

# ***1. Project Synthesis Report: Unpacking Transparency in Government Procurement – Rethinking WTO Government Procurement Agreements***

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## **1. INTRODUCTION**

### **1.1 Background<sup>1</sup>**

Government Procurement (GP) in developing countries is estimated to account for 9-20 per cent of Gross Domestic Product (GDP). GP covers purchases of goods and services made by the national, provincial or municipal governments and its various agencies out of their budgetary resources. GP can also be financed from aid received through bilateral or international aid programmes. The share of GP in national public finances is significant.

Transparency in Government Procurement (TGP) was one of the four “new issues”, included in the World Trade Organization (WTO) at the 1996 Singapore Ministerial Conference. Article 21 of the Singapore Ministerial Declaration agreed to “establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement”. In 2001, during the Fourth Ministerial Conference in Doha, WTO Members agreed to launch negotiations on transparency aspects of government procurement after the Fifth Ministerial, subject to explicit consensus on modalities at that Session. However, Members did not reach an agreement at the Fifth Ministerial Conference at Cancún in 2003 and consequently no decision was taken. During the Geneva General Council Meeting in July 2004 Members agreed to the so-called “July Package”. This agreement foresees the inclusion of Trade Facilitation (TF) in the WTO. The General Council’s decision, however, explicitly excludes negotiations on Transparency in Government Procurement as part of the Doha Work Programme. A multilateral Agreement on Transparency in Government Procurement has been left (at least for the time being) out of the WTO’s realms.

### **1.2 IWOGDA II Project**

CUTS-CITEE embarked upon a research project on two of the so-called Singapore issues, namely Transparency in Government Procurement and Trade Facilitation called

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IWOGDA II (International Working Group on the Doha Agenda II). The first part of this programme had dealt with Investment and Competition Policy and resulted in the publication of the report *Putting our Fears on the Table* (CUTS, 2003). The second part of the project, IWOGDA II, set about to bring together experts on TGP and TF, in order to inform about the issues and stimulate debate.

Although much has been written on the topic, awareness of these issues (TGP and TF) has been traditionally low in developing countries, not only among the civil society but also among policy-makers and trade negotiators. The IWOGDA programme is a response to an urgent need to promote understanding on a larger scale.

The terms of reference (ToR) for the project covered five issues, namely:

- i) Scope and definition of government procurement;
- ii) WTO core principles *vis-à-vis* a TGPA;
- iii) Elements of technical assistance and capacity building;
- iv) Dispute settlement aspects; and
- v) Country case studies.

Papers were invited from a range of international experts on these issues. Some of these experts were requested to develop the country case studies by considering the following hypothesis “Increased transparency in government procurement will reduce corruption”. They were specifically requested to examine the existing policy on government procurement, how it is being implemented, how transparent it is, whether this policy has been changed over time to make it more transparent (or otherwise), whether there is a federal policy or different agencies have different policies (if yes, should they be harmonised for achieving better transparency), and whether there is a regulatory body to monitor the policy on government procurement (if yes, how is this body functioning; positive aspects and shortcomings).

The papers that were prepared in response to this ToR form the basis for this publication and the list is reproduced in Annex A.

### **1.3 Brainstorming Meeting**

The expert papers (see Annex A) were discussed at a brainstorming meeting in Jaipur on 28<sup>th</sup> June 2004. It became apparent during the review of the papers, the presentations and ensuing discussions that there were more fundamental issues relating to government procurement in the context of the WTO’s GPA than the issue of transparency and a fresh look at several aspects of government procurement was warranted. In particular, the following emerged:

- i) a “soft law” (voluntary) approach instead of a multilateral agreement on TGP within the WTO may be more appropriate;
- ii) procurement is a technical issue and should be dealt with as such;
- iii) a transparent procurement system is characterised by the documentation of clear rules, without which it is not possible to verify that those rules were followed;
- iv) procurement reforms are not about corruption but rather about good governance and achieving national development objectives;

- v) although there may be considerable agreement on the ends (efficient, non-corrupt, and transparent procurement systems), remarkably little has been published about the means to attain them;
- vi) there is little publicly available literature on effective and replicable strategies that developing countries have adopted, or could adopt, to improve their public procurement systems; and
- vii) a government procurement agreement (GPA) is unavoidably about market access.<sup>2</sup>

It was also recognised that in order to take the TGP agenda forward, it is necessary that the following questions be addressed:

- i) What exactly is the value of transparency in government procurement?
- ii) What is actually needed for effective transparency, what does it entail and what are the options in so far as there are options?
- iii) What can a multilateral agreement do to achieve transparency?
- iv) How can transparency be used to further a sovereign development agenda for developing nations?

This report is the outcome of this brainstorm meeting. (The workshop participants and reviewers of this report are acknowledged in Annex B.)

## **2. PROCUREMENT FUNDAMENTALS**

### **2.1 What is Procurement?**

Procurement may be defined as the process which creates, manages and fulfils contracts relating to the provision of supplies, services or engineering and construction works, the hiring of anything, disposals and the acquisition or granting of any rights and concessions. If procurement is indeed a process, it can be documented as a succession of logically related actions occurring or performed in a definite manner which culminates in the completion of a major deliverable or the attainment of a milestone. Processes in turn are underpinned by methods (i.e. a documented, systematically-ordered collection of rules or approaches) and procedures (i.e. the formal steps to be taken in the performance of a specific task, which may be evoked in the course of a process), which are informed and shaped by the policy of an organisation. Methods and procedures can likewise be documented and linked to processes (Watermeyer, 2004c).

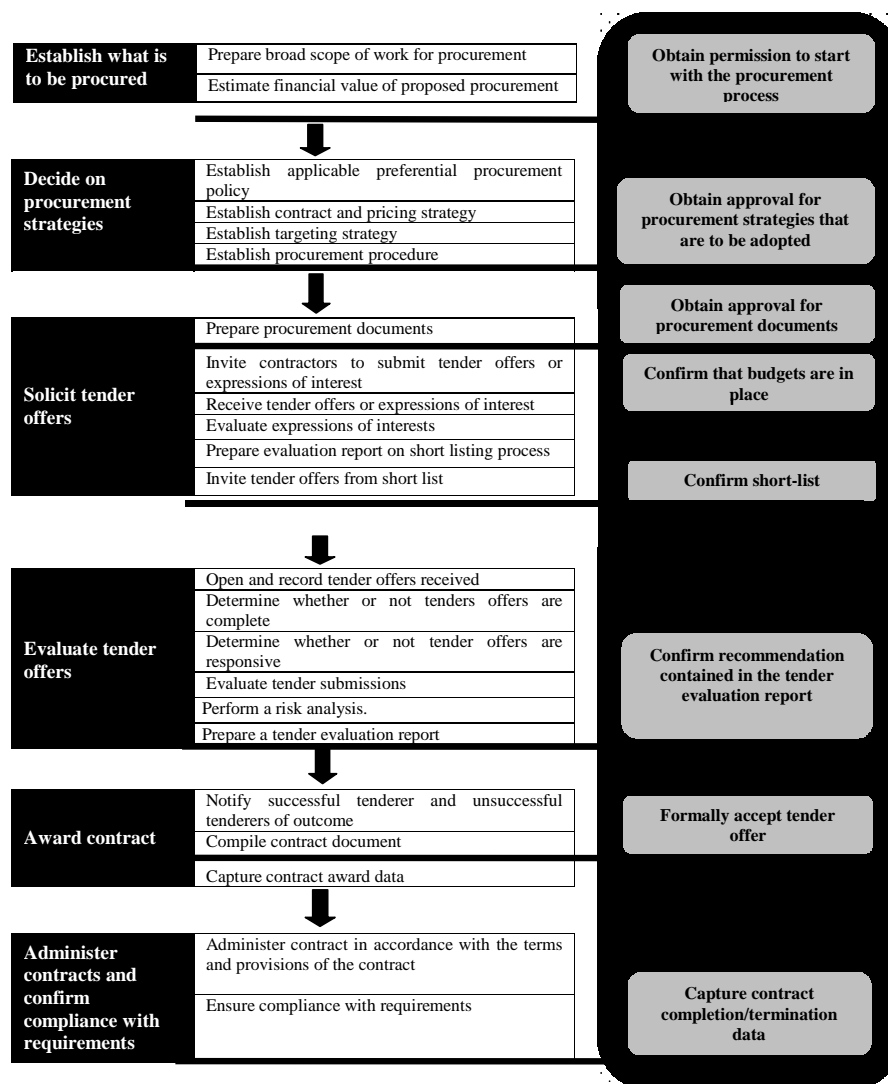
Procurement activities commence once the need for procurement is identified and end when the transaction is completed. There are six principal procurement activities and a number of generic steps that need to be taken to proceed from one activity to another (Pautz *et al*, 2003). These generic steps may be categorised as either inputs towards the attainment of a milestone within the procurement process or procedural milestones which require decisions or approvals in order to proceed to the next step (see Figure 1). Not all these steps will necessarily be required in a particular procurement. At the same time, some of them may need to be adapted to accommodate procedures associated with e-procurement, e.g. online price quoting and reverse auctioning (Ozorio de Almeida, 2004).

