delivery of services. Exclusion of tenderers with attributes exhibiting an unacceptable level of risk to the delivery of the direct outcomes sought would support cost-effectiveness provided the risk was great enough to warrant exclusion without regard for cost.[52] Where attributes of a tenderer are considered unacceptable in terms of the criteria related to the achievement of

48 Par 5.6.
49 Par 5.4.1.
50 Par 5.4.4.1.
51 Par 5.5.2.
52 Par 5.5.2.2.

horizontal outcomes, the achievement of such outcomes is sought without regard to the cost. Unless the general cost of excluding otherwise acceptable tenderers is determined by another process, exclusionary horizontal criteria could not be said to support cost-effective decision-making.[53]

9.5.3 Compliance process

The *compliance process* was defined to limit further participation in the tender evaluation process to those tenders that meet "all material aspects of the tender invitation".[54] The publication of the *compliance process* criteria has the effect of informing decision-making by potential tenderers whether they are capable of participating in the tender as well as informing the design of their solutions.[55] Exclusion on formal grounds and compliance to generally applicable legal norms related to the delivery of services can be argued to maintain public trust in the public procurement process but not to support cost-effectiveness. The exclusion of tenders that do not meet the tender specification was concluded to support the cost-effectiveness of the evaluation process.[56] Where attributes of a tender are considered unacceptable in terms of the criteria related to the achievement of horizontal outcomes, the achievement of such horizontal outcomes are sought without regard for the tender's prospect for achieving the direct outcomes and therefore sought regardless of cost.[57] Unless the general cost of excluding tenders that otherwise meet all material aspects of the tender specification is determined by another process, exclusionary horizontal criteria could not be said to support cost-effective decision-making.[58]

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53 Par 5.5.2.2.
54 Par 5.4.1.
55 Par 5.5.3.
56 Par 5.5.3.
57 Par 5.5.3.
58 Par 5.5.3.

9.5.4 Shortlisting process

The *shortlisting process* has the objective of limiting further participation in the tender processes to alleviate the burden of evaluating an inappropriate number of tenders.[59] The *shortlisting process* therefore could only be procedurally cost effective if: (i) the shortlisting method ensured that excluded tenderers or tenders did not have the potential to be the most meritorious tender and (ii) the cost of conducting the *shortlisting process* is less than the cost of a full evaluation of the tenders excluded by the *shortlisting process*.[60]

9.5.5 Ranking process

The *ranking process* was defined to be the process of examining and ordering tenders in terms of their relative merit with the objective of identifying the most meritorious tender.[61] The design of the methods for *ranking process* in the general case - where merit is considered across a range of attributes of a tender - was concluded to be non-trivial. The publication of the ranking method and criteria signals the weighting of attributes sought by the public body and therefore informs the design and construction of solutions for tenders. The predetermination, complexity and publication of the ranking method may lead to anomalies either through unintended effects of the method or by the design of tenders intending to maximise heavily weighted criteria. For cost-effectiveness, the alignment of the method determining merit with the balance of outcomes sought and the transparency of the method are essential for producing a set of solutions that contains the optimal solution.[62]

9.5.6 Selection process

The *selection process* is the sub-process of decision-making, generally directly after the *ranking process*, which finalises the tender evaluation process.[63] If the most highly ranked tender is not selected, three possibilities were concluded to exist: no selection

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59 Par 5.4.1.
60 Par 5.5.4.
61 Par 5.4.1.
62 Par 5.5.5.
63 Par 5.4.1.

is made, a tender that is not the highest-ranked is selected or a tender is selected that has equivalent merit to the most highly ranked tender. Cost-effectiveness would require that, if it is worthwhile, the most highly ranked tender be selected, provided the *ranking process* established optimality based on the cost-outcome relationship. The application of additional methods in the *selection process* refining the ranking can be regarded as an extension of the *ranking process*. It also presents an opportunity to inspect the most highly ranked tender for factors emerging from the relative examination in the *ranking process*. The inspection of an abnormally low bid is a common compensating check for a *ranking process* anomaly. If no tender is affordable, the decision not to proceed with the award of a tender was argued to be on the basis that there was no worthwhile course of action made available through the tender process.

The *selection process* was concluded to be the decision-making process to select a particular course of action taking into account refinements to the determination of optimality and additional considerations emerging from the relative comparison in the *ranking process*, including the determination that the selection of a course of action, or no course of action, is worthwhile.[64]

9.5.7 Application of the functional model to regulatory system analysis

In the context of an analysis of a legal framework for the regulation of decision-making in tender evaluation processes, it is the *regulatory system* that is the subject of the analysis and not any particular *transactional system.* Such analysis is indirect as it considers the rules and principles that govern the assembly of rules and procedures in *transactional systems*. Conclusions regarding the functional attribution of provisions of the *regulatory system* toward cost-effectiveness can only be made to the extent that they compel, or do not compel, the design of *transactional systems* that are cost-effective, for example:[65]

64 Par 5.5.6.
65 Par 5.6.

(a) Enforcing or preventing the inclusion of cost-effective decision-making procedures.
(b) Prohibiting or permitting the inclusion of decision-making provisions that conflict with cost-effective decision-making.
(c) Permitting or prohibiting discretion where generalised regulatory provisions cannot serve all transactional circumstances.

The analysis of the legal frameworks for the regulation of decision-making in the tender evaluation process was structured by identifying the provisions of the *regulatory* system regulating individual sub-process functions in the *transactional system* and analysing their effect on cost-effectiveness as above.

9.6 Analysis of the South African regulatory system

The *regulatory system* governing the tender evaluation process was determined to consist of a framework consisting of statutes, regulations, instruction and practice notes and guidelines that have application in three mutually exclusive groups:[66]

(a) *National and Provincial Framework* governing the procurement of goods and services by national and provincial departments; constitutional entities; national and provincial public entities; major public entities; and national government enterprises. The statutory and regulatory framework provisions applicable to this group are those of the PFMA, the *PFMAR,* authoritative instruction notes, practice notes and guidelines.
(b) *Local Government Framework* governing the procurement of goods and services by municipalities and municipal entities. The statutory and regulatory framework provisions applicable to this group are those of the MFMA, MSA and the MFMA*R*.
(c) *Construction Works Framework* governing the procurement of construction works by all public entities. The statutory and regulatory framework provisions applicable to this group are those of the CIDBA, the *CIDR* and guidelines issued by the *CIDB*.

[66] Par 6.3.

The provisions of the PPPFA and the *PPPFAR* applied to all the groups and were analysed generally for all groups.[67]

9.6.1 Qualification processes

9.6.1.1 Formal responsiveness

The *regulatory system* prescribes that the public body has the discretion to disqualify a tenderer on formal grounds: the non-submission of required documents, certificates. In the case of the omission of certain forms, a grace period for submission is permitted. Limiting formal exclusionary grounds by permitting rectification in certain instances is seen to support cost-effectiveness. The blanket requirement for registration of suppliers on the *CSD* and - in the case of construction works contractors - on the *CIDB* register of contractors, was concluded to alleviate formal aspects of qualification and reduce unnecessary disqualifications as well as promoting consistency and procedural cost-effectiveness in the central verification of compliance with responsibility criteria.

9.6.1.2 Responsibility

The *regulatory system* provides peremptory provisions for the disqualification of a tenderer if it is not tax compliant or if it is generally prohibited from conducting business with the public sector. Although argued not to support cost-effective decision-making, the grounds for exclusion required by the *regulatory system* appear to fall within a reasonable and justifiable set of circumstances. In the *Local Government Framework*, responsibility criteria are extended to include compliance with local government ordinances and standing in respect of obligations toward the local body. The criteria examine outstanding obligations not only relating to the person of the bidder, but to it office bearers.

[67] Par 6.8. Figure 9: *Regulatory system* summarises the framework of law applicable to the groups.

Under the current instructions, set-asides based on the classification of a tenderer and more generally, in terms of guidance provided, the qualificationary criteria not related to the performance of the contract, are prohibited

9.6.1.3 Competency

The *regulatory system* requires *qualification process* criteria to be related to the capability, resources, technical capacity and ability of the tenderer, and proscribes the inclusion of criteria related to the category of the bidder. The *Construction Works Framework* requires more generally that criteria must relate to the subject matter of the tender. The *regulatory system* therefore limits qualification criteria to be of the class that will exclude tenderers based on an assessment of risk related to their ability to perform.

The *Construction Works Framework* regulates a mandatory pre-qualification process independent of any particular tender with limited discretion and requires verification of attributes of a tenderer prior to award. Procedural cost-effectiveness is sought through the standardisation of the *qualification process*. The criteria for pre-qualification relate to the risk of performance and the direct outcomes sought from construction works tenders. A degree of flexibility is provided to include tenderers who may produce an optimal solution in respect of macro outcomes with the consideration of additional risks specific to a particular tender. The *Construction Works Framework* therefore provides some measures to ensure the procedural cost-effectiveness gained through standardisation is not rigidly enforced to the detriment of macro-level cost-effectiveness.

Aside from the competency criteria considered in the mandatory pre-qualification for construction works contractors, if competency criteria are included in the *transactional system*, they must be considered under the framework of functionality. This potentially constrains the method to a complex compensatory method combined with the *compliance process*.[68]

[68] Par 6.5.4.3.

9.6.2 Compliance process

9.6.2.1 Formal responsiveness

The conclusions regarding formal responsiveness for the *qualification process* apply generally and equally to the *compliance process*.

9.6.2.2 Substantive responsiveness

The *regulatory system* contains various provisions promoting the broad production of solutions, for example the requirement to reference national or international standards and avoiding constraining solutions to particular brands. The criteria are not limited and include those related to its practicality, usefulness, working or operating capability, quality, viability, reliability and durability. The *Construction Works Framework* requires a narrower but largely overlapping set of standards that the criteria must relate to the contract performance, these must be justified in terms of the outcomes and be objective and quantifiable to the extent practicable.[69]

The requirement for tenders to meet minimum local content thresholds as a compliance criterion effectively compels the promotion of local industry content "at any cost". The *regulatory system* excludes any test for the optimality of solutions directed toward the outcome of promoting local industry in balance with other outcomes and therefore relies on a process outside the procurement system to balance the cost.[70]

The blanket prohibition of the use of maximum cost benchmarks in the *compliance process* was seen not to support cost-effectiveness for the reasons that (a) a published reserve price may optimise the production of solutions and (b) the earlier exclusion of a tender that is not worthwhile would support procedural cost-effectiveness.[71]

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69 Par 6.7.3.
70 Par 6.5.8.2.
71 Par 6.8.2.2.

