

## **The use of civil activism in combatting corruption in public procurement.**

### **Introduction**

Corruption is a phenomenon that is not limited to particular communities, countries, regions or continents. Public procurement, which is the procurement of goods and services by government from the private sector to enable government to fulfill its obligations towards its citizens, is generally accepted to be highly vulnerable to corruption. It is estimated that in developed countries 10 – 15% of their GDP is spent on public procurement and in developing countries 25 – 40%. Studies show that approximately 20% of the money globally spent on public procurement is lost to corruption. The OECD *Foreign Bribery Report* of 2014 states that 57% of all bribery relates to the obtaining of public procurement contracts.

Corruption in public procurement in developing countries has a more pronounced effect on the poor and vulnerable sections of the community as they are more dependent on the state for the provision of basic services. In the South African context, especially if regard is had to recent media reports on corruption, one must agree with former Deputy Chief Justice Mosenke as stated in the 2011 Glenister case: *'There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order.'*

In this lecture I will briefly refer to some causes of corruption in public procurement and the different methods utilised to combat such corruption. I will discuss civil activism in particular and refer to some examples in South Africa. I will refer to regulated civil activism in public procurement in a few other jurisdictions, where after I will make some conclusionary remarks relevant to the present position in South Africa.

### **Causes of corruption in public procurement**

A lot of research has been done on the causes of corruption in public procurement. This is especially so for developing countries, and countries in transition, which, some believe, are more prone to corruption than developed countries. The most common causes of corruption identified have social, economic, administrative and

political origins. They manifest, amongst others, in a lack of the following: adequate management information systems; performance management; a culture of performance in institutions; ethical awareness; liberal democratic institutions; citizen education; leadership; and skills to investigate corruption. Further causes are entrepreneurial politics; excessive discretion; outdated policies and procedures; complex legislation; deficient control and accountability; insufficient supervision; undue influence; poor discipline; poor work ethics; corruption by law enforcement agencies and so the list continues.

There are those that are of the view that corruption is encouraged in developing societies, especially in Africa, by traditional concepts of presenting gifts, especially to the chief or headman, and secondly family or ethnic solidarity. They usually do not give cognisance to the fact that the majority of such corruption is perpetrated by multinational companies emanating from the developed world. Twenty years ago the USA was the only country where bribery of foreign officials was a criminal offence. This was addressed when the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* entered into force on 15 February 1999. Only in 2009 the mentioned Convention was amended to provide that bribes paid to foreign public officials should not be tax deductible.

Obasanyo, a Nigerian, puts it as follows: *'I shudder to think how an integral aspect of our culture could be taken as a basis for rationalizing otherwise despicable behaviour. In the African concept of appreciation and hospitality, the gift is usually a token. It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open, and never in secret. When it is excessive, it becomes an embarrassment and it is returned. If anything, corruption has perverted and destroyed this aspect of our culture'*

Although all of the factors in the above list may contribute in varying respects to corruption, on a more fundamental, and perhaps over simplistic basis, I agree with Adeniran that the real root cause of corruption lies, as he puts it, *'in an unholy alliance between self-interest, opportunity and submission to the temptation'*. To my mind the combination of self-interest, the opportunity to unlawfully serve such self-interest, coupled by the submission to the temptation to do so, which is, if not

caused, at least assisted by the lack of accountability, is the root cause of corruption in both developed and developing countries. The nature of the self-interest, the opportunity for corruption and the lack of accountability depends on the specific circumstances and vary from procurement to procurement.

### **Measures to combat corruption**

As the measures to combat corruption in public procurement are diverse, the nature of the measures are often used as criteria for classification. In accordance herewith they can be classified as administrative measures, criminal measures, institutional measures and civil activism. I will only deal with civil activism.

Civil society in the context under discussion encompasses individuals and a number of formal and informal interest groups and organisations which vary in their degree of formality, power and independence of the state. The role of the media of course needs specific reference as it often is at the heart of civil activism.

Activism consists of efforts to promote, impede, or direct specified interests usually with the desire to make improvements or perceived improvements in society. Forms of activism can range from writing letters, the use of social media, political campaigning, boycotts, strikes, demonstrations, the use of different forms of art, and the use of the courts through public interest litigation, to the violent overthrow of governments.

The question arises why there is a need for civil activism and why it is increasing in popularity. One answer may be that, as argued by Susan Rose-Ackerman, a research fellow at the World Bank, it is as a result of certain failures or deficiencies of democracy. She states that although free and fair elections are one of the most powerful 'vertical' accountability mechanisms, elections have at least three structural problems:

1. they only hold elected officials accountable, whereas the vast majority of the public officials are appointed bureaucrats;
2. they cannot give clear accountability signals to individual office holders;
3. they encourage politicians to favour patronage, rather than defend the public interest.