A procurement system comprises processes (see Figure 1), which are underpinned by methods and procedures, which in turn are informed and shaped by the operational policy of an institution.

## 2.2 Goals for Procurement

A recent analysis of the most frequently encountered goals for procurement identified nine goals for government procurement systems (Schooner, 2002) (see Table 1).<sup>3</sup> These goals may in turn be categorised as those relating to good governance (primary goals) and those relating to the use of procurement to promote social, national agendas and sustainable development objectives (secondary or non-commercial objectives).

<b>Table 1: Most frequently encountered goals for government procurement systems (after Schooner, 2002)</b>	
<b>Systemic goal</b>	<b>Thinking behind systemic goal</b>
Competition	The government receives its best value in terms of price, quality and contract terms and conditions through competition.
Integrity (rules of conduct for those engaged in procurement)	Bribery, favouritism or unethical behaviour have no place in a procurement system. Tenderers should compete solely upon the merits of their demonstrated capabilities and the quality and price of their offers rather than their influence on government officials.
Transparency	Business is conducted in an impartial and open manner.
Efficiency (administrative and transactional efficiency)	The least amount of resources is spent in the process of procuring what is needed. The ideal system is one that employs the fewest possible people to procure.
Customer satisfaction*	Please the end user.
Best value (value for money)	Getting the best deal or bargain for the public's money.
Wealth distribution	Use procurement as a leverage or a vehicle of wealth e.g. to support domestic firms and small businesses or target contractors located in specific geographical areas of high unemployment.
Risk avoidance	Avoid undue risk e.g. filter out undesirable or incompetent contractors, allocate risks to the party most able to manage the risk, make provision for termination in the event that the contracted item is no longer required.
Uniformity	Should all government entities procure in the same way, transactions become routine, officials are trained more easily and can readily move between departments during their careers, tenderers only have to learn one system in order to do business with government.
*Customer satisfaction is frequently linked to flexibility within the procurement system.	



**Figure 1: Generic procurement activities, associated steps and internal controls (Watermeyer, 2004c)**

**PROCEDURAL MILESTONE (CONTROL POINT)**

A study undertaken for the European Community in 1995 cites five principle domestic (as distinguished from foreign policy) socio-economic or political functions which public procurements may be used to achieve, in addition to obtaining the required goods, services or works (McCrudden, 1995). These are:

- i) to stimulate economic activity;
- ii) to protect national industry against foreign competition;
- iii) to improve the competitiveness of certain industrial sectors;
- iv) to remedy regional disparities;
- v) to achieve certain more directly social policy functions such as to:
  - a) foster the creation of jobs;

- b) promote fair labour conditions;
- c) promote the use of local labour;
- d) prohibit discrimination against minority groups;
- e) improve environmental quality;
- f) encourage equality of opportunity between men and women; or
- g) promote the increased utilisation of the disabled in employment.

This list comprehensively captures the main thrusts of socio-economic objectives that are commonly pursued by both developed and developing countries.

On the other hand, the procurement challenges flowing out of the Earth and World Summits are to utilise procurement, without prejudicing international trade principles, to attain secondary objectives pertaining to (Watermeyer, 2004a):

- i) the alleviation and reduction of poverty;
- ii) minimising the harmful effects of development on the local environment;
- iii) the establishment and strengthening of indigenous building materials;
- iv) the promotion of construction technologies that increase employment; and
- v) the promotion of the increased use of environmentally sound goods, building materials and construction technologies.

Governments establish their procurement systems and policies either explicitly or implicitly around goals. Such goals may be used as the point of departure for the development of regulations or form part of the legislation itself. For example, the goals associated with the first nation-wide non-binding regulation in China, the Interim Measures for the Administration of Government Procurement (1999), were to unify legislation and to forge an open, just and fair framework for procurement (Liu, 2004). The Constitution of the Republic of South Africa (Act 108 of 1996), requires the government procurement system to be fair, equitable, transparent, competitive and cost effective (Watermeyer, 2004b).

Similarly, secondary objectives regulating procurement may be expressed in law or in policy. For example, the Constitution of the Republic of South Africa (Act 108 of 1996) establishes South Africa's preferential procurement policy and the Preferential Procurement Policy Framework Act (Act 5 of 2000) establishes how such a policy is to be implemented (Watermeyer, 2004b). In India, there are policies in place which permit "purchase preferences" (i.e. allowing public sector units who compete with the private sector to revise their prices downwards where their tenders are within 10 per cent of a large private sector unit) and reserve a large number of products for production by small scale firms and provide for price preference in favour of small-scale firms (Debroy and Pursell, 1997; Srivastava, 2003). In Malaysia, procurement policy supports the National Development Policy, which seeks to improve the economic participation of the Bumiputera<sup>4</sup> and to make them equal partners of development in the country (Nambiar, 2004).

### **2.3 Generic Procurement Procedures and Methods**

A recent analysis of the World Bank procurement procedures, WTO's Government Procurement Agreement, the UNCITRAL Model Law on the Procurement of Goods, Construction and Services complete with a guide to enactment, the current European

Union directives and a number of South African procurement procedures have indicated that (Watermeyer, 2004c):

- i) there are eight generic procurement procedures associated with procurements other than those relating to disposals and e-procurement (see Table 2);<sup>5</sup>
- ii) there are four generic evaluation methods (see Table 3); and
- iii) eligibility criteria can form part of a procurement procedure.

Not all these procurement procedures are necessarily appropriate to the procurement of supplies, services and engineering and construction works under all circumstances. These procedures facilitate the solicitation of tender offers i.e. the activities and sub-activities associated with “solicit tender offers” activity shown in Figure 1.

<b>Table 2: Generic procurement procedures (Watermeyer, 2004c)</b>	
<b>Procedure</b>	<b>Description</b>
Negotiated procedure	Tender offers are solicited from a single tenderer.
Nominated procedure	Tenderers that satisfy prescribed criteria are admitted to an electronic database. Tenderers are invited to submit tender offers based on search criteria and their position on the database. Tenderers are repositioned on the database upon appointment or upon the submission of a tender offer.
Open procedure	Tenderers may submit tender offers in response to an advertisement by the organisation to do so.
Qualified procedure	A call for expressions of interest is advertised and thereafter only those tenderers who have expressed interest, satisfy objective criteria and who are selected to submit tender offers, are invited to do so.
Quotation procedure	Tender offers are solicited from not less than three tenders in any manner the organisation chooses, subject to the procedures being fair, equitable, transparent, competitive and cost-effective.
Proposal procedure using the two-envelope system	Tenderers submit technical and financial proposals in two envelopes. The financial proposal is only opened should the technical proposal be found to be acceptable.
Proposal procedure using the two-stage system	Non-financial proposals are called for. Tender offers are then invited from those tenderers that submit acceptable proposals based on revised procurement documents. Alternatively, a contract is negotiated with the tenderer scoring the highest number of evaluation points.
Shopping procedure	Written or verbal offers are solicited in respect of readily available supplies obtained from three sources. The supplies are purchased from the source providing the lowest price once it is confirmed in writing.

