

**SYMPOSIUM: EUROPE MEETS US AND OTHERS: CURRENT DEVELOPMENTS IN
PROCUREMENT LAW WITH A FOCUS ON THE SELECTION, QUALIFICATION, AND EXCLUSION
OF TENDERERS**

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CURRENT DEVELOPMENTS IN AFRICAN PROCUREMENT LAW

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1. Introduction

To talk of current developments in public procurement law in Africa is of course an overambitious topic for there is no way that I can provide you with even the briefest overview of the procurement laws in 55 odd African states ranging from developed systems such as those in Nigeria, Kenya or South Africa to fledgling states such as Somalia and South Sudan and everything in-between. Also unlike the EU directives on public procurement that generate one public procurement conversation across most of Europe and arguably also federal procurement in the US that can facilitate a single procurement discussion on an almost continental basis there is no umbrella instrument or structure that can generate an African public procurement conversation. In recent years there have however been

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moments where we have seen a truly African dialogue in public procurement. Interestingly those have been conversations that have focused significantly on the regulatory aspect of public procurement and in particular on reform of public procurement law in Africa.

Current developments in public procurement law in Africa are accordingly less about fine-tuning existing systems or progressive development of current rules as is arguably the case in Europe and the US, and more about wholesale reforms introducing completely new regulatory systems.

I shall thus start by giving you some background to these reforms and progressively zoom in on the focus area of our symposium, but also narrow down the scope of the discussion from Africa to my native domestic system of South Africa.

2. Overview of developments in the African context¹

African systems have experienced major reforms in public procurement regulation in recent years.² As Stephen Karangizi, who formerly headed the COMESA procurement reform initiative (on which more below), noted, these developments have largely been in the form of 'the recognition of the need to enact specific legislation to provide for clear and unambiguous laws on procurement'.³ Current reforms gathered momentum following the 1998 International Conference on Public Procurement Reform in Africa held in Abidjan⁴ and

¹ See generally G. Quinot & S. Arrowsmith, 'Introduction' in *Public Procurement Regulation in Africa* (2013) 1-5.

² See Quinot & Arrowsmith in *Public Procurement Regulation in Africa 2*; S. Karangizi, 'Framework Arrangements in Public Procurement: a Perspective from Africa' in Tilipman and Arrowsmith (eds.), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (2010-2011) 244.

³ Karangizi in *Reform of the UNCITRAL Model Law on Procurement* 244.

⁴ See S. Karangizi, 'The COMESA Public Procurement Reform Initiative' (2005) 14 *PPLR* NA51, NA52; African Development Bank Group, *COMESA Public Procurement Reform and Capacity Building Projects, Project Performance Evaluation Report* (2012) 2-3.

continued to the High Level Forum on Public Procurement Reform in Africa held in Tunis in 2009.⁵

The 1998 conference in Abidjan was described as a “watershed in bringing to the fore the importance of public procurement, its linkages with governance and the far-reaching implications of its poor performance on African economies”.⁶ The 30 African governments and the international development partners that attended agreed on:

- "(a) the need for modernisation of public procurement in Africa to meet international standards and best practice;
- (b) the need to forge a consensus among all stakeholders on the urgency of engaging in public procurement reforms; and
- (c) the need to promote national reform programmes with a common strategic framework focusing on accountability, transparency and efficiency".⁷

One of the four pillars of public procurement reform in Africa identified at the conference was "enabling legislation and regulations".⁸ Following this conference many African states have enacted completely new public procurement regulatory regimes.⁹ These major developments were recognised at the 2009 High Level Forum in Tunis. The 45 African

⁵ See the Tunis Declaration on Public Procurement Reforms in Africa, 17 November 2009 (http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/FINAL%20DECLARATION%20TRANSLATED%20ENGLISH_26-11-09.pdf [accessed 30 June 2014]).

⁶ S.R. Karangizi and I. Ndahiro, 'Public Procurement Reforms and Development in the Eastern and Southern Africa Region' in R. Hernández Garcia (ed.), *International Public Procurement: a Guide to Best Practice* (2009) 113.

⁷ African Development Bank Group *COMESA Projects* 3.

⁸ Karangizi (2005) 14 *PPLR* NA53.