To the above can be added that individual political candidates, as well as political parties, are clientelistic, rather than being held accountable to a specific policy or outcomes. Elections are only held periodically, typically every four to five years which delays accountability. Lastly the state is too involved and has a monopoly in the formal processes of holding its officials accountable. This includes the monitoring and investigation of corruption, the prosecution, adjudication and punishment of offenders both criminally and administratively.

Loammi Wolf is of the opinion that in South Africa the lack of accountability is attributable, at least in part, to the closed list pure proportional electoral system for Parliament and the provincial legislatures. Party leaders who control the party lists of candidates for political office has considerable power. This weakens oversight of the executive as party loyalty supersedes accountability to the electorate. It can further be manipulated as a system of patronage by the faction within a party who has gained the upper hand.

The need for civil activism in the fight against corruption is recognized in a number of international instruments:

The *UN Convention Against Corruption*, the *African Union Convention on Preventing and Combating Corruption* and the *SADC Protocol Against Corruption* article 4.1 in essence provide for state parties to adopt measures and mechanisms to encourage participation by the media, civil society and non-governmental organisations in efforts to prevent corruption.

### **Examples of civil activism to curb corruption in public procurement in South Africa:**

South Africa is no stranger to civil activism. Public protests, also against corruption and its effects on service delivery are quite common.

Individuals often act as activist, being it whistle blowers or ordinary citizens like John Maseko, the ex-driver of Atul Gupta who kept a list of the people who visited the Gupta residence in Saxonworld, or public interest litigants like Terry Crawford Brown, in the arms deal saga or Hugh Glenister in the Scorpions case.

A number of civil organisations are actively involved in curbing corruption, also in public procurement. To name but a few in no particular order: Corruption Watch, the Right to Know Campaign, the Helen Suzman Foundation, Freedom under Law, Council for the Advancement of the South African Constitution, the Institution for Accountability, Earthlife Africa, the South African Faith Community Environmental Institute and various labour organisations. At Rhodes University, the 'Public Service Accountability Monitor' forms part of the School of Journalism and Media Studies. They evaluate budgeting, planning, expenditure and performance in a number of service delivery departments of the Eastern Cape Government and issue reports thereon.

In the last few years the civil activism that attracted the most attention to corruption in public procurement is related to public interest litigation and incidents reported to the public protector. I mention but a few by way of example:

**1) The so-called "arms deal"** which refers to a package of defense-related procurement during 1999. Andrew Feinstein a senior ANC MP was the first politician to cry foul. He resigned in 2001 when the government ignored his request for an inquiry into the deal. Patricia de Lille also a then ANC MP presented Parliament with a dossier containing allegations of extensive corruption and called for a judicial investigation.

The Seriti commission was appointed in 2011 after Terry Crawford Brown approached the Constitutional Court to compel government to appoint an independent commission of inquiry into the arms deal. The commission started work in 2013 and brought out a report in 2016 finding no evidence of corruption. The Right to Know Campaign and Corruption Watch are of the opinion that the Seriti Commission's findings are a whitewash. An application in the High Court to have its findings set aside is in the process. Terry Crawford Brown lost an application to the Constitutional Court for direct access to obtain similar relief. He now wants to take the matter to foreign courts that will have jurisdiction over some of the alleged perpetrators.

Many believe that the culture of corruption in post-apartheid South Africa found its roots in the arms deal.

**2) Hugh Glenister** a businessman, with no apparent political agenda, instituted court proceedings to stop the dissolution of the Scorpions. The matter concerned the constitutional validity of the *National Prosecuting Authority Amendment Act* and the *South African Police Service Amendment Act*. The effect of these Acts were to disband the Directorate of Special Operations, (Scorpions) a very successful specialised crime fighting unit that was located within the National Prosecuting Authority, and its replacement with the Directorate of Priority Crime Investigation, (Hawks) which is located within the South African Police Service (SAPS).

The main ground advanced by Glenister in order to invalidate the legislation that established the Hawks was that the Hawks lacked the necessary structural and operational independence to be an effective corruption-fighting mechanism. He alleged that for that reason, the legislation was inconsistent with the international obligations of the Republic and therefore the Constitution.

The 2011 majority judgement written by former Deputy Chief Justice Moseneke and Justice Cameron held that the mentioned legislation disbanding the Scorpions and establishing the Hawks were unconstitutional. This legislation has subsequently been amended and again dealt with by the Constitutional Court in a subsequent judgment.