It is also possible to use an online price and reverse auction techniques to purchase certain categories of supplies such as commodities. In the reverse auction method, tenderers submit prices through the web and are provided with information on other tenderers. Each tenderer is allowed to reduce his tendered price competitively with others during the auction and the one offering the lowest price at a pre-agreed end time for the auction will be the one awarded the contract (Ozorio de Almeida, 2004).<sup>6</sup>

<b>Table 3: Generic tender evaluation methods (Watermeyer, 2004c)</b>	
<b>Method</b>	<b>Procedure</b>
Method 1: Financial offer	<ol style="list-style-type: none"> <li>1) Rank tender offers from the most favourable to the least favourable comparative offer.</li> <li>2) Recommend highest ranked tenderer for the award of the contract, unless there are compelling and justifiable reasons not to do so.</li> </ol>
Method 2: Financial offer and preferences	<ol style="list-style-type: none"> <li>1) Score tender evaluation points for financial offer.</li> <li>2) Confirm that tenderers are eligible for the preferences claimed and if so, score tender evaluation points for preferencing.</li> <li>3) Calculate total tender evaluation points.</li> <li>4) Rank tender offers from the highest number of tender evaluation points to the lowest.</li> <li>5) Recommend tenderer with the highest number of tender evaluation points for the award of the contract, unless there are compelling and justifiable reasons not to do so.</li> </ol>
Method 3: Financial offer and quality	<ol style="list-style-type: none"> <li>1) Score quality, rejecting all tender offers that fail to score the minimum number of points for quality stated in the tender data, if any.</li> <li>2) Score tender evaluation points for financial offer.</li> <li>3) Calculate total tender evaluation points.</li> <li>4) Rank tender offers from the highest number of tender evaluation points to the lowest.</li> <li>5) Recommend tenderer with the highest number of tender evaluation points for the award of the contract, unless there are compelling and justifiable reasons not to do so.</li> </ol>
Method 4: Financial offer, quality and preferences	<ol style="list-style-type: none"> <li>1) Score quality, rejecting all tender offers that fail to score the minimum number of points for quality stated in the tender data, if any.</li> <li>2) Score tender evaluation points for financial offer.</li> <li>3) Confirm that tenderers are eligible for the preferences claimed, and if so, score tender evaluation points for preferencing.</li> <li>4) Calculate total tender evaluation points.</li> <li>5) Rank tender offers from the highest number of tender evaluation points to the lowest.</li> <li>6) Recommend tenderer with the highest number of tender evaluation points for the award of the contract, unless there are compelling and justifiable reasons not to do so.</li> </ol>



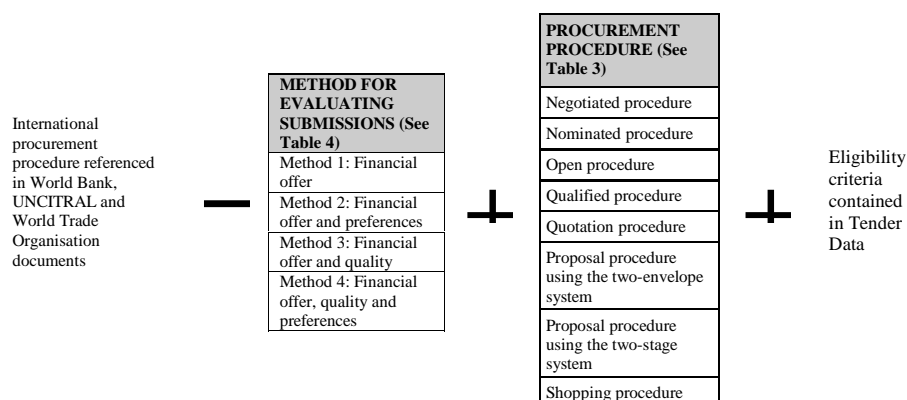
Disposals, on the other hand, may be undertaken using one of following procedures:

- i) the negotiated procedure as described in Table 2;
- ii) the open procedure as described in Table 2;
- iii) the qualified procedure as described in Table 2; or
- iv) public auction, i.e. the advertising and displaying of items and assets that are to be auctioned prior to their auction sale.

Eligibility criteria in the form of attaining a minimum quality score can provide a simple and cost-effective alternative to the scoring of quality in tender submissions in professional service contracts. In this procedure, the scoring of quality is merely to establish that the tenderer is capable of providing the work and to reject the tender submissions of those who fail to attain the threshold score. Thereafter, the tender offers can be evaluated on the basis of price or price and preference.

Combinations of the generic procedures and methods outlined in Tables 2 and 3, with or without eligibility criteria, can be used to simulate most international procurement procedures and methods applicable to supplies, services and works as illustrated in Figure 2 (see also annex B of SANS 294, 2004). They provide organisations with a wide range of procedures and methods including those that require a measure of discretion in making procurement decisions, thus allowing ‘global resolution’ or ‘reformation’ in procurement methods and practices referred to by Rege (2001) in order to attain best value procurement outcomes.<sup>7</sup>

Quality (i.e. totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs) can be addressed in procurement using one of the methods outlined in Table 4 under the circumstances that are indicated therein.



**Figure 2: Relationship between international procurement procedures and the generic methods (Watermeyer and Jacquet, 2004)**

<b>Table 4: Methods for addressing quality in procurement (Watermeyer and Jacquet, 2004)</b>	
<b>Method</b>	<b>Description of method</b>
Specifications	Specify the full and unambiguous requirements in the scope of work of a procurement document.
Life cycle costing	Take cognisance of whole-life costing in the financial evaluation of tender offers.
Qualified procedure	Make use of the qualified procurement procedure (see Table 2) and ensure that respondents who are invited to submit tender offers are suitably qualified to do so.
Eligibility criteria	Introduce quality into the eligibility criteria for the submission of tender offers or for the attainment of a minimum score in terms of specified quality criteria for tender offers to be evaluated.
Undertakings at tender stage	Require tenderers to submit plans for monitoring and applying quality management principles in the performance of their contracts.
Preference	Establish a category of preference for quality in the evaluation of tenders.
Evaluation criteria	Evaluate specified quality criteria as an integral part of the tender offer.

#### **2.4 Addressing Secondary Objectives in a Procurement System**

Secondary or non-commercial objectives can be categorised in terms of obligations placed on tenderers or successful contractors as tabulated in Table 5. The focus of each of the four types described in Table 5 is different. The Type I and II category (structure/internal workings of the contracting entity) typically focuses on the structure and internal workings within the company immediately prior to the commencement of the contract and for the duration of the contract. The Type III category (outsourcing) on the other hand, focuses on undertakings that targeted enterprises and/or labour will be engaged in economic activities in the performance of the contract and the monitoring thereof, while Type IV (nominated deliverables) uses procurement to leverage socio-economic benefits (Watermeyer, 2004a).

<b>Table 5: Classification of secondary objectives in terms of obligations placed on tenderers/successful tenderers (Watermeyer, 2004a)</b>			
<b>Type</b>		<b>Obligation placed on tenderer/successful contractor</b>	<b>Examples of obligations</b>
<b>#</b>	<b>Descriptor</b>		
I	Structure of the contracting entity	Satisfy nominated requirements to be eligible for the award of a contract or a preference.	Have a company profile (e.g. equity ownership/control/operational responsibilities/size) that satisfies prescribed criteria.
II	Internal workings of the contracting entity	Satisfy nominated requirements to be eligible for the award of a contract or a preference; or undertake to implement certain work place actions during the performance of a particular contract.	Have a company staffing structure that satisfies prescribed criteria. Establish and maintain a drug free workplace. Be in good standing with tax collection authorities. Implement a policy and programme of equal employment opportunity on the grounds of race/gender/disability. Provide conditions of employment more favourable than those provided for in the law.  Embrace environment friendly technologies and/or practices.
III	Outsourcing	Provide business and/or employment opportunities to target groups through activities directly related to a particular contract.	Subcontract a portion of the contract to targeted enterprises. Engage targeted enterprises and/or targeted labour in the performance of the contract. Enter into joint venture with targeted enterprises at prime or subcontract level.
IV	Nominated deliverables	Undertake to provide specific deliverables, which may be related or unrelated to a particular contract.	Participate in a country's economy to the extent that the sum total of all commercial/industrial activity equals or exceeds a monetary value over a period of time. Develop human resources, e.g. by assisting in tertiary and other advanced training programmes, in line with key indicators.