⁹ Quinot & Arrowsmith in *Public Procurement Regulation in Africa* 3.

countries that attended the Tunis meeting along with their development partners renewed their commitment "to consolidate the reforms and promote a multi-sector and participatory approach, mainstreaming public procurement into all State reforms in order to improve their economic impact, particularly in innovative sectors".¹⁰

3. Drivers of procurement reform and development in Africa

One of the biggest substantive influences in African procurement reform has been the 1994 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services. A significant number of African countries have directly or indirectly relied on the model law in formulating their own systems. Indirect reliance occurred where one country used the procurement laws of another country (typically a neighbour) to design its procurement system, but the neighbour in turned relied on the model law. An example is Botswana where procurement regulation was greatly influenced by Ugandan procurement law, which in turn originated from the model law, resulting in some UNCITRAL influences in areas of Botswana procurement regulation such as procurement methods.¹¹ The effect of such indirect influence is that the impact of the UNCITRAL model law is even more significant than what is suggested by the official figures published by UNCITRAL regarding the number of countries that have adopted the model law.¹²

¹⁰ Tunis Declaration on Public Procurement Reform in Africa Sustaining Economic Development and Poverty Reduction (17 November 2009).

¹¹ See R.A. Kumar and E. Caborn, 'The Regulatory Framework for Public Procurement in Botswana' in Quinot & Arrowsmith (eds), *Public Procurement Regulation in Africa* 37

¹² UNCITRAL, *Status: UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)* (http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html [accessed 30 June 2014])

A related influence and the most comprehensive African reform programme has been the Public Procurement Reform Project of COMESA, the Common Market for Eastern and Southern Africa,¹³ and its successor, the Enhancing Procurement Reforms and Capacity Project, sponsored by the African Development Bank. Noteworthy objectives of these programmes are the need to "modernise public procurement rules and practices throughout COMESA as well as to attain their uniformity and harmonisation" in a manner that is aligned to "practices that [are] of internationally accepted standards".¹⁴ The latter objective extends the nature of the projects' influence on domestic procurement laws beyond those principles set out in the projects themselves. The projects accordingly also became a medium to transfer wider international influences on national systems in the region, which expressly includes the UNCITRAL model law.

The COMESA projects developed a model strategy for public procurement reform in its member states, including a regulatory model.¹⁵ In 2009 the COMESA Council took a further step towards harmonisation when it adopted a standard public procurement regulation for all public procurement within set thresholds conducted within the common market.¹⁶ As with the EU Directives on public procurement, COMESA member states must align their domestic procurement laws to these regulations for procurement within the thresholds.¹⁷

The influence of the COMESA projects has been significant with fourteen of the nineteen COMESA member states having aligned their procurement systems with the model

¹³ The member states of COMESA are Burundi; Comoros; Democratic Republic of the Congo; Djibouti; Egypt; Eritrea; Ethiopia; Kenya; Libya; Madagascar; Malawi; Mauritius; Rwanda; Seychelles; Sudan; Swaziland; Uganda; Zambia; Zimbabwe. This represents the largest economic zone in Africa with an estimated annual public procurement market of US\$ 50 billion, African Development Bank Group *COMESA Projects* 1, 2.

¹⁴ Karangizi (2005) 14 *PPLR* NA53.

¹⁵ Karangizi (2005) 14 *PPLR* NA56.

¹⁶ COMESA Legal Notice No. 3 of 2009, COMESA Official Gazette Vol. 15 No. 3 of 9 June 2009.

¹⁷ COMESA Legal Notice No. 3 of 2009, article 5.

developed under the projects.¹⁸ A target date of 2014 has furthermore been stated for the implementation of the regional procurement system under the 2009 COMESA Procurement Regulations.¹⁹

A third initiative with regional reform influence in Africa is the public procurement reform project of the West African Economic and Monetary Union (WAEMU).²⁰ The second phase of this initiative, which started in 2007, aims at developing and implementing a community procurement regulatory framework in the national laws of member states, based on two regional public procurement directives adopted in 2005 with the objective of modernising and harmonising national procurement systems of member states.²¹

4. Procurement harmony, foreign aid and social policy in procurement

Despite these unifying influences, harmony between procurement laws in Africa remains an elusive goal. In this regard one of the biggest concerns in African procurement law is the impact of tied aid arrangements. Significant portions of foreign aid to African countries are delivered through procurement processes and procurement reform is viewed as an important element in the pursuit of aid effectiveness.²² However, donors may or may not dictate the use of their own procurement rules in spending aid money or may attach other conditions to aid procurement.²³ This may differ from donor to donor or even project to project. The net result is the use of a multiplicity of procurement rules in a single country,

¹⁸ African Development Bank Group *COMESA Projects* vi.

¹⁹ African Development Bank Group *COMESA Projects* vi.

²⁰ WAEMU, or UEMOA from its more commonly used French name, *Union économique et monétaire ouest-africaine*, consists of Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal, Togo and Guinea-Bissau.