While the consideration of substantive compliance criteria is not mandated, if a public body decides to include such a *compliance process* in the *transactional system*, the *regulatory system* prescribes the procedure and method for the *compliance process* within the framework of functionality. Compliance criteria for the scoring of functionality must be related to the performance of the contract although the operation of the weighting and scoring method are not prescribed. The complexities associated with compensatory methods - such as weighted multi-attribute methods – means that this imposes a significant constraint on the design and assembly of the *transactional system*. This limitation imposed on the *compliance process* by the *regulatory system* was seen to increase the risk of misalignment in the production of solutions as well as the risk of unwarranted exclusions and therefore was concluded to place constraints on cost-effective decision-making.[72]

9.6.3 Shortlisting process

A shortlisting process is not directly provided for in the frameworks. The provisions regulating the evaluation of functionality may accommodate a shortlisting process by using a method based on relatively determined criteria. The absence of shortlisting procedures beyond those for simplified procedures was concluded not to compromise cost-effectiveness.[73]

9.6.4 Ranking process

The three framework groups compel the *transactional system* to use one of two particular formulae to calculate a numerical value expressing merit for the ranking of tenders. Which formula is to be used is determined by the anticipated contract value. Merit is determined by a compensatory method balancing the tender price and the B-BBEE rating of the tenderer.[74]

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72 Par 6.8.2.2.
73 Par 6.8.3.
74 Par 6.8.4.

In terms of the proposed model for cost-effective decision-making, the optimal choice must be made from the available courses of action. The regulated factors determining optimality exclude elements of risk, quality and of cost wider than that of the offered price. The exclusion of any consideration relating to the direct outcome does not accord with the argument that in general the direct outcome should always carry some weight in the determination of optimality and therefore excludes critical elements of the general model for cost-effective decision-making in public procurement.[75]

9.6.5 Selection process

The *selection process* in the *regulatory system* permits an award to be made to a tender other than the highest-ranking tender on wide grounds, namely that objective criteria, aside from those considered for the achievement of specific goals, must justify such an award. Judicial and academic interpretation generally concur that (1) potential tenderers must be informed of the criteria that would be considered in the *selection process* if such criteria can be anticipated by the public body and (2) criteria that the legislature had intended to be evaluated in a different way should not be considered, such as functionality or specific goals.[76]

The framework defines a tiebreaker mechanism in the event that the *ranking process* cannot determine a winner uniquely which can be considered an extension of the *ranking process*.[77]

The framework also permits the cancellation of a tender, under four conditions although does not limit the grounds for cancellation of a tender to these four conditions. In the case of funds not being available, no acceptable tenders received or for the reason that the originating need has changed or does not exist, these can generally be said to support the test for cost-effective decision-making, as no available course of action would be worthwhile. The requirement to cancel a tender after an inspection

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75 Par 6.8.4.
76 Par 6.8.5.
77 Par 6.8.5.

of the actual tender pricing discloses that the *transactional system* specified the incorrect ranking formula could be argued to improve optimality albeit at significant procedural cost.[78]

9.7 Analysis of the regulatory system in the United Kingdom

The *EUCD*, which regulates the evaluation and award of public contracts, is one of three directives adopted by the *EU* regulating public procurement. For the purposes of the comparative analysis of regulatory frameworks for public tender evaluation, the study was limited to the examination of the *UK* transposition of the *EUCD*.[79]

The *UK Regulations* permit the use of five procedures: the open procedure, restricted procedure, competitive procedure with negotiation, competitive dialogue procedure and the innovation partnership procedure. For the purposes of the comparative analysis, only the open procedure was analysed as it is the procedure used in the absence of special circumstances.[80]

The examination of the provisions of the *regulatory system* was conducted according the tender evaluation decision-making processes. Observations were made regarding the attribution of features of the *regulatory system* toward cost-effectiveness.

9.7.1 Qualification process

During the evaluation of formal responsiveness, procedures for rectification are specifically permitted provided they are performed in full compliance with the principles of equal treatment and transparency.[81]

The *UK Regulations* require the mandatory exclusion of tenderers for offences such as conspiracy, corruption, bribery or fraud affecting the European Community's

78 Par 6.8.5.
79 Par 7.2.
80 Par 7.5.
81 Par 7.6.1.1.

financial interests or a breach of obligations relating to the payment of taxes or social security contributions if they have been established by a judicial or administrative decision having final and binding effect.[82]

The contracting authority has the discretion to exclude a tenderer on a closed list of responsibility criteria including non-payment of taxes, violations of environmental, social and labour law, collusion, misrepresentation, conflict of interest, grave professional misconduct, and persistent deficiencies in the performance of prior contracts, which renders its integrity questionable. The closed list removes the possibility of *qualification process* criteria in the *transactional system* outside this list, thereby limiting the grounds that may reduce the set of solutions available for selection.[83]

The *regulatory system* provides for a self-cleaning procedure allowing a tenderer to provide evidence to show it complies.

The contracting authority has the discretion to include competency qualification criteria in the *transactional system* subject to the general standard that they must be limited to ensuring that a tenderer meets the requirements to perform the intended contract and that the requirements are related and proportional to the subject matter of such contract. Where methods are used, they must be transparent, objective and non-discriminatory.[84]

The contracting authority has the discretion to specify set-asides for participation in a procedure for sheltered workshops and economic operators, whose main aim is the social and professional integration of disabled or disadvantaged persons. These horizontal qualification criteria fall into the general category of being indirectly linked to the performance of the contract.[85]

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82 Par 7.6.1.2.
83 Par 7.6.1.3.
84 Par 7.6.1.3.
85 Par 7.6.1.6.

Transactional systems are not required to perform the *qualification process* prior to other processes and may conduct the qualification of tenderers concurrently with the *selection process*. This flexibility may enable procedural cost-effectiveness of the *transactional system* in certain circumstances but it was concluded, in general, to be of doubtful value in improving efficiencies and may carry additional risks.[86]

9.7.2 Compliance process

During the evaluation of formal responsiveness, rectification is specifically permitted provided it is performed in full compliance with the principles of equal treatment and transparency. [87]

The *transactional system* may include substantive responsiveness criteria requiring compliance with a limited list of technical specifications. Such technical specifications must adhere to certain conditions, such as the use of specific standards and the mandatory inclusion of equivalents to particular makes, sources or origins. The *compliance process* may be undertaken before the *qualification process*. The *transactional system* may include a provision to consider a tender as unacceptable if the tender price exceeds the contracting authority's budget.[88]

The *transactional system* may include a requirement that the contract must performed in the context of sheltered employment programmes Further horizontal compliance criteria may only relate to horizontal aspects of the procurement performance.[89]

9.7.3 Shortlisting process

A *shortlisting process* for the open procedure is not directly provided for in the *UK Regulations*.[90]

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86 Par 7.6.1.8.1.
87 Par 7.6.2.1.
88 Par 7.6.2.2.
89 Par 7.6.2.3.
90 Par 7.6.3.

9.7.4 Ranking process

The *UK Regulations* permit the use of a wide range of ranking methods with the general standard that the method used must be based on the assessment of most economically advantageous tender. "Most economically advantageous", while specified to be from the contracting authority's point of view, was concluded to embrace the consideration of externalities, directly or indirectly linked to the contract for which the contracting authority could be accountable.[91]

The *UK Regulations* permit a considerable degree of flexibility in the *ranking process* method. The *ranking process* method may include an assessment of the best price-quality ratio, price only, cost-only or quality-only. The criteria used in the ranking method must be based on price or cost using a cost-effectiveness approach including life-cycle costing, qualitative factors, environmental and social aspects linked to the subject matter of the intended contract. "Linked to the subject matter of the contract" may include factors such as how goods are produced, how they are traded or how raw materials are sourced. The qualitative factors that may be considered include technical merit, aesthetic and functional characteristics, social, environmental and innovative aspects. The consideration of factors relating to the tenderer are limited to those attributes that have a direct impact on the level of performance or factors that present risk to the performance.[92]

The *UK Regulations* exclude the possibility of horizontal objectives unrelated to the performance of the contract in the *ranking process.* The optimality determined by the method may include balancing the full life-cycle costing including the consideration of externalities with risk and quality of outcomes related to the performance of the contract. The discretion permitted in defining the method for the *transactional system* is regulated by the standard that it must identify the most economically advantageous tender by using the permitted criteria and that the method and weighting of criteria must be transparent.[93]

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91 Par 7.6.4.3.
92 Par 7.6.4.1.
93 Par 7.6.4.1.

9.7.5 Selection process

The regulated *selection process* provides for few exceptions to awarding the contract to the most highly ranked tender. A regulated process is mandated for obtaining an explanation or assessing the risk associated with abnormally low tenders. The procedure specified by the *UK Regulations* to consider risk of abnormally low tenders can be argued to promote cost-effectiveness by compelling a procedure for examining risk before selecting a course of action and ensuring that a potentially optimal tender is not disregarded.[94]

The contracting authority may decide not to award the contract to a tenderer if the tenderer has not complied with its obligations in EU environmental, social and labour law.[95]

The *UK Regulations* contemplate the cancellation of a call for tenders although no explicit conditions are provided. In the event that no acceptable tenders are received, the contracting authority may commence alternate procedures. This would include the case where no tender is within the contracting authority's budget.[96]

9.8 Comparative analysis

The purpose of the comparative analysis was to identify dissimilarities that could provide indications for regulatory improvement in meeting cost-effective decision-making requirements of the system.

9.8.1 Analysis of the regulatory systems' objectives and principles

It was concluded that there is basic congruence in the requirements for transparency, fairness and competitiveness in the regulatory systems of both jurisdictions.[97]

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94 Par 7.6.5.1.
95 Par 7.6.5.2.
96 Par 7.6.5.3.
97 Par 8.2.3.

The requirements of the *UK Regulations* for equity extend to permissive provisions for measures to promote the participation of under-represented groups, specifically to achieve gender-based equality. The South African framework requires the procurement system to be equitable, permitting categories of preference and measures to protect and advantage persons or categories of persons disadvantaged by unfair discrimination. The South African framework requires broader and positive measures for the achievement of equity as a requirement of the system.[98]

The requirements of the *UK Regulations* for the free movement of goods, freedom of establishment and freedom to provide services within the community of nations was concluded to have no correspondence with the requirements of the South African framework.[99]

The *UK Regulations* are required to possess elements of cost-effectiveness. Procedural cost-effectiveness, although not expressed as a requirement, was concluded to be a desirable characteristic as evidenced by the UK's representations in the consultative process establishing the EU Framework. Transactional cost-effectiveness was concluded to be equivalent to the principle or standard in tender evaluation procedures requiring the most economically advantageous tender for award. The interpretation of macro-level cost-effectiveness as the requirement to direct resources optimally at the achievement of macro-level outcomes was concluded to be a requirement of the *UK Regulations* although the outcomes must be directly or indirectly linked to the performance of the contract in the balance determined by the contracting authority and not from the system-wide perspective.[100]

The dissimilarities in the underlying principles driving regulatory design, at a high-level expose the motives and purposes of the jurisdictional contexts. The dissimilarities

98 Par 8.2.3.
99 Par 8.2.3.5.
100 Par 8.2.3.5.

between the underlying principles were investigated as possible explanations for dissimilarities in the regulatory provisions where necessary.