Several models for public sector procurement interventions, based largely on country specific procurement regimes and requirements, have evolved (Watermeyer, 2000). These can be broadly categorised as falling into one of four generic schemes indicated in Table 6, which in turn can be subdivided into one of the nine implementation methods identified by the Public Procurement Research Group (Arrowsmith *et al*, 2000) to promote non-commercial objectives as tabulated in Table 7.

<b>Table 6: Generic schemes for using procurement to attain socio-economic objectives (Watermeyer, 2004a)</b>	
<b>Scheme Type</b>	<b>Description</b>
<b>Reservation</b>	<p>Contracts or portions thereof are reserved for contractors who satisfy certain prescribed criteria e.g. contractors who:</p> <ul style="list-style-type: none"> <li>• are owned, managed and controlled by a target population group;</li> <li>• are classified as being a small business enterprise;</li> <li>• have equity ownership by companies with prescribed characteristics; or</li> <li>• are joint ventures between non-targeted and targeted joint ventures.</li> </ul>
<b>Preferencing</b>	<p>Although all contractors who are qualified to undertake the contract are eligible to tender, tender evaluation points are granted to those contractors who satisfy prescribed criteria or who undertake to attain specific goals in the performance of the contract.</p>
<b>Indirect</b>	<p>Procurement strategies and requirements are used to promote policy objectives by constraining the manner in which the procurement is delivered or by being used to generate offsets in parallel to the procurement. E.g. specifications require that work associated with the contract is undertaken in a manner that supports policy objectives or offsets whereby undertakings such as the provision of bursaries, participation in an economy, the provisions of community centres etc that are unrelated to the procurement itself are, in order to secure the contract, committed to.</p>
<b>Supply side</b>	<p>Supply side measures are provided to targeted enterprises to overcome barriers to competing for tenders or for participating in procurements within the supply chain, e.g. access to bridging finance and/or securities, mentorship, capacitation workshops etc.</p>

<b>Table 7: Methods used to implement policies relating to secondary objectives (Watermeyer, 2004a)</b>		
<b>Scheme Type</b>	<b>Methods</b>	<b>Actions associated with the method</b>
<b>Reservation</b>	#1 Set asides	Allow only enterprises that have prescribed characteristics to compete for the contracts or portions thereof, which have been reserved for their exclusive execution.
	#2 Qualification criteria	Exclude firms that cannot meet a specified requirement, or norm, relating to the policy objective from participation in contracts other than those provided for in the law.
	#3 Contractual conditions	Make policy objectives a contractual condition, e.g. a fixed percentage of work must be subcontracted out to enterprises that have prescribed characteristics or a joint venture must be entered into.
	#4 Offering back	Offer tenderers that satisfy criteria relating to policy objectives an opportunity to undertake the whole or part of the contract if that tenderer is prepared to match the price and quality of the best tender received.
<b>Preferencing</b>	#5 Preferences at the short listing stage	Limit the number of suppliers/service providers who are invited to tender on the basis of qualifications and give a weighting to policy objectives along with the usual commercial criteria, such as quality, at the short listing stage.
	#6 Award criteria (tender evaluation criteria)	Give a weighting to policy objectives along with the usual commercial criteria, such as price and quality, at the award stage.
<b>Indirect</b>	#7 Product/service specification	State requirements in product or service specifications, e.g. by specifying labour-based construction methods.
	#8 Design of specifications, contract conditions and procurement processes to benefit particular contractors	Design specifications and/or set contract terms to facilitate participation by targeted groups of suppliers.
<b>Supply side</b>	#9 General assistance	Provide support for targeted groups to compete for business, without giving these parties any favourable treatment in the actual procurement.

Concerns regarding the undermining of primary procurement (good governance) objectives are invariably expressed whenever procurement is used as an instrument of socio-economic policy. Typically the concerns raised revolve around the risk of the following occurring when implementing a preferential procurement policy (Watermeyer, 2004a):

- i) loss of economy and inefficiency in procurement;
- ii) the exclusion of certain eligible tenderers from competing for contracts;
- iii) the reduction in competition;
- iv) unfair and inequitable treatment of contractors;
- v) lack of integrity or fairness;
- vi) lack of transparency in procurement procedures; and
- vii) failure to achieve secondary procurement objectives through the procurement itself.

It should be noted that these risks relate to the compromising of a procurement system's good governance objectives.

Type IV (nominated deliverables) secondary objects that are unrelated to a particular contract (offsets) are extremely difficult to implement in a manner which does not violate most of the abovementioned concerns, particularly if obligations extend beyond the procurement contract period. Accordingly, these secondary objectives are considered from the outset to compromise primary procurement objectives.

Type II (internal workings of the contracting entity) can be implemented on a compliance/non-compliance basis. Those that require implementation on a basis other than this can be implemented in the same manner as Type I and Type III objectives. Type IV secondary objectives that relate specifically to contracts, similarly can be implemented either on a compliance/non-compliance basis or in the same manner as Type I and III objectives.

Watermeyer (2004a) performed a risk assessment based on AS/NZS 4360:1999 (Risk Management) on the implementation of a preferential procurement policy which has objectives that can be realised by creating a demand for services and supplies from, or to secure the participation of, targeted enterprises and targeted labour (Types I and III secondary objectives with respect to Table 5), using the first eight methods listed in Table 7 (see Table 8). His analysis indicated that the methods which relate to preferencing at the short listing stage and award (tender evaluation) criteria, whilst not guaranteeing that socio-economic objectives will be met, are the methods that are most likely not to compromise requirements for a system which has fair, equitable, transparent, competitive and cost effective good governance goals, if appropriately managed.<sup>8</sup> The analysis furthermore indicated that method 3 (contractual conditions), method 7 (product/description specification), and method 8 (design of procurement to benefit particular contractors) have the potential under certain circumstances to satisfy primary objectives while method 1 (set asides), method 2 (qualification criteria), and method 4 (offering back) are most likely to compromise such objectives.

<b>Table 8: Probability of the risk being managed within acceptable limits in most procurements where labour and enterprises are targeted (Type I and III secondary objectives) (Watermeyer, 2004a)</b>								
<b>Risk to be managed</b>	<b>Method of policy implementation (see Tables 6 and 7)</b>							
	<b>Reservation scheme</b>				<b>Preferencing scheme</b>		<b>Indirect scheme</b>	
	<b>#1: Set asides</b>	<b>#2: Qualification criteria</b>	<b>#3: Contractual conditions</b>	<b>#4: Offering back</b>	<b>#5: Preferences at short listing stage</b>	<b>#6: Award criteria</b>	<b>#7: Product/service specification</b>	<b>#8: Design of specifications, contract conditions and procurement processes to benefit particular contractors</b>
Loss of economy and inefficiency in procurement	3	3	2	1	1	1	2	2
Exclusion of qualified tenderers from competing for tenders	3	3	2	-	-	1	2	2
Reduction in competition	2	3	2	2	1	1	2	2
Unfair and inequitable treatment of contractors	3	3	2	3	1	1	2	2
Lack of integrity or fairness	2	2	1	2	1	1	1	2
Lack of transparency in procurement procedures.	1	1	1	2	1	1	1	1
Failure to achieve secondary procurement objectives through procurement	2	2	1	2	2	2	1	2
<b>Legend</b>	1 = Favourable outcome will probably occur in most circumstances. 2 = Unfavourable outcome might occur. 3 = Unfavourable outcome likely in most circumstances.							

Tender evaluation points can be granted using one of three methods outlined in Table 9. Methods 1 and 2 are objective and require no subjective judgments to be exercised in the quantification of the preference. The evaluation in these methods merely needs to determine whether or not the tenderer is eligible for a preference. Method 3 may, on the other hand, depending upon how it is formulated, require subjective judgment to arrive at the quantum of the preference unless tenderers are required to quantify the goals that they offer in a uniform and objective manner.