²¹ African Development Fund, *Appraisal Report Project in Support of Public Procurement Systems Reform in the WAEMU Zone (Phase II)* (2006) 1.

²² A La Chimia, 'Donor's influence on developing countries' procurement systems, rules and markets: a critical analysis' in Quinot & Arrowsmith (eds), *Public Procurement Regulation in Africa* 223.

²³ La Chimia in *Public Procurement Regulation in Africa* 235.

often by local administrations.²⁴ For example, in Lesotho for only 9% of the \$253m aid disbursements for government sector in 2013 domestic procurement rules were used.²⁵

Here we can already start to zoom in on the particular focus of our symposium when we note the difficulties that emerge when vastly different methods and criteria are used in procurement adjudication under different regimes across regions, but also within a single country.

What is quite often at issue in this regard in the African context is a tension that subsequently emerges between the use of procurement for local policy purposes in many African systems and aid procurement. A common condition imposed by donors, even when domestic procurement rules are used for aid procurement, is that no eligibility criteria may be used that exclude or prejudice foreign bidders.²⁶

This condition is especially problematic in Africa since another common feature of procurement systems in Africa is the formal integration of horizontal policy objectives and particularly social policy objectives in domestic procurement laws.²⁷ It is thus quite common to find that African systems include selection and award criteria aimed at furthering social policies such as wealth distribution, gender equality, rural development and even social cohesion. For example, in Kenya a price preference is given during the selection process to “disadvantaged groups” defined as “persons perceived to be denied, by mainstream society, access to resources and tools which are useful for their survival in a way that disadvantages

²⁴ La Chimia in *Public Procurement Regulation in Africa* 235; G. Quinot, 'A comparative perspective on supplier remedies' in Quinot & Arrowsmith (eds), *Public Procurement Regulation in Africa* 316.

²⁵ OECD/UNDP, *Making Development Co-operation More Effective: 2014 Progress Report* (2014) 129.

²⁶ La Chimia in *Public Procurement Regulation in Africa* 237.

²⁷ G. Quinot, 'Promotion of social policy through public procurement in Africa' in Quinot & Arrowsmith (eds), *Public Procurement Regulation in Africa* 380.

them, or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities, and includes enterprises owned by women, the youth and persons with disabilities”.²⁸

The common use of qualification and award/selection criteria for policy purposes can of course also create tension with other objectives in the procurement process such as value for money and efficient procurement.

Current developments in this respect in public procurement law in Africa neatly illustrate this tension and South Africa provides an interesting example.

5. Qualification and selection of bidders in South Africa

Under the South African Preferential Procurement Policy Framework Act (“the PPPFA”)²⁹ the award of tenders above the low threshold of 30 000 South African rand (that is about €2000) must be done on the basis of price and preference criteria using a scoring system out of 100 points.³⁰ Depending on the value of the contract either 20 or 10 points are allocated on the basis of preference criteria, while the remainder goes to price.³¹

What is quite interesting about this system is how it has and continues to develop both in terms of the preferential element and the best value for money element of the adjudication process.

²⁸ Kenyan Public Procurement and Disposal (Preference and Reservations) Regulations 2011, regulation 2.

²⁹ Act 5 of 2000.

³⁰ PPPFA, section 2.

³¹ PPPFA, section 2. Contracts with a value of 1 million Rand or lower are adjudicated using the 80/20 split, while for contracts with a value above 1 million Rand the 90/10 split is used, Preferential Procurement Regulations, 2011, regulations 5 & 6.

5.1 Preference points

On the preferential side, I should start by pointing out that in law at least there is no normative debate in South Africa about whether procurement legitimately could or could not be used for social policy purposes since the Constitution itself mandates

“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”.³²

Such preference may, however, only be given in terms of a national statutory framework.³³

In other words, the scheme must be established by legislation.

Regulations under the PPPFA initially provided for each contracting authority to formulate in each tender how the preference points will be calculated for that tender.³⁴ It allowed significant scope for variation in how the 20 or 10 points could be made up in terms of award criteria within the broad framework of government’s black economic empowerment (“BEE”) policy. While ownership by “historically disadvantaged individuals”³⁵ in the supplier was a mandatory component of the preference point calculation, point calculation in a given procurement could also take into account for example management composition of the

³² Constitution of the Republic of South Africa, 1996, section 217(2).

³³ Constitution of the Republic of South Africa, 1996, section 217(3).

³⁴ Preferential Procurement Regulations, 2001.