9.8.2 Qualification process

9.8.2.1 Procedural aspects

The flexibility of procedures offered by the *UK Regulations* to perform the *qualification process* were noted, in principle, to offer opportunities to improve the cost-effectiveness of the evaluation process although in practice to be of doubtful value.

The mandatory pre-qualification process, required by the South African framework through the operation of the *CSD* and the *Construction Works Framework*, was concluded to offer advantages in the procedural cost-effectiveness of the evaluation process for both public bodies and potential tenderers through standardisation and re-use of *qualification process* procedures.[101]

9.8.2.2 Formal aspects

The separate pre-qualificationary mechanisms of the *CSD* and *CIDB* registration in the South African framework offer certain safeguards against aspects of unnecessary disqualification on formal grounds.[102]

The explicit discretion afforded by the *UK Regulations* to seek rectification was concluded to provide a mechanism for limiting unnecessary exclusion of tenderers thereby reducing the potential for narrowing the set of available courses of action. The mechanism was further concluded to promote certainty in decision-making regarding formal aspects of the *qualification process*, reducing the probability of disputes and thereby improving the procedural cost-effectiveness of the system.[103]

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101 Par 8.3.1.4.
102 Par 8.3.3.4.
103 Par 8.3.3.4.

9.8.2.3 Responsibility aspects

The *Local Government Framework* extends responsibility criteria that may unnecessarily limit the production of solutions in the pursuit of remote objectives that may be more effectively achieved by conventional direct interventions.[104]

The *UK Regulations* include a procedure for a tenderer to submit evidence to show that measures it has taken may render it responsible, where it otherwise would not qualify. This promotes a wide set of available courses of action, although it may have the effect of increasing the effort and cost of the evaluation process.[105]

Set-asides permitted by the *UK Regulations* are discretionary and apply in limited circumstances. Although not required by the regulations, the cost directed at the achievement of the set-aside objectives in the circumstances of a specific transaction could be determined in order to apply the principles of macro-cost-effectiveness decision-making.[106]

9.8.2.4 Competency aspects

While the *UK Regulations* limit the competency criteria employed to a closed set, it does not constrain the public body to a particular method. By contrast, the South African framework permits a wider range of criteria to be employed but constrains the public body to a single method.[107]

The consideration of competency criteria in the pre-qualification process of the *Construction Works Framework* standardises criteria for particular classes of contract subject matter and provides providing a transparent set of fixed, mandatory and universal criteria to potential construction work tenderers. The central control of

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104 Par 8.3.3.4.
105 Par 8.3.3.4.
106 Par 8.3.3.4.
107 Par 7.3.4.4.

designations and associated criteria provide the means for system-wide objectives to be compelled by pre-qualificationary criteria.[108]

Limiting the evaluation of competency criteria to a weighted aggregation method has significant implications for the *transactional system* in the South African framework. The operation of a weighted aggregation method compensates for deficiencies in certain attributes with surfeits in others. This may be a desired method by the design of the public body but the operation of such methods was noted to be complex, and their results often difficult to predict. The specific discretion to employ different methods, as permitted in the *UK Regulations*, allows the public body greater freedom to design the *qualification process* of the *transactional system* to ensure the evaluation targets specific attributes.

9.8.3 Compliance process

9.8.3.1 Procedural aspects

Both the South African and UK frameworks require the *compliance process* to be conducted prior to the *ranking* and *selection processes*, concluded to promote procedural cost-effectiveness by excluding tenders early in the process that in any event would not be eligible for selection.[109]

9.8.3.2 Formal aspects

The explicit discretion afforded by the *UK Regulations* to seek rectification was concluded to provide a mechanism for limiting unnecessary exclusion of tenders thereby reducing the potential for narrowing the set of available courses of action. As with the *qualification process*, the provision was further concluded to promote certainty in decision-making regarding formal aspects of the *compliance process*, reducing the probability of disputes and thereby improving the procedural cost-effectiveness of the system.[110]

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108 Par 8.3.4.4.
109 Par 8.4.1.4.
110 Pars 8.4.2 and 8.3.1.4.

9.8.3.3 Substantive responsiveness

The South African and UK frameworks explicitly permit the specification and evaluation of substantive responsiveness criteria broadly in the same terms and with regard to certain criteria, such as the use of brand names and adherence to standards, they contain essentially similar limitations.[111]

9.8.3.3.1 Local content set-asides

Set-asides were generally concluded not to meet the requirement of cost-effectiveness in general and that checks and balances external to a tender process would be required to guard against contracting on unsatisfactory commercial terms. The mandatory exclusion of solutions not meeting local content thresholds in the South African framework, while permitted in terms of the legislative and regulatory framework, would not support the achievement of cost-effectiveness in general without such safeguard. To satisfy the requirements of macro cost-effectiveness viewpoint it would need to be shown that any cost incurred in the pursuit of promoting the local market maintains the optimal direction of resources to the balance of outcomes.[112]

9.8.3.3.2 Cost benchmark prohibition

The *UK Regulations* are silent about including publishing cost-benchmarks in the *transactional system* whereas it is prohibited as a compliance criterion in the South African framework. No conclusions can be drawn from the comparative analysis, other than the general observation that a published reserve price was concluded to promote the production of optimal solutions.[113]

111 Par 8.4.3.4.
112 Par 8.4.4.3.1.
113 Par 8.4.4.3.2.

9.8.3.3.3 Compliance criteria

The only significant difference in compliance criteria observed between the frameworks was the explicit inclusion of environmental criteria in the *UK Regulations.* The common limitation in both frameworks is that criteria must be related to the direct outcome and therefore do not present different propositions for cost-effectiveness.[114]

9.8.3.3.4 Compliance method

The *UK Regulations* do not constrain public bodies to any particular *compliance process* method. The South African framework constrains the *compliance process* to be undertaken as part of the evaluation of functionality. This was concluded to introduce risk by steering the public body to use a complex compensatory method with lower predictability in terms of its results. This was seen to both increase the risk of excluding a tender that is, in fact, compliant and of not excluding a tender that is, in fact, not compliant. This constraint compelled by the South African framework limiting the way in which decisions can be made presents risk in both these aspects and this constraint can be concluded not to be supportive of cost-effectiveness.[115]

9.8.3.3.5 Variant solutions

While variant solutions may increase the set of produced solutions to improve optimality, innovative or the horizontal solutions, it would appear that it is not a frequent inclusion in tender procedures and introduces risks into the process. The explicit provision in the *UK Regulations* as opposed to the silence in the South African framework would therefore not appear to offer a significant practical advantage to the requirement of cost-effectiveness in the system.[116]

9.8.4 Shortlisting process

The contribution of the shortlisting process to cost-effectiveness was limited to advancing procedural cost-effectiveness although it was concluded to pose a risk to

114 Par 8.4.4.3.3.
115 Par 8.4.4.3.4.
116 Par 8.4.4.3.5.

the elimination of optimal and worthwhile solutions. It can be concluded that the common exclusion of a shortlisting process in the open procedure in the South African and UK frameworks does not compromise cost-effectiveness.[117]

9.8.5 Ranking process

The transparency of the South African framework's uniform, blanket approach to determining merit promotes a general understanding of the requirement by potential tenderers. The fixed nature of criteria and weightings across all procurements reduces the problem of complexity in translation of the method in the production of optimal solutions. Conversely viewed, across the diverse content of different tenders, merit is simplistically determined by a narrow range of factors. The *UK Regulations* permit individual customisation, allowing the targeted production of solutions to suit each procurement.[118]

Owing to the uniformity of its approach, the South African framework's *ranking process* can be precisely analysed in terms of this requirement. Optimality is determined by the balancing of the price of the tender and the single outcome of broad-based black economic empowerment quantified as an expression of a tenderer's B-BBEE status. The cost-outcomes relationship is expressed in the compensatory method to determine optimality. Optimality is thus determined to the exclusion of other factors, notably the exclusion of factors relating to the direct outcome. By contrast, the *UK Regulations* permit the determination of optimality in the cost-outcomes relationship to include determinations based on price only, cost only, quality only or cost-quality. The choice and weighting of factors, within these constraints, must only satisfy the condition that it represents the most economically advantageous offer to the public body.[119]

Under the model of macro-level cost-effectiveness, the outcomes of the procurement system required by policy are included in the cost-outcome relationship. However as

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117 Par 8.5.4.
118 Par 8.6.5.
119 Par 8.6.5.

concluded above, in the procurement context factors relating to the direct outcome are always a consideration and, unless in the particular circumstances of a particular transaction all courses of action have been determined to be equivalent in this regard, must occupy some weight in determining the cost-outcomes relationship. The determination of optimality by the *ranking process* is thus limited by the *regulatory system* to fall short of the cost-effectiveness requirement.[120]

The limitation in the South African framework that a public body must only consider the price of a tender, after making necessary adjustments for certain variable elements, restricts the consideration of cost to one dimension, the amount quoted by the tenderer. Depending on the nature of the transaction, the *transactional system* may only require this single dimension of cost but, in general, a wider set of considerations may be necessary to develop the full picture of cost that will result from the transaction. Especially in the case of high-value complex transactions, the narrow view of cost taken in the South African framework is concluded not to support the model of cost-effectiveness.[121]

In principle, the imposition of blanket weightings in the *ranking process* for determining optimality in the cost-outcomes relationship for system-wide horizontal outcomes is supported in terms of the macro-level cost-effectiveness.[122]

9.8.6 Selection process

Prior to award, both the South African and UK frameworks require an examination of abnormally low tenders, a recognised weakness of *ranking processes* where price is highly weighted. The procedure specified in the *UK Regulations* was concluded to provide greater certainty to the public body and tenderers alike. The South African framework would rely on the general standards of fairness of administrative decisions to govern the decision to exclude an abnormally low-priced tender. It was submitted that the approach adopted by the *UK Regulations* supports cost-effective decision-

120 Par 8.6.5.
121 Par 8.6.5.
122 Par 8.6.5.

making by (1) compelling the risk associated with abnormally low bids to be considered by its explicit presence in the regulations, (2) ensuring that a procedure is followed to verify that a potentially optimal course of action is not being rejected for the wrong reason and (3) reducing the probability of a challenge to the decision by specifying the procedure to be followed.[123]

The South African framework also provides the latitude to consider other objective criteria, provided these are published. This discretion can be argued to provide the opportunity for refining the determination of optimality after the *ranking process*, although it would not extend to considering criteria in any way different from that intended by regulation.[124]

Although through different mechanisms, both frameworks provide for grounds to cancel the tender process if no acceptable tenders are received and provide for the discretion to embark on alternative procedures. This provision was concluded to promote the achievement of cost-effectiveness of the tender process.[125]

Both frameworks provide for grounds for the cancellation of the tender process if the tenders received are unaffordable or cannot be funded. The *UK Regulations* explicitly provide the discretion to embark on alternative procedures. This was concluded to promote the achievement of cost-effectiveness.[126]

9.8.7 Summary of recommendations

The significant regulatory shortfalls in the cost-effectiveness of decision-making indicated by the comparative analysis in the South African system of procurement are summarised as recommendations below for improving the system:[127]

123 Par 8.7.5.
124 Par 8.7.5.
125 Par 8.7.5.
126 Par 8.7.5.
127 Par 8.8.

(a) Explicit provisions for the rectification of formal defects in the *qualification process* may be considered in the *qualification* and *compliance processes*.