### **3) PRASA corruption investigation**

The South African Transport and Allied Workers Union in 2012, later pursued by the National Transport Movement, laid complaints with the public protector alleging maladministration and related improper conduct involving procurement irregularities, conflict of interest and nepotism by functionaries at the Passenger Rail Agency of South Africa.

The Public Protector found that the transactions investigated revealed a culture of systemic failure to comply with the SCM policy. The investigations are still ongoing but what has already been uncovered indicates that corruption has cost PRASA and the taxpayer an estimated 2 billion rands.

#### **4) Nkandla**

Perhaps the most well-known public interest litigation is the application by the EFF and DA relating to the Nkandla saga where the procurement of certain infrastructure at the State President's residence was flawed. The investigation by the public protector was carried out in response to seven complaints lodged between 13 December 2011 and November 2012. The first complaint, from a member of the public was lodged in terms of the *Public Protector Act* on 13 December 2011.

#### **5) Nuclear Procurement**

At present the most important public interest litigation cases are those related to the government's pursuit of what will be the largest single procurement ever entered into by South Africa: the procuring of multiple nuclear power plants in order to generate 9.6 gigawatts of electricity, at a cost that could well exceed R1 trillion (that is one million, million rand). To put this amount in context, the Arms procurement, after over spending, amounted to approximately 70 000 million rand.

The NGOs, Right to Know and South African Faith Community Environmental Institute seek the review of the decisions to sign intergovernmental agreements on nuclear power between South Africa and Russia, the USA, and South Korea. They also seek an order that procedurally fair public participation is mandatory before the state can embark on the nuclear power procurement process. The matter has been set down for hearing on 13 and 14 December 2016. Last week Tuesday the Department of Energy issued a new Integrated Resources Plan for comment. It in essence post phones the procurement of nuclear power from coming into operation in 2025 to 2037. Eskom nevertheless indicated that it will continue with its own plans to procure the building of a nuclear plant to come into operation in 2025.

#### **Lawfare:**

At this point in time of South Africa's history it is probably not an exaggeration to say that civil society is in a low intensity lawfare with the state to combat corruption especially by the predatory elite. This lawfare is bound to escalate with the nuclear procurement initiatives and with corruption, especially by the predatory elite, continuing unabated.

The present situation is not desirable nor sustainable. The fear is that the predatory elite will target the courts. A country can also not be governed through the courts.

South Africa is in need of strong institutions of governance of the public procurement process. There clearly is a need for civil activism but ways must be found to incorporate it in the public procurement regime. For this purpose one can look at examples from other jurisdictions.

## **International examples of regulated civil participation in public procurement**

### **India**

In Rajasthan, the largest state in India, the civil organisation, Mazdoor Kisan Shakti Sangathan (MKSS) has, in a little over a decade, developed into one of India's most powerful social justice movements. The organization is a union of ordinary, mostly poor people and has successfully demonstrated the power of civil participation in governance. The MKSS uses forums called public hearings, or social audits, to facilitate discussions among residents on government expenditures in their communities. Its success has influenced the state government of Rajasthan to introduce aspects of social auditing within local government processes. The state government now requires that a social audit be held annually within each village. At the public hearing the conduct of the projects are discussed and inefficiencies, poor planning, false information, and corruption are laid bare. As a follow-up to the public hearing, a formal report is prepared by MKSS. Copies of this report are sent to senior state government officials, the media, and other groups engaged in anti-corruption campaigns.

### **Philippines**

One of the primary goals in the enactment of the Procurement Reforms Code of the Philippines in 2003 was to curb corruption. Section 13, Article V, mandates the presence of civilian observers at all stages of the procurement process, provided that they do not have any direct or indirect interest in the bidding process. The stages to which observers are invited include the prebid conference, opening of bids, post-qualification meetings, contract award meetings and special meetings of the Bid Award Committee. These observers must come from either a duly recognized private



group in a sector relevant to the procurement or a nongovernmental organization. Observers assess the Bid Award Committee's compliance with the provisions of the Code. It then submits a report on the supply chain management activities conducted by the BAC to the Head of the Procuring entity, and if the BAC is found to have committed an irregularity, also to the Office of the Ombudsman.

### **Korea**

Based on the *Anti-Corruption Act*, the Board of Audit and Inspection of Korea, in July 2001, introduced the "Citizen Audit Request System". This system allows citizens to request audits if they believe that the public entity entrusted with carrying out a particular function has not properly done so. A written request for an audit must be submitted by three hundred (or more) citizens. A "Citizen Audit Request Screening Committee" together with the Board of Audit and Inspection, decides whether or not to conduct an audit. Audit results are fully disclosed to the public, save on matters that can jeopardize public and state security.