<b>Method</b>	<b>Methodology</b>	<b>Example</b>
1	Award a fixed number of points for attaining a specific goal.	Have an enterprise profile that satisfies prescribed criteria, e.g. criteria relating to its geographic location, status as a small or medium enterprise (SME) and/or company profile (ownership, operational responsibilities and control, or a combination thereof, by marginalized population groups).
2	Award a variable number of points in proportion to the degree to which a tenderer responds to a particular goal (i.e. in proportion to the quantum offered).	Undertake to marshal and structure resources to perform the contract in such a manner that the quantum of expenditure incurred on the engagement of defined target groups (labour and/or enterprises) equals or exceeds a given percentage of the contract value.
3	Award points on a comparative basis in terms of which the best offer received scores the maximum number of allotted points; the worst offer scores no points; and the remaining offers are scored between these limits.	Undertake to set aside a percentage of payroll for the training of employees who fall within defined target groups, e.g. people with disabilities, women or youth. Undertake to provide community facilities or provide skills training, bursaries and business opportunities to targeted communities.

### **3. TRANSPARENCY IN PROCUREMENT**

#### **3.1 Understanding Transparency in the Procurement Context**

A transparent procurement system is seen to (OECD, 2003; Arrowsmith, 2003, and Fenster, 2002):

- i) provide best value for money though increased competition and good economic governance;
- ii) improve the performance of industry and local markets;
- iii) improve the global competitiveness of local industries;
- iv) improve access to markets for small and medium enterprises;
- i) provide a means for combating bribery and corruption;
- ii) enhance accountability and public confidence;
- iii) minimise covert discrimination at the invitation, evaluation and execution stage;
- iv) assist conscientious officials to resist pressures from their political masters seeking to depart from their “own” policies for reasons of political expediency; and
- v) minimise the concealing of not just discriminatory behaviour but also other illegitimate conduct, including corruption and patronage.



OECD (2003) points out that “the conduct of government procurement involves a sequence of procedural steps that provide opportunities at different levels for transparency and open decision-making”. Evenett and Hoekman (2003) consider a procurement system to be transparent if:

- i) the terms upon which the procurement process are to be conducted and the criteria upon which any decisions are to be made are properly documented and made widely available;
- ii) the eventual procurement award decision, and where appropriate, any intermediate decision, is made publicly available as are the reasons given for these decisions; and
- iii) it is possible to verify that the documented procedures and criteria were indeed applied.

Transparency is maintained through (Schooner, 2002):

- i) the publishing of statutes, regulations, policies and rules that define the procurement process;
- ii) publicly announcing government’s requirements;
- iii) articulating in every solicitation how tenders will be evaluated;
- iv) notifying all of the unsuccessful tenderers (and members of the public who request the information) which tenderer received the award and for what amount;
- v) the debriefing of unsuccessful tenderers and explaining to them how all of the rules and regulations were followed;
- vi) the provision of protest procedures, where independent third parties can review all of the agency records; and
- vii) the employment of appropriate oversight to audit agency actions.

From the foregoing, it is clear that a transparent procurement system is characterised by the documentation of clear rules and the means to verify that those rules were followed (Westring and Jadoun, 1996 and Watermeyer, 2004c). Discretionary systems whereby tender committees or tender boards have the powers to decide on procurement processes and the manner in which tenders offers are to be adjudicated are not transparent as they fail to satisfy the Evenett and Hoekman criteria for transparency. The role of tender committees in a transparent procurement system should be to evaluate tenders in terms of published criteria and to confirm that the documented processes and procedures were adhered to.

It should be noted that the Evenett and Hoekman criteria do not preclude the application of preferential procurement policies. It is possible to implement preferential procurement policies in a transparent manner (Watermeyer, 2000 and 2004a).

The WTO’s dispute settlement mechanism (DSM) is based on the presumption that a violation of an obligation would have an effect on the trade of Members. Accordingly, the WTO’s Dispute Settlement Understanding (DSU) uses compensation or retaliatory measures to correct non-compliance. Recourse to the DSU cannot challenge how a procurement authority has handled a specific procurement or overturn a contract decision. In the absence of commitments on market access, the role of the DSU in a potential multilateral TGPA would be limited to that of a review body, which could examine if the transparency commitments have been complied with (Shingal, 2004).

A transparent procurement system allows challenges to be made and ruled on in terms of an adjudication procedure, which, if upheld, can be readily translated into compensation in the form of reasonable costs associated with the preparation and submission of a tender (Watermeyer, 2004d). (See Annex C)

### **3.2 Improving Transparency within a Procurement System**

Transparency, in a nutshell, needs to answer the basic questions: Has full information in terms of the criteria that apply in the procurement process been disclosed and applied in the procurement process?

Transparency in procurement can be improved upon through:

- i) the capturing of key information in an electronic data base and the use of web-based information technology to publish information on procurement opportunities and awards of contracts (Ozorio de Almeida, 2004);
- ii) the harmonising of procurement processes, procedures and methods within a country (World Bank, 2003 and Watermeyer, 2004b);
- iii) standardisation of procurement documentation (World Bank, 2003 and Watermeyer, 2004c); and
- iv) the introduction of challenge procedures in the form of adjudication where procurement processes, procedures and methods are comprehensively documented (Watermeyer, 2004d).

## **4. STANDARDISING PROCUREMENT PROCESSES, PROCEDURES AND METHODS**

ISO/IEC Guide 2<sup>9</sup> defines a standard as a “document, established by consensus and approved by a recognised body that provides for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context”. Given that procurement is a process comprising methods and procedures, it is surprising that there are no international or national standards for procurement, other than those recently published by Standards South Africa (See Annex D), despite the demand being expressed by members of the International Standards Organisation (ISO) and their partners in a recent survey for standards relating to management systems in fields such as governance (Watermeyer, 2004c).<sup>10</sup>

Standard procurement procedures and methods cannot be developed in isolation from the goals (objectives) that are established for a procurement system. For example, SANS 294, *Construction Procurement Processes, Procedures and Methods* (2004) (see Annex D), provides rules for a procurement system that are fair, equitable, transparent, competitive and cost effective. Implicit in the formulation of these rules are the qualitative system performance requirements set out in Table 10.

The goals and associated qualitative performance requirements contained in Table 10 apply to both public and private sector.<sup>11</sup> International and national standards developed in terms of annex 3 of the WTO Technical Barriers to Trade Agreement, such as SANS 294, are developed in a transparent manner by both the private and public sectors.

Accordingly, procurement standards developed in terms of this agreement can be adopted by both public and private sectors.

It may be argued that those wishing to do business with a public or private organisation have to understand the organisation's procurement culture, methods and systems in order to successfully access business opportunities and to price risks associated with their procurement. Accordingly, the procurement system of an organisation may be construed as a barrier to trade. The adoption of both the public and private sectors of a common set of rules, based on agreed objectives, would effectively remove this barrier to trade.

Standardisation, apart from removing technical barriers to trade, enables:

- i) those engaged in procurement activities to perform their duties, within the confines of their organisation's procurement policy, in a uniform and generic manner;
- ii) procurement documents to be readily compiled in a uniform and generic manner; and
- iii) curricula to be developed to capacitate those engaged in a range of procurement activities.

It furthermore allows governments to readily develop an internal procurement skills base, which is not lost when staff moves between different departments or levels of government.