³⁵ “Historically Disadvantaged Individual (HDI)” was defined in the regulations as “a South African citizen-
(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No. 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) (“the Interim Constitution”); and/or
(2) who is a female; and/or
(3) who has a disability:

Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI.”

supplier, the involvement of women and/or location of the bidder.³⁶ There were, however, numerous problems with this approach that generated significant levels of litigation around selection decisions in public procurement. Since there was such large margin of discretion left to procurement officials to formulate the particular preferential selection criteria and how those will be assessed, the fairness of the preferential element in particular procurements was constantly challenged,³⁷ fairness being one of the five principles that the Constitution also requires all procurement to meet.³⁸

Another problem with this approach was that it did not result in alignment between individual procurement practices and government's policy of social redress. No single message was communicated to the supplier market by means of the selection criteria, which would have incentivised particular conduct on the part of suppliers – for example increasing black ownership or management in the supplier. This approach also acted to the clear detriment of foreign suppliers, without however totally excluding them from South African tenders.

The 2011 regulations under the PPPFA introduced a completely different approach to determining the 20 or 10 preference points during bid adjudication.³⁹ Rather than allowing discretion to contracting authorities on how the 20 or 10 points will be calculated, the regulations now prescribe a simple grid setting out how many preference points will be

³⁶ Preferential Procurement Regulations, 2001, regulations 1, 3(2), 4(2), 12, 13, 17.

³⁷ See e.g. *TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG); *Manong and Associates (Pty) Ltd v. City Manager, City of Cape Town, and Others* 2009 (1) SA 644 (EqC); *Manong and Associates (Pty) Ltd v. Department of Roads and Transport, Eastern Cape, and Others (No. 2)* 2008 (6) SA 434 (EqC).

³⁸ Constitution of the Republic of South Africa, 1996, section 271(1).

³⁹ Preferential Procurement Regulations, 2011.

allocated to a bidder based on that bidder’s official black economic empowerment status level certificate.⁴⁰

For contracts between the value of R30 000 and R1 million	
B-BBEE Status Level of Contributor	Number of Preference Points
1	20
2	18
3	16
4	12
5	8
6	6
7	4
8	2
non-compliant contributor	0

For contracts of a value above R1 million	
B-BBEE Status Level of Contributor	Number of Preference Points
1	10
2	9
3	8
4	5
5	4
6	3
7	2
8	1
non-compliant contributor	0

The BEE status level certificates are issued upon application to any entity in terms of the Broad-based Black Economic Empowerment Act,⁴¹ which is a scheme that is not limited to public procurement. The status level of a particular entity under this scheme is determined with reference to scorecards, also officially published under the BEE regime. While different sectors may develop sector-specific scorecards, there is also a generic scorecard identifying

⁴⁰ Preferential Procurement Regulations, 2011, regulations 5 & 6.

⁴¹ Act 53 of 2003.

seven elements on which an applicant will be measured.⁴² These are Ownership, Management Control, Employment Equity, Skills Development, Preferential Procurement, Enterprise Development and finally Socio-Economic Development and Sector Specific Contributions.⁴³ Based on this assessment a supplier will have a BEE status level, which will simply be translated into preference points in a given procurement.

The net result of these developments is that the specific selection criteria for preference points are no longer determined under procurement law and that contracting authorities have no role to play in formulating or assessing these criteria. It is also a single approach to all instances of procurement, which thus have a much bigger chance of having a real impact on the supplier market.

5.2 Price and quality considerations

If one turns to the other dimension of the adjudication process in South Africa that focuses broadly on value for money considerations, the first observation must be that this dimension still plays the biggest role by far in tender awards in South Africa. Selection criteria based on this dimension account for 80 or 90 of the 100 points in the adjudication process⁴⁴ and as I shall indicate in a moment may in addition both be qualification criteria and trumping selection criteria.

Initially the PPPFA's regulations provided for the 80 or 90 points to be calculated based on a combination of the price of the bid and a functionality assessment.⁴⁵ The latter could

⁴² Codes of Good Practice on Black Economic Empowerment issued under the BBEEA (GN no. 112, GG 29617 of 9 February 2007).

⁴³ Codes of Good Practice on Black Economic Empowerment, code series 000 statement 000, para. 7.

⁴⁴ PPPFA, section 2.

⁴⁵ Preferential Procurement Regulations, 2001, regulation 8.

include not only criteria relating to the goods or services offered, but also to the bidder, for example financial viability, track record etc. Functionality thus played a significant role during the selection process and often generated qualitative assessments of bids.