Several local governments have also introduced the "Citizen Auditor System". In terms hereof citizens, who are not public officials, serve as auditors. They conduct audits on complaints received and notify the aggrieved party of the audit result.

### ***Qui tam* actions in America**

The concept of enlisting members of the public to protect the King's property originates from England. They are brought by a person *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, (that was especially for my daughter Shani who is studying Latin and doing much better than I ever did) that is, "a person who sues on behalf of the king as well as for himself." Such actions were available to ordinary citizens and part of the money recovered was given as reward to the person who brought the suit.

The English tradition of *qui tam* actions found its way into the *American False Claims Act*. This Act is based upon the theory, as stated by the Federal Court in *United States v. Griswold*, ' . . . that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain'. (For those of you who indulge in the pleasure of reading cowboy books, this

reminds one of the tradition of bounty hunters in the Wild West.) The 1986 amendments to the Act were intended to curb the proliferation of fraud in the arms procurement during the cold war. The *Civil False Claims Act* in essence created civil liability for any person who caused the government to pay a fraudulent claim. The Act entitles civilians to report such fraud directly to the Department of Justice for legal action. If the Department of Justice does not institute legal action the civilian can do so. If the action by the Department of Justice is successful the civilian receives as reward, 15% to 25% of the amount recovered, and if they institute action themselves they receive up to 35%.

The individual begins a *qui tam* action by serving the DOJ with a copy of the complaint and disclose all evidence and information such person possesses. After reviewing the complaint, the DOJ has four options namely to:

1. prosecute the action;
2. allow the complainant to proceed independently, while retaining the right to intervene later in the proceedings;
3. ask the court to dismiss the action after an opportunity for the complainant to be heard; and
4. subject to court approval, settle the action with the perpetrator, following an opportunity for the complainant to criticise the proposed settlement.

This Act has been, as can be expected, the subject of protracted litigation in America.

One common feature of the above examples is that they tend to be more reactive. More proactive measures are also needed.

### **Application in SA**

In South Africa the PFMA does not provide for civil participation in the public procurement process. The MFMA does provide for participation by the local community in the budgetary process. The *Municipal Systems Act*, in chapter four provides for civil society to be involved, amongst others, in the integrated development plan, the preparation of the budget, strategic decisions regarding service delivery and the performance management system. Specific provision is

however not made for civilian oversight of the whole procurement process. The Gauteng Province has embarked on an initiative to open up its procurement decisions to public scrutiny by allowing civilians to observe certain bid adjudication committee meetings.

The main corruption challenge public procurement in South Africa is facing at present is the proposed nuclear procurement. That civil activism is essential to combat this threat cannot be denied. A possible solution to regulate civilian oversight of the proposed nuclear procurement in order to combat corruption could be the following:

A civilian integrity committee could be appointed to oversee the procurement process, from the identification of the need through all its phases. Such a committee could comprise for example of a retired judge and two experts, one in supply chain management and the other in nuclear power.

Such a committee need to be properly institutionalised and will the following have to be addressed:

- Provision must be made for: the objective appointment of the members; the regulation of the relationship between the state officials and the committee; procedures for conflict resolution between the committee and officials; succession of members of the committee; the duty to report to the chief procurement officer, the public protector and, where possible, to the public at large; and for expedited investigative and court procedures to resolve possible disputes or allegations of corruption;
- The members of the committee must be independent; people of integrity; be experts in their respective fields; have no conflict of interest; and adhere to a code of conduct;
- The committee must have a clear mandate, have access to adequate resources; have oversight of all phases of the procurement; have access to all information including confidential information; have the right to require information and ask questions; be able to add new data to the process, for instance the needs of interest groups like the poor, the vulnerable and specific communities; and be able to obtain outside expert advice;
- Finally the performance by the committee must be regularly evaluated.

Such a committee is of course not a golden bullet that will address all corruption in the proposed nuclear procurement. If the right people are not appointed collusion with officials can still occur. Such a committee can also become obstructive and undermine the procurement effort. I am of course quite confident that at present the political will does not exist to implement such or a similar measure.

### **Conclusion**

Civil oversight of public procurement should be incorporated in all stages of the supply chain management regime of government in order to achieve state-civil society synergy to combat corruption. I believe more can be achieved through cooperation between state officials and civil society than through aggressive positioning. Such incorporation should of course in no way limit the use of other forms of civil activism to, when necessary, combat corruption in public procurement.

The predatory elite, when corruption is exposed, often blame a third force to be at work that, for allegedly sinister purposes, wish to discredit them. Civil activism might prove to be the third force in the nuclear procurement, to successfully combat corruption. If not this procurement might bankrupt the state.