## **5. DEVELOPING COUNTRY CONCERNS RELATING TO WTO PROCUREMENT AGREEMENTS**

The country papers prepared for the brainstorming meeting (see Annex A) cited a number of concerns relating to accession to the Government Procurement Agreement (GPA), a plurilateral agreement which has been signed by some WTO members and is administered by a plurilateral committee. Specific concerns included:

- i) Even though the Brazilian Government is ready and willing to work to forward the issues related to transparency in GP raised during the Singapore Ministerial, it is quite unwilling to link market access to this issue. The Brazilian Government believes that the Uruguay Round is still inconclusive and that issues relating to subsidies in developed nations' agricultural structures are unacceptable to nations that rely on a competitive exporting edge in agriculture commodities (Ozorio de Almeida, 2004).
- ii) Malaysia fears that accession to the GPA will erode their national interests, particularly in respect of their National Development Policy, which seeks to improve the economic participation of Bumiputera and to make them equal partners in the development of the country and government's role in stimulating local industries (Nambiar, 2004).
- iii) India's biggest problem lies with "national treatment" requirement as preferences and reservation schemes are in place for small and indigenous businesses (Srivastava, 2003).
- iv) South Africa's concerns centre on the possibility that accession will preclude government from applying preferences on the basis of national priorities, including black economic empowerment, and may supplant smaller less competitive suppliers. (This concern is compounded by the fact that South Africa negotiated the Uruguay Round on the basis of "developed" nation status.) (Watermeyer, 2004b)

<b>Table 10: Qualitative system performance requirements based on identified system objectives</b>	
<b>System objective</b>	<b>System requirement</b>
Fair	<p>The process of offer and acceptance within the procurement system is to be conducted:</p> <ul style="list-style-type: none"> <li>i) impartially without a bias, i.e. in a manner which favours or seems to favour one tenderer or in a manner which is seen as supporting one tenderer to the detriment of another; and</li> <li>ii) in a manner which affords tenderers timely access to the same information.</li> </ul> <p>The procurement system provides for a challenge procedure which results in a tenderer being compensated for his cost of tendering if it is determined that a breach in the procurement system resulted in the contract not being awarded to such tenderer.</p>
Equitable	<p>The terms and conditions under which the work associated with the procurement is provided does not contain unreasonable provisions, which could, unfairly, prejudice the interests of any party.</p> <p>The only grounds for not awarding a contract to a tenderer who satisfies all the terms and conditions of the tender are that the tenderer:</p> <ul style="list-style-type: none"> <li>i) is under restrictions to do business with the organisation as a result of prior corrupt and fraudulent practices;</li> <li>ii) does not have the capability or capacity (or both) to perform the contract;</li> <li>iii) is not in good standing insofar as statutory obligations (e.g. taxes) are concerned; and</li> <li>iv) may not be able to perform the contract in the best interest of the organisation owing to conflicts of interest.</li> </ul>
Transparent	<p>The procurement system is such that:</p> <ul style="list-style-type: none"> <li>i) the terms upon which the procurement process is to be conducted and the criteria upon which any decisions are to be made are properly documented and communicated to both tenderers and those responsible for the processing of tender offers;</li> <li>ii) the eventual procurement award decision, and where appropriate, any intermediate decisions, is made publicly available as are the reasons given for these decisions;</li> <li>iii) the reasons given for decisions are made known to the tenderers; and</li> <li>iv) it is possible to verify that the documented procedures and criteria were indeed applied.</li> </ul>
Competitive	<p>The procurement system provides for appropriate levels of competition to ensure that cost effective and best value procurement outcomes are attained.</p>
Cost effective	<p>The procurement system is standardised as far as possible and provided with sufficient flexibility to facilitate the attainment of best value procurement outcomes in terms of quality, timing and price, using the least amount of resources necessary to effectively manage and control the procurement process.</p>
Attainment of secondary (non-commercial objectives)	<p>The procurement system may incorporate measures to promote objectives associated with a preferential procurement policy provided that:</p> <ul style="list-style-type: none"> <li>i) such measures do not exclude qualified tenderers from competing for the award of contracts and are fair, equitable, transparent, competitive and cost effective; and</li> <li>ii) any deliverable or preferencing criteria associated with such procedures are measurable, quantifiable and monitored for compliance.</li> </ul>

Rege (2001) cites the reluctance of developing countries to accede to the GPA as:

- i) negligible benefits of membership;
- ii) GPA membership is unnecessary for development of regional trade;
- iii) developed countries are likely to be the main beneficiaries of developing country membership; and
- iv) policy changes are required by GPA membership, particularly those relating to price preference.

Shaheen (2004) has explored the likely responses of developing countries to a possible multilateral Transparency in Government Procurement Agreement (TGPA). He points out that there are numerous reasons that reinforce developing nation resistance to such a TGPA. Three of the many reasons are:

- i) Membership of the Agreement will bring about only marginal export gains for them. The major gains will accrue to the developed countries' manufacturing and service industries that are able to take advantage of the improved access to developing country markets under the Agreement.
- ii) There is a potential for the development of regional trade among developing countries in the procurement sector. However, for the development of this trade, membership to a TGPA is not necessary as liberalisation measures in such regard can be managed at the regional level.
- iii) For most developing countries, the efficiency gains to procurement agencies from the application of the Agreement may not be significant in view of the following:
  - a) The purchase of goods through tenders is widely prevalent on large capital projects as well as those requiring ongoing service and 'spillover business'.
  - b) Governments within developing and least developed nations already claim to follow transparency protocols as outlined by the World Bank and international financial institutions whose member nations fund developing country projects. Hence, there is little perceived benefit to signing onto another agreement which would require additional upfront costs in infrastructure and training of civil servants to manage such a system.

## **6. MODELS FOR GOVERNMENT PROCUREMENT SYSTEMS**

### **6.1 Different Models for Government Procurement**

In India, Article 298 of the Constitution of India authorises the Central and the State governments to contract for goods and services and also requires the executive to protect the fundamental rights of all citizens to be treated equally (while soliciting tenders), but beyond that it does not provide any guidance on public procurement principles, policies or procedures (World Bank, 2003). Section 217 of the Constitution of the Republic of South Africa, on the other hand, establishes the primary and broad secondary procurement objectives in South Africa as indicated in Table 11. The policy for the "good governance" aspects of procurement, which is captured in Section 217(1), establishes a comprehensive framework for procurement that is consistent with international norms and standards. These requirements shape procurement procedures and practices (see Table 10). Section 217(2) establishes South Africa's preferential

procurement policy in that it provides for a preferencing scheme and measures to be taken to protect or advance persons disadvantaged by unfair discrimination. Section 217(3) of the Constitution establishes the manner in which South Africa's preferential procurement policy is to be implemented, namely that national legislation must prescribe a framework within which the preferential procurement policy must be implemented (Watermeyer, 2004b).

<b>Table 11: Public procurement objectives in South Africa as contained in the constitution</b>		
<b>Objective</b>		<b>Reference</b>
<b>Primary</b>	Procurement system is to be fair, equitable, transparent, competitive and cost effective.	Section 217 (1)
<b>Secondary</b>	Procurement policy may provide 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.	Section 217 (2)

The practice of the World Bank to separate consulting services from the provision of general services, supplies and construction works and to provide model bidding documents is reflected in the regulatory practices of Ecuador (Moncayo, 2004).

The country papers prepared for the Brainstorming Session indicate that there are several models available to developing countries to regulate their procurement systems. These may be broadly categorised as follows:

- 1) **Centralised approach** in terms of which central tender boards or similar organisations oversee the process, evaluate tenders and award contracts.
- 2) **Prescriptive approach** in terms of which legislation and associated regulations detail procedures to be followed on a decentralised basis.
- 3) **Financial instructions**, which establish minimum requirements relating to expenditure and auditing and provide no specific instructions regarding the manner in which institutions are to conduct their procurement.
- 4) **Framework approach** in terms of which legislation establishes high level requirements and leaves it to institutions to provide the detail.

Malaysia first published its national legislation governing procurement in 1949 and 1957, Ecuador in 1976 and 1989, Brazil in 1993, South Africa during the period 1996 to 2003 and China in 2001. Countries with older pieces of legislation have opted for either a centralised or prescriptive approach. China, who has only very recently engaged in government procurement, has opted for a framework approach, as has South Africa, who following the abandonment of the apartheid system in 1994 has reviewed and reformed many of its laws.

All authors of the country papers reported on deficiencies and shortcomings in all the systems relating to the curbing of corrupt practices. In some countries, combinations of the approaches are pursued, e.g. procurements above a prescribed value are dealt with in terms of the centralised approach and procurements below the prescribed value in terms of financial instructions.