(b) Reassessment of the effectiveness of including responsibility criteria in the *qualification process* aimed at certain remote objectives taking into account the balance of excluding potential courses of action without consideration of the cost of such exclusions.

(c) Explicit provisions for a tenderer to submit evidence to show measures that it has taken to qualify where it otherwise would not in the *qualification process*.

(d) Assessing the effect of including qualification criteria in the compensatory scheme together with compliance criteria in evaluation of functionality. The separation of the *qualification process* from the *compliance process* in filtering may enforce greater transparency in the grounds for disqualification, improving the participation and consequently, the production and inclusion of a wider set of available solutions.

(e) Permitting greater discretion in the methods permitted for the *compliance process*.

(f) Within the fixed blanket weightings for system-wide horizontal ranking criteria, permitting greater discretion to consider factors relating to the direct outcomes, for example quality in the *ranking process.*

(g) The discretion for the wider consideration of cost beyond the adjusted price of the tender in the *ranking process*.

(h) Requiring the examination of abnormally low-priced tenders with an associated procedure to ensure procedures to obtain greater certainty are carried out prior to excluding a potentially optimal solution from selection.

Using the provisions of the *UK Regulations* as functional prototypes, the comparative analysis concluded that superior choices might exist in terms of the regulatory design of the tender evaluation sub-processes. In summary, these relate to procedures, methods and the latitude for discretion to account for particular transaction circumstances in the assembly of *transactional systems*. Alternatively, while the comparative analysis concentrated on dissimilarities between the *regulatory systems* with respect to cost-effectiveness, the recommendations could be viewed as the extent

of material dissimilarities between the *regulatory systems* taking into account the different objectives and environment of the two jurisdictions. The decision-making sub-processes are regulated by similar constructs in both systems and there is considerable commonality in the detailed provisions.

9.9 Concluding remarks

In conclusion, through the comprehensive analysis of the meaning of 'cost effective' as a constitutional requirement of the procurement system, the meaning was found to have application in a wider sense than inferred from its common usage. The conceptual elevation of 'cost effective' to apply at various levels in the system was found to accord with its application in programme measurement and analysis, literary opinion and in case law, as well as in the general principles applied to the design of procurement regulation. The application of these different views of cost-effectiveness may provide a different vantage point for dialogue regarding regulatory design.

The models offered for the defining the cost-effectiveness of courses of action, decisions regarding the selection or rejection of courses of action and for systems of such decision-making provide basic criteria for determining compliancy with the requirement of cost-effectiveness at a principles level.

The functional model of decision-making processes, while constructed for the purpose of the analysis of the *regulatory system* within the scope of this study, may usefully be enhanced to cover analyses of evaluation functions in a more general sense.

As observed, the failure of a *transactional system* to comply with the constitutional requirement of cost-effectiveness would not imply the non-compliance of the *regulatory system*.[128] Under what circumstances a constitutional requirement of system, such as cost-effectiveness of the procurement system, would be justiciable therefore remains an open question. The question of the *regulatory system* meeting

[128] Par 3.8.

the constitutional requirement for systemic cost-effectiveness is perhaps limited to principles-based arguments, such as conducted in this study.

The significance of the public procurement in the economy of South Africa is well established. The importance of the public procurement system is recognised at a constitutional level, which imposes requirements on the system beyond those aimed directly at economic outcomes. The understanding of the requirement for a cost-effective system exposed by the models developed in the study extends this requirement to all outcomes of the system: while the balance of constitutional public procurement outcomes must be driven and determined by political forces, the resources directed at the achievement of the balance of outcomes so determined must be worthwhile and optimal. The principles developed in understanding the functional role of legal regulation toward the achievement of cost-effectiveness and the specific recommendations for refining the provisions of the current regime for cost-effectiveness will further the attainment of this constitutional requirement.

Bibliography

Literature

Albano *et al Information and Competitive Tendering*

Albano G *et al* "Information and competitive tendering" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Ancarani *Service Sourcing*

Ancarani A "Service Sourcing" in Thai K (ed) *International Handbook of Public Procurement* (Auerbach Publications Boca Raton 2009)

Anthony *Construction Procurement Regulation*

Anthony A *The Legal Regulation of Construction Procurement in South Africa* (LLM-Thesis University of Stellenbosch 2013)

Arrowsmith and Trybus *Public Procurement*

Arrowsmith S and Trybus M *Public Procurement The Continuing Revolution* (Kluwer Law International The Hague 2003)

Arrowsmith *UNCITRAL Model Law*

Arrowsmith S *Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard* The International and Comparative Law Quarterly 2004 53(1) 17-46

Arrowsmith *Contract Award Procedures*

Arrowsmith S "The Public Sector Directive 2004/18 – Contract Award Procedures" in Arrowsmith S (ed) *EU public procurement law: An introduction* (EU Asia Inter University Network for Teaching and Research in Public Procurement 2010) 129-216

Arrowsmith *EC Regime on Public Procurement*

Arrowsmith S "EC Regime on Public Procurement" in Thai K (ed) *International Handbook of Public Procurement* (Auerbach Publications Boca Raton 2009)

Arrowsmith *Horizontal Policies*

Arrowsmith S *Horizontal Policies in Public Procurement: A Taxonomy* Journal of Public Procurement 2010 10(2) 149-186

Arrowsmith *Public Procurement Regulation*

Arrowsmith S "Public Procurement: Basic concepts and the coverage of procurement rules" in Arrowsmith S (ed) *Public Procurement Regulation: An Introduction* (Asia Link 2000) 1-31

Arrowsmith, Linarelli and Wallace *Regulating Public Procurement*

Arrowsmith S, Linarelli J and Wallace D *Regulating Public Procurement, National and International Perspectives* (Kluwer Law International The Hague 2000)

Asker and Cantillion *Optimal Procurement*

Asker J and Cantillion E *Optimal Procurement when both Price and Quality Matter* Centre for Economic Policy Research 2005 Discussion Paper No 5276

Asker and Cantillion *Properties of scoring auctions*

Asker J and Cantillion E *Properties of scoring auctions* The RAND Journal of Economics 2008 39(1) 69-85

Ausubel and Cramton *Dynamic auctions*

Ausubel L and Cramton P "Dynamic auction in procurement" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Bajari and Tadelis *Incentives and award procedures*

Bajari P and Tadelis S "Incentives and award procedures: competitive tendering vs. negotiations in procurement" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Bajari, MacMillan and Tadelis *Auctions Versus Negotiations*

Bajari P, MacMillan R and Tadelis S *Auctions Versus Negotiations in Procurement: An Empirical Analysis* Journal of Law, Economic and Organization 2009 25 2 372-399

Barnett *et al Impact and Value for Money*

Barnett, C *et al Measuring the Impact and Value for Money of Governance Programs* Itad 2010 1-37.

Bergman and Lundberg *Tender evaluation*

Bergman M and Lundberg S *Tender evaluation and supplier selection methods in public procurement* Journal of Purchasing and Supply Management 2013 19(2) 73-83

Bolton *Analysis of Criteria*

Bolton P *Government An analysis of the criteria used to evaluate and award public tenders* Speculum Juris 2014 1 1-26

Bolton *Committee System*

Bolton P *The Committee System for Competitive Bids in Local Government* PELJ 2009 12(2) 57-96

Bolton *Dispensing with Public Tender Procedures*

Bolton P *Grounds for dispensing with Public Tender Procedures in Government Contracting* PELJ 2006 9(2) 1-38

Bolton *Law of Government Procurement*

Bolton P *Law of Government Procurement in South Africa* (LexisNexis Butterworths Durban 2006)

Bolton *Regulatory framework*

Bolton P "The regulatory framework for public procurement in South Africa" in Quinot G and Arrowsmith S (eds) *Public Procurement Regulation in Africa* Cambridge University Press Cambridge 2013 178-199

Bolton *Scope for Negotiating Government Contracts*

Bolton P *Scope for negotiating and/or vary the terms of government contracts awarded by way of a tender process* Stellenbosch Law Review 2006 17(2) 266-288

Bolton *Use of Government Procurement*

Bolton P *The Use of Government Procurement as an Instrument of Policy* SALJ 2004 121(3) 619-635

Botha *Statutory Interpretation*

Botha C *Statutory Interpretation: An introduction for students* 4 ed (Juta Lansdowne 2005)

Bouckaert and Halligan *Managing Performance*

Bouckaert G and Halligan J *Managing Performance – International Comparisons* Routledge Oxford 2008)

Bovis *Regulatory Trends*

Bovis C *Regulatory Trends in Public Procurement at the EU Level* European Procurement and Public Private Partnership Law Review 2012 4 221-228

Braithwaite *Rule and Principles*

Braithwaite J *Rule and Principles*: *A Theory of Legal Certainty European law* Australian Journal of Legal Philosophy 2002 27 47-82.

Braun *Selection of bidders*

Braun P *Selection of bidders and contract award criteria: the compatibility of practice in PFI procurement with European law* Public Procurement Law Review 2001 1 1-14.