However, in a successful application for judicial review of the regulations in 2010 the court held that the PPPFA itself only provides for price strictly speaking to be used as a selection criterion and not for functionality to be combined with price.⁴⁶ This caused a significant upheaval in how bids are adjudicated since it ostensibly meant that functionality could no longer play a role in selection.⁴⁷

The 2011 PPPFA regulations subsequently provided for functionality to be a qualification criterion to be taken into account in the first stage of adjudication.⁴⁸ The position now is thus that bids are assessed in a two-stage approach in which objective criteria relating to functionality, that has been indicated as such in the bid specifications, are used to identify those bids that qualify as a first step. Functionality here is only used as a qualification criterion with all bids meeting the stated threshold for functionality to proceed to the award stage. During the second stage, the selection criteria of price and preference are combined to determine each bid's score out of 100 points.⁴⁹ The bidder with the highest score must be awarded the contract.⁵⁰

Price as a selection criterion refers strictly to the price offered by the bidder and mostly only the contract price, that is not a more comprehensive calculation of life-cycle cost.

⁴⁶ *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* 2011 4 SA 406 (KZP).

⁴⁷ See G. Quinot, 'The Role of Quality in the Adjudication of Public Tenders' (2014) 17 *Potchefstroom Electronic Law Journal* 1.

⁴⁸ Preferential Procurement Regulations, 2011, regulation 4.

⁴⁹ Preferential Procurement Regulations, 2011, regulations 5 & 6.

⁵⁰ PPPFA section 2(1)(f).

Under this approach the selection part of the procurement process can be done programmatically, there is no discretion involved. It is simply a matter of calculating the points.

Not surprisingly, this approach has generated a lot of criticism from especially larger contracting authorities like public utilities who are also subject to these rules. One of the main complaints is that it is no longer possible to compare bids on quality – that is functionality criteria. Restricting functionality to a threshold qualification criterion is viewed as a poor approach to identifying the most suitable bid and obtaining best value for money.

In litigation last year the door has now been opened to yet another approach. While the PPPFA states that the bidder with the highest number of points calculated on the selection criteria of price and preference must be awarded the contract, it also creates an exception, which states that a bid may be awarded to another bidder, that is not the highest scoring one, if justified by other objective criteria.⁵¹ In a 2013 judgment of the High Court it was held that this provision in effect adds a third stage to the adjudication in terms of which the contracting authority must consider selection criteria other than price and preference into account to determine whether the contract should be awarded to the highest scoring bidder on price and preference or not.⁵² These other selection criteria may include considerations of functionality, ostensibly even the very same criteria used during the qualification process in the first stage of adjudication. This is just a High Court judgment in one division and it remains to be seen whether it will be followed by other High Courts or the higher courts. The position is at present not clear. Adding this third stage of course has the potential to

⁵¹ PPPFA section 2(1)(f).

⁵² *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* 2013 ZAWCHC 3 (6 February 2013).

largely undermine the strict legislative scheme of price and preference as selection criteria and the relative weight given to each in the award stage.⁵³ At the same time it is understandable that there will be a push for quality considerations to play a role during selection and not just qualification.

What is of interest here is to see the constant flux between prescribing strictly the criteria to be used in awarding a contract with very little discretion to contracting authorities on the one hand and building discretion into the system on the other. Also, if this latest three-stage approach is accepted it of course has the potential to completely negate the balancing act between policy elements and price as set out in the legislative scheme.

6. Conclusion

I want to conclude by linking what we are seeing in South Africa to remarks made by Steven Schooner earlier this year at a conference in Wales about the paradigm view of what is being procured and its influence on the design of the procurement process.⁵⁴ I think that the formal design of the South African system, with functionality restricted to a threshold qualification process with no possibility to compare functionality between bidders reflects the paradigm of goods procurement where it is much easier to simply define the product required and place everyone offering that product on the same level. However, as Schooner has argued, goods procurement does not represent the bulk of public procurement anymore. In practice services procurement is the dominant form. It follows that the paradigm view should be one of services procurement.

⁵³ See Quinot (2014) 17 *Potchefstroom Electronic Law Journal* 21-25; P. Bolton, 'An Analysis of the Criteria Used to Evaluate and Award Public Tenders' (2014) 1 *Speculum Juris* 22-24.

⁵⁴ S. Schooner, 'Public Procurement Insights and Mega Trends – What's Coming?' *Procurement Week 2012: A 2020 Vision: Public Procurement Insights and Mega Trends*, Institute for Competition and Procurement Studies, Cardiff, Wales 17-21 March 2014.

I think that Schooner's argument is borne out in the tensions we are seeing in qualification and selection in the South African systems. I thus think that the current development through litigation to bring quality/functionality back into the selection process is an inevitable result of the prevalence of services procurement and the considerably more complicated processes needed to adequately identify the best offer in a services context.