## **6.2 Anticorruption Measures**

The authors of each country paper cited a range of measures put in place to deal with corruption. These included:

- i) The provision of an independent judicial systems, the auditing of supervision/ management systems, and the establishment of standard civil servant systems (Liu, 2004);
- ii) Laws relating to access to information (Moncayo, 2004);
- iii) The conducting of ex-post audits of government expenditure including procurement by the office of an Auditor General and the establishment of commissions to investigate offences alleged under an act designed to prevent corruption (World Bank, 2003);
- iv) An array of laws relating to corruption, reporting on corrupt practices, establishing the office of a public protector to investigate complaints, promoting access to information, promoting just administration, and the protection of those disclosing information relating to corrupt practices (Watermeyer, 2004b).

The success or otherwise of all these initiatives is dependent on there being in place comprehensive, well formulated and documented procurement procedures that are free of undue discretion and subjectivity. The success rate for prosecutions is low in the absence of such procedures.

## **6.3 A Replicable Model**

Table 12 outlines the contents of the articles of the WTO's GPA (Watermeyer, 2004b). These provisions cannot be readily incorporated into a developing country's procurement system. It is also not easy to confirm if all the provisions have been addressed in a particular system.

The current practice has been to encourage countries to develop their procurement systems along the lines of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and the World Bank's procurement guidelines (Procurement under IBRD Loans and IDA credits and Selection and Employment of Consultants by World Bank Borrowers). Developing countries are frequently exposed to World Bank's procurement guidelines as they have often been required to make use of these guidelines in Bank funded projects or been exposed to them when contemplating procurement reforms in the wake of Country Procurement Assessment Reports (CPARs) conducted in response to requests for World Bank finance.

<b>Table 12: Overview of the WTO's GPA</b>	
<b>Article</b>	<b>Outline of provisions</b>
I: Scope and Coverage	Establishes the range of applicability of the Agreement, viz, applicable to procurement, having a contract value in excess of a threshold, by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.
II: Valuation of Contracts	Provides the basis for determining the value of a contract and provisions relating to the determination of whether or not the Agreement is applicable.
III: National Treatment and Non-discrimination	Establishes requirements for laws, regulations, procedures and practices to: a) provide for treatment of products, services and suppliers of any other party no less favourable than that accorded to domestic products, services and suppliers; and b) ensure that a locally established supplier is not treated less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership, and locally established suppliers are not discriminated against on the basis of the country of production of the goods or service being supplied.
IV: Rules of Origin	Establishes requirements for the application of common rules of origin.
V: Special and Differential Treatment for Developing Countries	Establishes concessions to accommodate the needs of developing countries, viz, the safeguarding of their balance-of-payments position, ensuring a level of reserves adequate for the implementation of programmes of economic development, and promoting the establishment or development of domestic industries and the economic development of other sectors of the economy.
VI: Technical Specifications	Establishes requirements for the drafting of technical specifications and the use of international and national specifications wherever appropriate.
VII: Tendering Procedures	Establishes: a) open tendering procedure whereby all interested tenderers may submit tender offers; b) selective tendering procedure in terms of which tenders are invited from a number of domestic suppliers and suppliers of other countries to ensure international competition in a fair and non-discriminatory manner; and

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<b>Article</b>	<b>Outline of provisions</b>
	c) limited tendering procedures i.e. procedures other than the open or selective tendering procedures.
VIII: Qualification of Suppliers	Establishes non-discrimination requirements for the qualification of suppliers.
IX: Invitation to Participate Regarding Intended Procurement	Establishes requirements for invitations to participate in a procurement.
X: Selection Procedures	Establishes requirements for selection procedures.
XI: Time-limits for Tendering and Delivery	Establishes minimum time period from publication of advertisement to receipt of tender submissions.
XII: Tender Documentation	Establishes requirements for language, content of documents and responding to reasonable requests for explanations.
XIII: Submission, Receipt Opening of Tenders and Awarding of Contracts	Establishes requirements for the submission, receipt, opening and award of contracts.
XIV: Negotiation	Establishes requirements for and conditions under which negotiations may be undertaken.
XV: Limited Tendering	Establishes the conditions under which limited tendering procedures may be used.
XVI: Offsets	Prohibits the imposition, seeking of or consideration of offsets in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, unless developing countries have negotiated for such provisions at the time of accession.
XVII: Transparency	Establishes an obligation to strive to indicate the terms and conditions under which tenders will be solicited.
XVIII: Information and Review as Regards Obligations of Entities	Establishes a requirement for the publication of a notice providing particulars of the successful tenderer after the award of a contract and to provide on request to a supplier an explanation of the reasons why the tenderer was unsuccessful.

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Article	Outline of provisions
XIX: Information and Review as Regards Obligations of Parties	Establishes requirements for each party to: <ul style="list-style-type: none"> <li>a) publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by the Agreement and to explain to any other party its government procurement procedures;</li> <li>b) provide such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially;</li> <li>c) provide to the Committee annual basic statistics on its procurement under the Agreement.</li> </ul>
XX: Challenge Procedures	Establishes requirements for suppliers to seek resolution of complaints with the procuring entity and challenge procedures for complaints to be dealt within the event of a breach of the Agreement by a court or by an impartial and independent review body.
XXI: Institutions	Establishes the composition and functions of a Committee on Government Procurement responsible for affording parties the opportunity to consult on any matters relating to the operation of the Agreement or the furtherance of its objectives.

The alignment of a country's procurement system to these models and to superimpose financial and risk management requirements on top of these is very difficult. Furthermore, these models presuppose that the legislative approach that will be adopted will be along the lines of the centralised or prescriptive approach. The models are not really geared for the more modern approach adopted by China and South Africa.

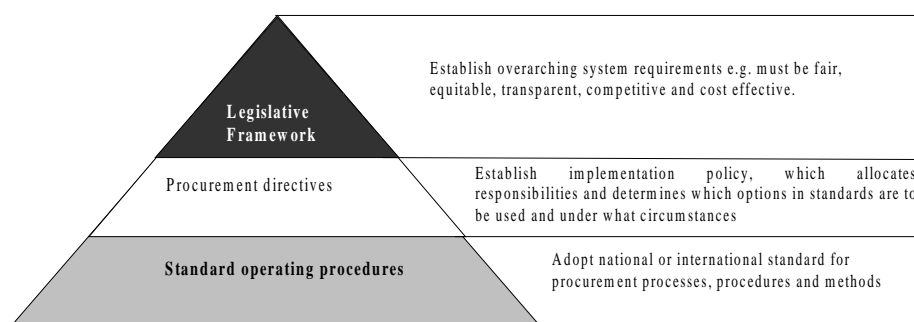
Watermeyer (2004b) has proposed a model that has the potential to be more easily replicated, based on South Africa's framework approach and the recently published South African National Standards for construction procurement. This model is outlined in Figure 3.

In terms of the model:

- i) The legislative framework should establish the procurement ends, i.e. the system's objectives such as those set out in Table 11. It should also link the procurement framework to anti-corruption measures and monitoring and auditing requirements.
- ii) The procurement directives should establish implementation policy, which allocates responsibilities as illustrated in Table 13 and identifies which of the options provided for in terms of iii) are to be used and under what circumstances.
- iii) The standard operating procedures are put in place through the adoption of a national standard for procurement such as SANS 294 (see Annex D), or an equivalent international standard should such a standard be developed. Such a standard should

provide for procedures and methods that are consistent with the system's stated objectives (see Table 10).<sup>12</sup>

The model presented in Figure 3 may also be adopted by international organisations, donor agencies and private sector organisations. The model can be readily located within a supply chain management system, which comprises demand management, acquisition management, logistics, disposal management and risk management (Watermeyer, 2004b) and linked to challenge procedures as described in Annex C.



**Figure 3: Universal model for implementing procurement within institutions**

It should be noted that SANS 294 is compatible with the provisions of the GPA (Watermeyer, 2004b). The GPA is in effect a framework similar to that provided in the proposed model. Article XIX requires each Party to the GPA to promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure regarding government procurement. SANS 294, or an equivalent international standard prepared along its lines, can similarly be used to provide standard operating procedures that are GPA compliant.

The standard operating procedures provide a set of rules that interpret the legislative framework requirements in a simple to apply standard. This approach has the benefit that it does not require officials to interpret the legislative requirements during implementation. This allows corruption to be combated in a proactive manner and allows procurement methods and procedures, which require discretionary authority to be used.