British Standards Institute *BS ISO 15686-5*

British Standard Institute *BS ISO 15686-5 Building and constructed assets – Service-life planning Part 5: Life-cycle costing* British Standards Institute London 2008)

Brynard *Flexible approach*

Brynard D *The duty to act fairly A flexible approach to procedural fairness in public administration* Administratio Publica 2010 18(4) 124-140

Burger and Hawkesworth *Value for Money*

Burger and Hawkesworth *How to attain Value for Money: Comparing PPP and traditional Infrastructure Public Procurement* OECD Journal on Budgeting 2011 1 1-56

Butler *Exclusion, Qualification and Selection*

Butler L "Exclusion, Qualification and Selection Under the UK Public Contracts Regulations 2015: The Copy-Out Copycat" in Exclusion, Qualification and Selection in Public Procurement DJØF 2015. Available at http://ssrn.com/abstract=2580122

Carpineti, Piga and Zanza *The variety of procurement practice*

Carpineti L, Piga G and Zanza M "The variety of procurement practice: evidence from public procurement" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Cellini and Kee *Cost-effectiveness*

Cellini S and Kee J " Cost-effectiveness and Cost-benefit Analysis" in Wholey J, Hatry H and Newcomer K (eds) *Handbook of Practical Program Evaluation. 3rd Edition.* (Josse-Bass San Francisco 2010) 493-530

Chen *Economic Approach to Public Procurement*

Chen T, *An Economic Approach to Public Procurement* Journal of Public Procurement 2008 8(3) 407-430

Christie *Law of Contract in South Africa*

Christie R *The Law of Contract in South Africa* 5 ed (LexisNexis Butterworths Durban 2006)

Collins *Complete English Dictionary*

Collins *English Dictionary: Complete and Unabridged.* 6th Edition. (HarperCollins Glasgow 2003)

Costantino *et al Balancing Additional Costs*

Costantino N *et al Balancing the additional costs of purchasing and the vendor set dimension to reduce public procurement costs* Journal of Purchasing and Supply Management 2012 18(3) 189-198

Cropper *et al Getting cars off the road*

Cropper M et al *Getting Cars Off the Road: The Cost-Effectiveness of an Episodic Pollution Control Program* Environmental and Resource Economics 2014 57(1) 117-143

Csáki and Adam *DSS Requirements*

Csáki C and Adam F *DSS Requirements to Support the Regulated Decision Making Process of Public Procurement* Journal of Decision Systems 2010 19 4 439-464.

Csáki *Decision Making Practice*

Csáki C "Investigating the Decision Making Practice of Public Procurement Procedures" International Public Procurement Conference Proceedings September 2006 869-899

Currie and de Waal *Bill of Rights*

Currie I and de Waal J *The Bill of Rights Handbook* 5 ed (Juta Lansdowne 2005)

Dauer *Responsiveness or responsibility*

Dauer J *Responsiveness or Responsibility? That Is the Question When Rejecting a Bidder for Minimum Failing to Provide References Demonstrating Experience Standards* The Procurement Lawyer 2012 48(1) 14-19

De Boer *et al Analysis of some mistakes*

De Boer L *et al An analysis of some mistakes, miracles and myths in supplier selection* 15th IPSERA Annual Conference 6-8 April 2006, San Diego, USA

De Boer, Labro and Morlacci *A review of methods*

De Boer L, Labro E and Morlacci P *A review of methods supporting supplier selection* European Journal of Purchasing and Supply Management 2001 7(2) 75-89

De Gouveia *Price Factor*

De Gouveia M *The Price Factor in EC Public Tenders* Public Contract Law Journal 2002 31(4) 679-693

De la Harpe *Green Public Procurement*

De la Harpe S *Green Public Procurement – An Option for South Africa?* 2008 Speculum Juris 22(2) 53-74

De la Harpe *Public Procurement Law*

De la Harpe S *Public Procurement Law: A Comparative Analysis* (LLD-Thesis University of South Africa 2009)

De la Harpe *Substantive and Objective Criteria*

De la Harpe S "Substantive and Objective Criteria in Preferential Public Procurement: The Case of the 2011 Regulations in South Africa" in Nyeck N (ed) *Public Procurement Reform and Governance in Africa* (Springer Nature New York 2016)

De la Harpe *Electronic Reverse Auctions*

De la Harpe S *The Use of Electronic Reverse Auctions in Public Procurement in South Africa* 2012 Speculum Juris 5(2) 21-37

Dekel and Schurr *Cognitive Biases*

Dekel and Schurr *Cognitive Biases in Government Procurement – An experimental Study* Review of Law & Economics 2014 169-200

Dekel *Improving public procurement efficiency*

Dekel O *Improving public procurement efficiency – applying a compliance criterion* Public Procurement Law Review 2015 3 63-77

Dekel *Legal Theory of Competitive Bidding*

Dekel O *The Legal Theory of Competitive Bidding for Government Contracts* Public Contract Law Journal 2008 37(2) 237-268

Dekel *Modification of Government Contract*

Dekel O *Modification of a Government Contract Awarded Following a Competitive Procedure* Public Contract Law Journal 2009 38(2) 401-426

Diamond *Performance management framework*

Diamond J *Establishing a Performance Management Framework for Government* Presupuesto y Gasto Público 2005 40 159-183

Dimitri *Best Value for Money*

Dimitri N *"Best Value for Money" in Procurement* Public Procurement Law Review 2013 13 2 149-175

Dimitri, Piga and Spagnolo *Handbook of Procurement*

Dimitri N, Piga G and Spagnolo G "Introduction" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Dini, Pacini and Valletti *Scoring rules*

Dini F, Pacini R, and Valletti T "Scoring rules" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Domberger and Jensen *Contracting Out*

Domberger S and Jensen P *Contracting Out by the Public Sector: Theory, Evidence, Prospects* Oxford review if Economic Policy 1997 13 2 67-78

Engel *et al Managing risky bids*

Engel A *et al* "Managing risky bids" in Dimitri N, Piga G and Spagnolo G (eds) *Handbook of Procurement* (Cambridge University Press New York 2006)

Erridge *Public Procurement and Supply Management Strategies*

Erridge A *Public Procurement and Supply Management Strategies* Public Policy and Administration 2002 17 1 52-71

Erridge, Fee and McIlroy *Assessment of Competitive Tendering*

Erridge A, Fee R and McIlroy J *An Assessment of Competitive Tendering using Transaction Cost Analysis* Public Money and Management 1999 19 3 37-42

Estache and Iimi *Quality or Price*

Estache A and Iimi *A Quality or Price? Evidence from ODA-Financed Public Procurement* Public Finance Review 2011 40(4) 435-469

Farina *Administrative law as regulation*

Farina C *Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power* SA Public Law 2004 19(1) 489-512

Faustino *Award Criteria*

Faustino P *Award Criteria in the new EU Directive on public procurement* Public Procurement Law Review 2014 3 124-133

Fuentes-Bargues and González-Gaya *Disproportionate tenders*

Fuentes-Bargues J and González-Gaya C *Determination of disproportionate tenders in public procurement* Journal of Investment and Management 2013 2(1) 1-9

Gluch and Baumann *Life cycle costing approach*

Gluch P and Baumann H *The life cycle costing (LCC) approach: a conceptual discussion of its usefulness for environmental decision-making* Building and Environment 2004 39 571-580

Goldberg *Competitive Bidding*

Goldberg V *Competitive Bidding and the Production of Precontract Information* The Bell Journal of Economics 1977 8 1 250-261

Graells *Exclusion, Qualitative Selection and Short-listing*

Graells A "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" in Lichere F, Caranta R and Treumer S (eds) *Modernising Public Procurement: The New Directive* (DJØF Publishing Copenhagen 2014)

Gutman *Room for discretion*

Gutman J *Is there room for discretion? Reforming public procurement in a compliance oriented world* Global Economy and Development (Brookings Institution Press 2014)

Hage *Comparative Law as Method*

Hage J " *Comparative Law as method and the method of Comparative Law*" in Adams M and Hierbaut D (eds) *The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke* (Hart Publishing Oxford and Portland 2014)

Helmrich *Equality-oriented horizontal policies*

Helmrich C *Equality-oriented horizontal policies in South African public procurement 2014* African Public Procurement Law Journal 2014 1 61-108

Henty *Implementation of the EU Directives in the UK*

Henty P *Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015* Public Procurement Law Review 2015 3 NA75-NA80

Henty *Use of public procurement*

Henty P *Use of public procurement to promote tax compliance in the United Kingdom 2014* Public Procurement Law Review 2014 1 NA26-NA28

Hoexter *Administrative Law*

Hoexter C *Administrative Law in South Africa* (Juta Claremont 2007)

Holt *Which contractor selection methodology?*

Holt G *Which contractor selection methodology?* International Journal of Project Management 1998 16(3) 153-164

IEG World Bank *Sourcebook for evaluating programs*

Independent Evaluation Group - World Bank *Sourcebook for Evaluating Global and Regional Partnership Programs* 2007 IEG-World Bank

Jin, Ryan and Yund *Two Stage Procurement Processes*

Jin Y, Ryan J and Yund W *Two Stage Procurement Processes With Competitive Suppliers and Uncertain Supplier Quality* IEEE Transactions on Engineering Management 2014 61(1) 147-158

Johnson *Trends in Governmental Outsourcing*

Johnson M "The Current Trends in Outsourcing as a practice: Causes, Case studies and Logic with Emphasis on the Governmental Sector" International Public Procurement Conference Proceedings 2004 3 151-170

Kameshwaran *et al Multiattribute electronic procurement*

Kameshwaran S *et al Multiattribute electronic procurement using goal programming* European Journal of Operations Research 2007179 518-536

Kidd *Procurement's Value*

Kidd A "Procurement's Value: What Are We Really Measuring" in Piga G and Thai K (eds) Advancing Public Procurement: Practices; Innovation and Knowledge Sharing (PrAcademics Press Publications Boca Raton 2007) 413-432

Kinsey *Transparency in Government Procurement*

Kinsey M *Transparency in Government Procurement*: *An International Consensus* Public Contract Law Journal 2004 34(1) 155-173

Krishna *Auction Theory*

Krishna K *Auction Theory* (Academic Press Burlington 2010)

Krüger *Ban-on-negotiations*

Krüger K, *Ban-on-negotiations in Tender Procedures: Undermining Best Value for Money?* Journal of Public Procurement 2004 4(3) 397-436

La Chimia *Donors' influence*

La Chimia A "Donors' influence on developing countries' procurement systems, rules and markets: a critical analysis" in Quinot G and Arrowsmith S (eds) *Public Procurement Regulation in Africa* Cambridge University Press Cambridge 2013 219-260

Lalive, Schmutzler and Zulehner *Auctions vs negotiations*

Lalive, R; Schmutzler, A; Zulehner, C *Auctions vs negotiations in public procurement: Which works better?* 2015 Working Paper Series, University of Zurich No 209

Letchmiah *Effectiveness of Preferential Procurement*

Letchmiah D *An Examination of the Effectiveness of Preferential Procurement in the South African Construction Industry* (PhD-Thesis University of the Witwatersrand 2012)

Levin and McEwan *Cost-effectiveness Analysis*

Levin H and McEwan P Cost-Effectiveness Analysis: Methods and Applications 2 ed (Sage Publishing Thousand Oaks 2001)

Levin *Cost-effectiveness Analysis*

Levin H "Cost-effectiveness Analysis" in *International* Carnoy M (ed) *Encyclopedia of Economics of Education* 2 ed (Emerald Publishing Oxford 1995) 381-386.

Lorentziadis *Post-objective determination*

Lorentziadis P *Post-objective determination of weights of the evaluation factors in public procurement tenders* European Journal of Operational Research 2010 200

Luzzini, Caniato and Spina *Designing vendor evaluation systems*

Luzzini, Caniato and Spina *Designing vendor evaluation systems: An empirical analysis* Journal of Purchasing and Supply Management 2014 20 113-129

Mattisson and Thomasson *Strategic process*

Mattisson O and Thomasson A The *strategic process and its impact on the outcome of a tender* 2007 Annals of Public and Cooperative Economics 78(3) 439-454

McAfee and McMillan *Auctions and Bidding*

McAfee R and McMillan J *Auctions and Bidding* 1987 Journal of Economic Literature XXV June 1987 699-738

McCrudden *Using public procurement*

McCrudden C *Using public procurement to achieve social outcomes* Natural Resources Forum 2004 28 257-267

McCue and Prier *Using Agency Theory*

McCue C and Prier E *Using Agency Theory to Model Cooperative Public Purchasing* Advancing Public Procurement 2006 8 1-35

Mulgan *Measuring Social Value*

Mulgan G *Measuring Social Value* Stanford Social Innovation Review 2010 38-43

Ng *Multiple criteria*

Ng W *An efficient and simple model for multiple criteria supplier selection problem* European Journal of Operational Research 2008 186(3) 1059-1067.

Nicholas and Fruhmann *Small and Medium-sized Enterprises Policies*

Nicholas C and Fruhmann M *Small and Medium-sized Enterprises Policies in Public Procurement: Time for a Rethink* Journal of Public Procurement 2014 14 1 328-360.

Nicholas *Development of International Standards*

Nicholas C *Development of International Standards in Public Procurement Trade Law and Development* 2015 7 1 63-88.

Noon *Racial preferences for social stability*

Noon C *The Use of Racial Preferences in Public Procurement for Social Stability* Public Contract Law Journal 2009 38(3) 611-632

Nydick and Hill *Using the Analytic Hierarchy Process*

Nydick R and Hill R *Using the Analytic Hierarchy Process to Structure the Supplier Selection Procedure* International Journal of Purchasing and Materials Management 1992 28 2

OECD *Principles for Integrity*

OECD *Principles for Integrity in Public Procurement* 2009 OECD Publishing.

Palaneeswaran and Kumaraswamy *Contractor Prequalification Methodologies*

Palaneeswaran E and Kumaraswamy M *Recent advances and improvements in contractor prequalification methodologies* Building and Environment 2001 36 73-87.

Pauw and Wolvaardt *Multi-criteria Decision Analysis*

Pauw J and Wolvaardt J *Multi-criteria decision analysis in public procurement – a plan from the South* Politeia 2009 28(1) 66-88

Penfold and Reyburn *Public Procurement*

Penfold G and Reyburn P "Public Procurement" in Chaskalson M *et al* (eds) *Constitutional Law of South Africa* Volume 1 2nd ed (Juta Cape Town 2003) 25-i – 25-36

Prier and Csáki *Decision making framework*

Prier E and Csáki C "A Decision-making Framework to Analyze the Impact of Public Procurement Regulation" in Thai K (ed) *Toward New Horizons in Public Procurement* (PrAcademics Press Publications Boca Raton 2010) 412 H-J

Prier and McCue *Definition of public procurement*

Prier E and McCue C *The Implications of a Muddled Definition of Public Procurement* Journal of Public Procurement 2009 9 3&4 326-370

Priess *Rules on Exclusion*

Priess H *The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive* Public Procurement Law Review 2014 3 112-123

Quinot *Administrative Law 2010*

Quinot G *Administrative Law* Annual Survey of South African Law 2010 41-76

Quinot *Administrative Law 2011*

Quinot G *Administrative Law* Annual Survey of South African Law 2011 49-65

Quinot and Arrowsmith *Public Procurement Regulation*

Quinot G and Arrowsmith S "Introduction" in Quinot G and Arrowsmith S (eds) *Public Procurement Regulation in Africa* Cambridge University Press Cambridge 2013 1-21

Quinot *Institutional Legal Structure* 2014

Quinot G *An Institutional Legal Structure for Regulating Public Procurement in South Africa* 2014.

Quinot Judicial Regulation

Quinot G The Judicial Regulation of State Commercial Activity (LLD-Thesis University of Stellenbosch 2007)

Quinot *Promotion of social policy*

Quinot G "Promotion of social policy through public procurement in Africa" in Quinot G and Arrowsmith S (eds) *Public Procurement Regulation in Africa* Cambridge University Press Cambridge 2013 370-403

Quinot *Role of Quality*

Quinot G *The Role of Quality in the Adjudication of Public Tenders* PELJ 2014 17(3) 1110-1136

Quinot *State Commercial Activity*

Quinot G *State Commercial Activity A Legal Framework* (Juta Claremont 2009)

Riedl *et al Reducing Uncertainty*

Riedl D *et al Reducing Uncertainty in Supplier Selection Decisions: Antecedents and Outcomes of Procedural Rationality* 2013 Journal of Operations Management 31 24-36

Robinson *Cost-effectiveness analysis*

Robinson R, Cost-effectiveness analysis BMJ (Clinical research ed.) 1993 307 6907 793-795

Samuel *Comparative Law Theory*

Samuel G *An Introduction to Comparative Law Theory and Method* (Hart Publishing Oxford and Portland, Oregon 2014)

Schapper, Veiga Malta and Gilbert *Framework*

Schapper P, Veiga Malta J and Gilbert D *An Analytical Framework for the Management and Reform of Public Procurement* Journal of Public Procurement 2006 6(1&3) 1-26

Schooner *Objectives*

Schooner S *Desiderata: Objectives for a System of Government Contract Law* Public Procurement Law Review 2002 11 103

Sher and Punglia *Decision Analysis*

Sher D and Punglia R *Decision Analysis and Cost-Effectiveness Analysis for Comparative Effectiveness Research - A Primer* Seminars in Radiation Oncology 2014 24(1) 14-24

Soliño and De Santos *Transaction Costs*

Soliño A and De Santos P *Transaction Costs in Transport Public–Private Partnerships: Comparing Procurement Procedures* Transport Reviews 2010 30 3 389-406

Soman *Framing*

Soman D "Framing, Loss Aversion and Mental Accounting" in Koehler D and Harvey N (eds) *Blackwell Handbook of Judgement and Decision Making* Blackwell Publishing Malden 2004 377-423

Soudry *Principal-Agent Analysis*

Soudry O "A Principal-Agent Analysis of Accountability in Public Procurement" in Piga G and Thai K (eds) Advancing Public Procurement: Practices; Innovation and Knowledge Sharing (PrAcademics Press Publications Boca Raton 2007) 432-451

Stilger *Formulas*

Stilger P *Formulas for Choosing the Most Economically Advantageous Tender – a Comparative Study* (MSc-Thesis University of Utrecht 2011)

Stillman *American Bureaucracy*

Stillman R *The American Bureaucracy: the Core of Modern Government* (Nelson-Hall Chicago 1996)

Tadelis *Public Procurement Design*

Tadelis S *Public procurement design: Lessons from the private sector* International Journal of Industrial Organization 2012 30(3) 297-302

Teisman *Models for research*

Teisman *Models for research into Decision-making Processes*: *on Phases, Streams and Decision-making rounds* Public Administration 2000 78 4 937-956

Telgen, Harland and Knight *Public Procurement*

Telgen J, Harland C and Knight L *"Public Procurement in Perspective"* in Knight L *et al* (eds) *Public Procurement: International Cases and Commentary* (Routledge Oxon 2006)

Telles and Butler *Public Procurement Award Procedures*

Telles P and Butler L "*Public Procurement Award Procedures* in Directive 2014/24/EU" in Lichere F, Caranta R and Treumer S (eds) *Modernising Public Procurement: The New Directive* (DJØF Publishing Copenhagen 2014)

Thai *Advancing Public Procurement*

Thai K "Advancing Public Procurement: Practices; Innovation and Knowledge Sharing" in Piga G and Thai K (eds) Advancing Public Procurement: Practices; Innovation and Knowledge Sharing (PrAcademics Press Publications Boca Raton 2007) 1-13

Thai *International Public Procurement*

Thai K "International Public Procurement: Concepts and Practices" in Thai K (ed) *International Handbook of Public Procurement* (Auerbach Publications Boca Raton 2009)

Trepte *Regulating Procurement*

Trepte P *Procurement Regulation* (Oxford University Press Oxford 2006)

Tsai, Wang and Lin *Improving the ranking procedure*

Tsai H, Wang L and Lin L *A study on improving the ranking procedure for determining the most advantageous tender* Construction Management Economics 2007 25(5) 545-554

Tunca, Wu and Zhong *Price, Quality and Incumbency*

Tunca T, Wu D and Zhong F *An Empirical Analysis of Price, Quality, and Incumbency in Procurement Auctions* Manufacturing & Service Operations Management 2013 16(3) 346-364

Turpin *Government Contracts*

Turpin C *Government Contracts: A Study of Methods of Contracting* The Modern Law Review 1968 31(3) 241-256

Turpin *Government Procurement and Contracts*

Turpin C *Government Procurement and Contracts* (Longman Harlow 1989)

Volk P*rinciples-oriented approach*

Volk D *A principles-oriented approach to regulating reverse auctions* Public Contract Law Journal 2007 37(1) 127-139

Wan and Beil *RFQ Auctions*

Wan Z and Beil D *RFQ Auctions with Supplier Qualification Operations Research* 2009 57 4 934-949

Watermeyer *Facilitating sustainable development*

Watermeyer R *Facilitating sustainable development through public and donor procurement regimes: tools and techniques* Public Procurement Law Review 2004 1 30-55

Watermeyer *Generic and systematic approach to procurement*

Watermeyer R *A generic and systematic approach to procurement: the case for an international standard* Public Procurement Law Review 2005 1 39-61

Watermeyer *Regulating Public Procurement in South Africa*

Watermeyer R *Regulating public procurement in Southern Africa through international and national standards* Public Procurement Regulation in Africa Conference Stellenbosch 2011 October 25

Watt, Kayis and Willey *Tender evaluation*

Watt D, Kayis B and Willey K *The relative importance of tender evaluation and contractor selection criteria* International Journal of Project Management 2010 28(1) 51-60

Williams-Elegbe *Perspective on corruption*

Williams-Elegbe S "A perspective on corruption and public procurement in Africa" in Quinot G and Arrowsmith S (eds) *Public Procurement Regulation in Africa* Cambridge University Press Cambridge 2013 336-36

Witte, Joost and Thimm *Complex Decision-making Processes*

Witte E, Joost N and Thimm A *Complex Decision-making Processes – The Phase Theorem* International Studies of Management & Organization 1972 2 2 156-182

Ye *Indicative bidding*

Ye *Indicative bidding and a theory of two-stage auctions* Games and Economic Behavior 2007 58 181–207

Yukins *Assessing procurement through the principal-agent model*

Yukins C *A Versatile Prism: Assessing Procurement Law through the Principal-Agent Model* 2010 Public Contract Law Journal 40 63-86

Yukins *Case Study*

Yukins C *A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement* Public Contract Law Journal 2006 35(3) 457-484

Yukins, Wallace and Marburg-Goodman *International Procurement*

Yukins C, Wallace D Jr and Marburg-Goodman J *International Procurement* The International Lawyer 43 2 International Legal developments in review 2008 571-575

Legislation

Board Notice 86 of 2010 in GG 33239 of 28 May 2010

Broad-based Black Economic Empowerment Act 53 of 2003

Broad-based Black Economic Empowerment Amendment Act 46 of 2013

Competition Act 89 of 1998

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa, Act 200 of 1993

Constitution of the Republic of South Africa, Second Amendment Act 61 of 2001

Construction Industry Development Board Act 38 of 2000

Engineering Profession Act 48 of 2000

GN 1005 in GG 719 of 14 June 2016

GN 1737 in GG 25773 of 28 November 2003

GN 692 in GG 26427 of 9 June 2004 as amended by GN R1333 in GG No. 26991 of 12 November 2004, GN R751 in GG 27831 of 22 July 2005, GN R842 in GG 29138 of 18 August 2006, GNR1121 in GG 30510 of 23 November 2007, GN R1224 in GG 31603 of 14 November 2008 and GN R464 in GG 36629 of 2 July 2013

GN R1005 in GG 35939 of 30 November 2012

GN R225 in GG 27388 of 15 March 2005

GN R309 in GG 27431 of 1 April 2005

GN R502 in GG 34350 of 8 June 2011

GN R725 in GG 22549 of 10 October 2001

GN R868 in GG 27636 of 30 May 2005

GN R878 in GG 31346 of 22 August 2008

Housing Consumer Protection Measures Act 95 of 1998

Local Government: Municipal Demarcation Act 27 of 1998

Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Finance Systems Act 32 of 2000

National Energy Act 34 of 2008

National Small Business Act 102 of 1996

Preferential Procurement Policy Framework Act 5 of 2000

Prevention and Combating of Corrupt Activities Act 12 of 2004

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Protected Disclosures Act 26 of 2000

Public Finance Management Act 1 of 1999

State Information Technology Agency Act 38 of 2002

State Information Technology Agency Act 88 of 1998

State Tender Board Act 86 of 1968

Case law

ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1997 (10) BCLR 1429 (W)

Allpay Consolidated Investment Holdings (Pty) Limited and others v Chief Executive Officer of the South African Social Security Agency and others (Centre for Child Law as amicus) 2013 JOL 30089 (GNP)

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 1 SA 604 (CC)

Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another 2002 9 BCLR 891 (CC)

Bizstorm 51 CC T/A Global Force Security Services v Witzenberg Municipality and Another (unreported) Case no 13794/13 2014 ZAWCHC 83

BKS Consortium v Mayor, Buffalo City Metropolitan Municipality and Others 2013 4 All SA 461 (ECG)

CAE Construction CC v Petroleum Oil & Gas Corporation of S.A. and Others 2006 (3667/2006) ZAWCHC 57

Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others 2001 (10) BCLR 1026 (SCA)

Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality 2009 JOL 23397 (ECG)

Cash Paymaster Services (Eastern Cape) (Pty) Ltd v Member of the Executive Council Responsible for Social Development and Another (336/06) 2007 ZAECHC 70 (1 October 2007)

Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 1999 (1) SA 324 (Ck HC)

Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others 2005 4 All SA 487 (SCA)

Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd 2013 2 All SA 501 (SCA)

Chirwa v Transnet Limited and Others 2007 SA 367 (CC) 75-76.

City of Cape Town v Aurecon South Africa (Pty) Ltd (5663/13) 2014 ZAWCHC 51

Cshell 271 (Pty) Ltd v Oudtshoorn Municipality 2012 3 All SA (WCC)

Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another 2014 1 All SA 545 (SCA)

Entsha Henra bk v Hessequa Munisipaliteit and Others (1351/08) [2008] ZAWCHC 25 (15 May 2008)

Equity Aviation Services (Pty) Limited v South African Post Office Limited (17239A/2007) 2008 ZAGPHC 4

Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd 2009 8 BCLR 813 (SCA)

First Base Construction CC v Ukhahlamba District Municipality and Others 2006 JOL 16724 (E)

Freedom Stationery (Pty) Limited and another v Member of the Executive Council for Education, Eastern Cape and others (Centre for Child Law as amicus) 2013 JOL 30424 (ECG)

Gaydon Motor Spares (Pty) Ltd v Minister of Safety & Security & others 2008 JOL 21794 (N)

Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd (148/2007) [2008] ZASCA 112; 2009 (1) SA 163 (SCA); [2009] 1 All SA 349 (SCA)

Grinaker LTA Ltd and another v The Tender Board (Mpumalanga) 2002 3 All SA 336 (T)

Hanekom v Builders Market Klerksdorp (Pty) Ltd and Others (063/05) [2006] ZASCA 2; [2006] SCA 2 (RSA) (2 March 2006)

Hydro-Tech Systems (Pty) Ltd v City of Cape Town and Others (4174/2008) 2009 ZAWCHC 125; 2010 (1) SA 483 (C) (27 February 2009)

IMVUSA Trading 134CC and Another v Dr. Ruth Mompati District Municipality and Others (2628/08) [2008] ZANWHC 46 (20 November 2008)

Independent Electoral Commission v Langeberg Municipality 2001 SA 925 (CC)

Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education & others 2008 JOL 21327 (C)

JFE Sapela Electronics (Pty) Ltd & another v Chairperson, Standing Tender Committee 2004 JOL 12848 (C)

Lambda Test Equipment CC v Broadband Infraco (Pty) Limited and Another 2011 (Unreported) GSJ(W)

Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA)

Lohan Civil - Tebogo Joint Venture and Others v Mangaung Plaaslike Munisipaliteit and Others 2009 (508/2009) ZAFSHC 21 (O)

Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others 2012 (3791/2012) ZAWCHC 162 (C)

Londoloza Forestry Consortium (Pty) Ltd and Another v South African Forestry Company Limited and Others (28738/2006) [2008] ZAGPHC 195 (12 May 2008)

Manong & Associates (Pty) Ltd v Minister of Public Works and Another (518/2008) [2009] ZASCA 110; 2010 (2) SA 167 (SCA); [2010] 1 All SA 267 (SCA) (23 September 2009)

Manong and Associates (Pty) Ltd v City of Cape Town and Another (457/09) [2010] ZASCA 169; 2011 (2) SA 90 (SCA); 2011 (5) BCLR 548 (SCA) ; [2011] 2 All SA 383 (SCA)

Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport & Others (369/08) [2009] ZASCA 50; 2009 (6) SA 589 (SCA); [2009] 3 All SA 528 (SCA)

Menzies Aviation South Africa (Pty) Ltd v SAA (Pty) Ltd & others 2010 JOL 24726 (GSJ)

Metro Projects CC and Another v Klerksdorp Local Municipality 2004 (1) SA 16 (SCA)

Millennium Waste Management v Chairperson Tender Board 2008 2 SA 481 (SCA)

Minister of Social Development and Others v Phoenix Cash & Carry – Pmb CC 2007 (9) BCLR 982 (SCA)

Minister of Transport v Prodiba (Pty) Ltd (20028/2014) [2015] ZASCA 38 (25 March 2015*)*

Municipal Manager, Qaukeni Local Municipality & another v FV General Trading CC 2009 JOL 23731 (SCA)

Nelson Mandela Bay Metropolitan Municipality v MTN Service Provider (Pty) Ltd and Others (1661/2012) 2013 ZAECPEHC 2 (15 January 2013)

Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & others 2007 JOL 20448 (SE)

New Reclamation Group (Pty) Limited v Eskom Holdings Ltd (07/27391) [2008] ZAGPHC 138 (14 May 2008)

Nexus Forensic Services (Pty)Ltd v Chief Executive Officer of SASSA and Others (14708/2015) 2016 ZAGPPHC 579 (21 June 2016)

Olitzki Property Holdings v State Tender Board and another 2001 (8) BCLR 779 2001 (3) SA 1247 (SCA)

Premier of the Free State Provincial Government and others v Firechem Free State (Pty) Ltd 2000 3 All SA 247 (A)

Provincial Government of the Eastern Cape and others v Contractprops 25 (Pty) Ltd 2001 4 All SA 273 (A)

Q CIVILS (Pty)Ltd v Mangaung Metropolitan Municipality and Others (A48/2016) 2016 ZAFSHC 159 (8 September 2016)

Rainbow Civils CC v Minister of Transport and Public Works, Western Cape 2013 (21158/2012) ZAWCHC 3 (WCC)

RHI Joint Venture v Minister of Roads and Public Works 2003 5 BCLR 544 (Ck)

RMR Commodity Enterprise CC t/a Krass Blankets v Chairman of the Bid Adjudication committee and Others 2009 3 All SA 41 (SCA)

Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province & others; Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province & others; Star Asphalt/Kgotsong Civils Joint Venture & another v MEC for the Department of Transport and Roads, North West Province & others 2007 JOL 19022 (B)

Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality and Others 2014 (10075/13) ZAKZDHC 18 (KZD)

SA Container Stevedores (Pty) Ltd v Transnet Port Terminals & others 2011 JOL 27105 (KZD)

SA Eagle Co Ltd v Bavuma 1985 3 SA 42 (A)

Sanyathi Civil Engineering & Construction and Another v eThekwini Municipality and Others, Group Five Construction v eThekwini and Others 1 All SA 2011 (KZP)

Sebenza Kahle Trade CC v Emalahleni Local Municipal Council 2003 2 All SA 340 (T)

Simunye Developers CC v Lovedale Public FET College and Another 2010 (3059/2010) ZAECGHC 121 (ECG)

Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality & others 2010 JOL 25535 (KZP)

South African National Roads Agency Limited v Toll Collect Consortium and another 2013 4 All SA 393 (SCA)

South African Post Office Ltd v Chairperson of Western Cape Provincial Tender Board and Others 2001 5 BCLR 500 (C)

Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 3 SA 121 (CC)

Steradian Consulting (Pty Limited v Armaments Corporation of South Africa Limited and Others 2011 (Unreported) GNP(T)

Syntell (Pty) Ltd v City of Cape Town and Another (17780/2007) 2008 ZAWCHC 120

TBP Building & Civils (Pty) Ltd vs East London Industrial Development Zone (Pty) Ltd and Others 2009 (230/09) ZAECGHC 7 (ECG)

Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd & others v NBCRFI & another 2009 JOL 23191 (W)

Total Computer Services v Municipal Manager Potchefstroom and Others 2007 JOL 20884 (T)

Transnet Limited v Goodman Brothers (Pty) Ltd 2001 2 BCLR 176 (SCA)

Umfolozi Transport (Edms) Bpk v Minister van Vervoer 1997 2 All SA 548 (A)

UMSO Construction (Pty) Ltd v Member of the Executive Council of the Government of the Province of Eastern Cape Responsible for Roads & Transport & others 2006 JOL 17569 (Ck)

VDZ Construction (Pty) Ltd v Makana Municipality & others 2011 JOL 28061 ECG(E)

Vikela Africa Waste Care CC v MEC: Mpumalanga Department of Health 2013 JDR 0603 (GNP)

Viking Pony Africa Pumps t/a Tricom Africa v Hidro-Tech Systems and the City of Cape Town 2011 2 BCLR 207 (CC)

Vodacom (Pty) Ltd and Another v Nelson Mandela Bay Municipality and Others; 2012 3 SA 240 (ECP)

Vulindlela Security Force CC v MEC of the Department of Public Works, Province of Kwazulu-Natal (2267/2007) 2008 (ZAKZHC)

Vuna Healthcare Logistics (Mpumalanga) v MEC of Health and Social Development, Mpumalanga Provincial Government and Others 2012 (5948/2011) ZAGPPHC 126 (GNP)

Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd and Another 2016 1 All SA (SCA).

WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another 2013 5 SA 461 (KZD)

International instruments

Consolidated Version of the Treaty on European Union [2010] OJ C83/13

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47

Council Directive (EC) 2014/23/EC of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ L 94/1

Council Directive (EC) 2014/24/EC of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC OJ L 94/65

Council Directive (EC) 2014/25/EC of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L 94/243

Federal Acquisition Regulations, 2005

Government Procurement Agreement of the World Trade Organisation (2011)

Model Law on Public Procurement of the United Nations Commission on International Trade Law adopted (2011)

Public Contracts (Scotland) Regulations 2015 SSI 2015/446

The Public Contracts Regulations 2015, SI 2015/102

Treaty on European Union (Maastricht) (1993)

United Nations Convention against Corruption adopted by General Assembly resolution 58/4 of 31 October 2003

Internet sources

Chambers 21st Century Dictionary 2017 http://www.chambers.co.uk [date of use 12 January 2017]

CIDB 2005 *Best Practice Guideline # C1 Preparing procurement documents* http://bit.ly/2jPhikz [date of use 30 January 2017]

CIDB 2005 *Best Practice Guideline # C2 Choosing an appropriate form of contract for engineering and construction works* http://bit.ly/2kN9QID [date of use 30 January 2017]

CIDB 2007 *Best Practice Guideline # C3 Adjudication* http://bit.ly/2kMWVX4 [date of use 30 January 2017]

CIDB 2007 *Best Practice Guideline #A1 The procurement cycle* http://bit.ly/2jQpQoZ [date of use 30 January 2017]

CIDB 2007 *Best Practice Guideline #A2 Applying the procurement prescripts of the CIDB in the Public Sector* http://bit.ly/2kmbss4 [date of use 30 January 2017]

CIDB 2008 *Best Practice Guideline #A3 Evaluating tender offers* http://bit.ly/2kmonKh [date of use 30 January 2017]

CIDB 2007 *Best Practice Guideline #A4 Evaluating quality in tender submissions* http://bit.ly/2kmA7w3 [date of use 30 January 2017]

CIDB 2004 *Best Practice Guideline #A5 Managing construction risks* http://bit.ly/2kN8Yni [date of use 30 January 2017]

CIDB 2008 *Best Practice Guideline #A6 Applying the Registers to Construction Procurement* http://bit.ly/2kPmiU9 [date of use 30 January 2017]

CIDB 2007 *Best Practice Guideline #A7 The procurement of professional services* http://www.cidb.org.za/publications/Documents/The%20Procurement%20of%20Professional%20Services.pdf [date of use 30 January 2017]

CIDB 2008 *Best Practice Guideline #A8 Procurement Measures to Develop Registered Contractors* http://bit.ly/2kPnzuf [date of use 30 January 2017]

CIDB 2007 *Best Practice Guideline #B1 Formulating and implementing preferential procurement policies* http://bit.ly/2jpIJmA [date of use 30 January 2017]

CIDB 2004 *Best Practice Guideline #B2 Methods and procedures for implementing preferential procurement policies* http://bit.ly/2kmp3iN [date of use 30 January 2017]

CIDB 2010 *Position Paper on the Evaluation of Best Value for Money* http://www.cidb.org.za/documents/corp/news/corp_news_cidbpositionpaper_evalbestvaluemoneytenders_4aug2010.pdf [date of use 21 March 2015]

Collins 2017 https://www.collinsdictionary.com/dictionary/english [date of use 12 January 2017]

Crown Commercial Service 2014 *A Brief Guide To The EU Public Contracts Directive* http://bit.ly/1bp8R7V [date of use 16 January 2017]

Crown Commercial Service 2015 *The Public Contracts Regulations 2015 Guidance on Awarding Contracts* http://bit.ly/2isNMlv [date of use 16 January 2017]

DTI Date unknown *Trade Agreements* http://bit.ly/2jnuVbc [date of use 16 January 2017]

European Commission *Public Procurement in Europe - Cost and Effectiveness* http://bit.ly/2aH8asB [date of use 17 January 2017]

Merriam-Webster 2017 http://www.merriam-webster.com/dictionary [date of use 12 January 2017]

National Audit Office (UK) http://bit.ly/2iIaggY [date of use 17 January 2017]

National Treasury 2003 *Practice Note Number 1 of 2003* http://bit.ly/2jPlJsI [date of use 17 January 2017]

National Treasury 2004 *Supply Chain Management A Guide For Accounting Officers / Authorities* http://bit.ly/2jF5cbD [date of use 17 January 2017]

National Treasury 2006 *Practice Note No 2 of 2006* http://bit.ly/2jq9Ixd [date of use 17 January 2017]

National Treasury 2007 *National Treasury Practice Note No 8 of 2007/2008* http://bit.ly/2jPiIJa [date of use 17 January 2017]

National Treasury 2009 *National Treasury Practice Note No 7 of 2009/2010* http://bit.ly/2jAnFpL [date of use 16 January 2017]

National Treasury 2010 *SBD 9 Certificate of Independent Bid Certification* http://bit.ly/2jPbKn9 [date of use 16 January 2017]

National Treasury 2011 *Implementation Guide Preferential Procurement Regulations, 2011 Pertaining to the Preferential Procurement Policy Framework Act, Act No 5 of 2000* http://bit.ly/2isGrCx [date of use 17 January 2017]

National Treasury 2011 *SBD 6.1 Preference Points Claim Form in Terms of the Preferential Procurement Regulations 2011* http://www.etenders.gov.za/content/tender-documents [date of use 17 January 2017]

National Treasury 2014 *SBD 6.2 Invitation and Evaluation of Bids based on a Stipulated Minimum Threshold for Local Production and Content for the Residential Electricity Meters* http://bit.ly/2iZaX3e [date of use 17 January 2015]

National Treasury 2015 *National Treasury Instruction Note No 1 of 2015/2016* http://bit.ly/2k0jYwW [date of use 17 January 2017]

National Treasury 2015 *Public Sector SCM Review 2015* http://bit.ly/2iHUJ0K [date of use 17 January 2017]

National Treasury 2016 *National Treasury SCM Instruction Note No 4A of http://bit.ly/2k6ft49* [date of use 18 January 2017]

National Treasury Date unknown *SBD 1 Invitation to Bid* http://bit.ly/2k0md3j [date of use 15 January 2017]

OECD 2009 Principles for Integrity

http://www.oecd.org/gov/ethics/48994520.pdf [date of use 11 March 2016]

Oxford Dictionaries 2017 http:// https://en.oxforddictionaries.com/definition/cost-effective [date of use 12 January 2017]

Public Service Commission 2007 *Report on the Evaluation of the Batho Pele Principle of Value for Money in the Public Service* http://bit.ly/2iCzJ89 [date of use 5 January 2017]

Public Service Commission 2009 *Evaluation of Supply Management Practices within the R200 000 Threshold* http://bit.ly/2jFjKbg [date of use 5 January 2017]

Public Service Commission 2011 *Profiling and Analysis of the most Common Manifestations of Corruption and its Related Risks in the Public Service* http://bit.ly/2jAtJhT [date of use 5 January 2017]

PWC 2011 *Public procurement in Europe Cost and effectiveness http://bit.ly/2aH8asB* [date of use 16 January 2017]

South African Government *2016 Budget Speech* http://bit.ly/2ix1GmS [date of use 16 January 2017]

Statistics South Africa 2013 *Gross domestic product 2013* http://bit.ly/2iwWfEx [date of use 16 January 2017].

United Nations 2011 *UNICITRAL Model Law on Public Procurement* http://bit.ly/2iI33xo [date of use 16 January 2017]

United Nations 2013 *A Guide to UNCITRAL* http://bit.ly/2jjzfG7 [date of use 16 January 2017]

United Nations 2014 *Procurement and Infrastructure Development* http://bit.ly/2j4g95K [date of use 16 January 2017]

WTO 2017 *Parties and Observers to the GPA* http://bit.ly/2e02eKV [date of use 16 January 2017]