## **7. IMPLICATIONS OF RECENT RESEARCH AND DEVELOPMENTS IN PROCUREMENT ON WTO PROCUREMENT AGREEMENTS**

The stalemate on launching negotiations on the Singapore Issues at Cancún provides an opportunity to rethink government procurement agreements. In rethinking such agreements, it should be noted that:

- i) Procurement is not just about obtaining goods and services of an acceptable quality at the lowest price. Value for money from a government's perspective is not necessary lowest price that satisfies requirements. Cost effectiveness needs to be weighed up with other social considerations and development interventions.

- ii) Procurement policies are important from a development perspective. Reducing poverty and attaining development and other objectives requires getting the most out of the limited funds available for government purchases of goods, services, and infrastructure (Evenett and Hoekman, 2004a).
- iii) Best value from a sustainable development perspective, in terms of agreements made at the United Nations Conference on Environment and Development of 1992 (Earth Summit, Rio de Janeiro) and World Summit on Sustainable Development of 2002 (Johannesburg), is the cost effective procurement of supplies, services and works in a manner that does not negatively impact on the environment and contributes to the alleviation of poverty. It is accordingly essential that governments in both developed and developing countries, international institutions and donors review their procurement arrangements and align them to contribute to sustainable development policy objectives (Watermeyer, 2004a).
- iv) Public sector enterprises in developing countries may need some form of protection.
- v) International trade negotiations – whether bilateral, regional, or multilateral – are a mechanism through which governments address the terms upon which foreign firms can compete in domestic public procurement markets. It should be noted in this regard that an OECD study of 106 developing countries in 1998 revealed that (Evenett and Hoekman, 2004a):
  - a) about half the developing countries covered had an annual state procurement outlays of less than or equal to USD 1 billion;
  - b) only 6 developing countries had state procurement markets exceeding USD 10 billion; and
  - c) the sum of the 106 developing country markets represented 13.9 per cent of the total worldwide spending in 1998.
- vi) The current evidentiary basis upon which to formulate policy advice on procurement reforms in developing countries is unsatisfactory. The available empirical evidence is in fact often anecdotal in nature, does not provide policy makers with a sense of the relative costs and benefits of different policy options, and often does not withstand the scrutiny given to relatively sophisticated policy analysis (Evenett and Hoekman, 2004a).
- vii) If corruption is considered to be a cost of doing business, eliminating it will reduce costs and increase the volume of work. It makes economic sense to curb corruption, since it is a zero-sum-game, with the cost paid for by society (FIDIC, 2001).
- viii) Increased transparency in government procurement systems will only reduce corrupt and irregular practices and improve the predictability of the procurement system where (Watermeyer, 2004b):
  - a) A country has a legislative framework in place that establishes high level requirements for transparency that are supported by appropriate anti-corruption measures.
  - b) Basic procurement processes, methods and procedures, together with minimum timeframes for key actions, are comprehensively documented and published.
  - c) Procurement documents precisely describe the manner in which tenders are to be submitted and evaluated.
  - d) Codes of conduct governing the conduct of all the parties engaged in procurement forms an integral part of the procurement system.
  - e) Transgressors of the code of conduct and those that engage in corrupt and fraudulent practices are disciplined.

- f) Simple, cost effective challenge procedures are put in place.
- ix) Although an improvement in transparency in a procurement system may reduce corruption, the processes and controls introduced to improve transparency may lead to inefficiencies within the system. Best outcomes will occur when the whole procurement system is overhauled, as transparency is but one component of a procurement system. (See Table 10)
- x) The alignment of a developing country's procurement system to binding and non-binding agreements such as the GPA and the UNCITRAL Model Law on Procurement of Goods, Construction, and Services, respectively, is not straightforward as it needs to be integrated with a country's regulatory system and may require expertise which is not locally available. Furthermore, these agreements require interpretation and need to be supported by standard operating procedures. Extensive work is needed to translate the intent of the agreement into such procedures.

<b>Table 13: Linkages between procurement activities, procedures and management control points in the procurement process</b>		
<b>Activity</b>	<b>Procedures associated with activities</b>	<b>Management control points</b>
<b>Establish what is to be procured</b>	Procedures for preparing for procurement	<b>Obtain permission to start with the procurement process</b>
<b>Decide on procurement strategies</b>		<b>Obtain approval for procurement strategies that are to be adopted</b>
<b>Solicit tender offers</b>	Procedures for the preparation of procurement documents	<b>Obtain approval for procurement documents</b> <b>Confirm that budgets are in place</b>
	Procedures for advertisements Procedures for the solicitation of tenders, viz: <ul style="list-style-type: none"> <li>● Procurement procedures</li> <li>● Negotiated procedure</li> <li>● Nominated procedure</li> <li>● Open procedure</li> <li>● Qualified procedure</li> <li>● Quotation procedure</li> <li>● Proposal procedure using the two-envelope system</li> <li>● Shopping procedure</li> <li>● Proposal procedure using the two-stage system</li> <li>● Disposal procedure</li> <li>● Advertisements</li> </ul>	
		<b>Confirm short list</b>

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<b>Evaluate tender offers</b>	Procedures for the receipt and opening of tender submissions. Procedures for the evaluation of tender submissions, viz: <ul style="list-style-type: none"> <li>● Disqualification of tenderers</li> <li>● Test for responsiveness</li> <li>● Arithmetical errors</li> <li>● Ranking and scoring of responsive tenderers</li> <li>● Risk assessment</li> <li>● Negotiations with tenderers</li> <li>● Tender evaluation reports</li> </ul>	<b>Confirm recommendation contained in the tender evaluation report</b>
<b>Award contract</b>	Procedures for the award of contracts	<b>Formally accept tender offer</b>
<b>Administer contracts and confirm compliance with requirements</b>	Procedures for contract administration Procedures for the resolution of contractual disputes	<b>Capture contract completion/termination data</b>

The IWOGDA II TGP Project has explored new trends in procurement and expanded the knowledge base on aspects of government procurement. It has not only highlighted the ends of government procurement, but has also outlined the means, based on emerging best practices in developing countries which may be applied equally to developed countries. This in turn poses a number of questions, which may provide some direction in overcoming the current stalemate in the negotiations around transparency.

The ten questions that need to be answered are:

- i) Should the WTO regulate domestic policies in ways that go well beyond market access considerations?
- ii) Is the GPA, or for that matter a TGPA, an effective reform/development tool for a developing country?
- iii) Should the WTO rather pursue co-operation on procurement issues on a “soft law” basis with non-binding norms and standards and as such become a credible vehicle for governments to commit themselves to transparent and efficient procurement regimes?
- iv) Are current international guidelines on procurement appropriate for the social and development needs of low and middle-income countries?
- v) Is there a case for developing and including transparent procedures relating to the pursuit of secondary (non-commercial) objectives in the GPA or a TGPA?
- vi) Should transparent procedures be put in place across the full spectrum of procurement and not just above an agreed threshold in order to engender a culture of transparency in government procurement?

- vii) If procurement is a process, is procurement not a technical barrier to trade? Should it be dealt with as a technical issue through international organisations such as the International Standards Organisation?
- viii) Should procurement be harmonised nationally and internationally? If so, should an international standard for procurement processes, procedures and methods along the lines of SANS 294 (see Annex D) be developed and linked to challenge procedures relating to the award of tender to the extent that aggrieved tenderers may recover their tendering costs?
- ix) Is there a role for the WTO to promote ethical trade practices by maintaining an international database of firms that have been debarred from participating in government procurement in a member country for engaging in corrupt and fraudulent practices?
- x) What form of technical assistance and capacity building should the WTO provide to developing countries and under what conditions?

The answers to the aforementioned questions may mean that the WTO's procurement agenda may have to fundamentally change.

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## **Annex A: Expert papers**

Ozorio de Almeida, Marcos. Case Study of Electronic Government Procurement in Brazil.

Evenett, Simon J. and Bernard M. Hoekman. International Disciplines on Government Procurement: A Review of Economic Analyses and Their Implications.

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Watermeyer, Ronald Basil. Transparency within the South African Public Procurement System.

## **Annex B: Acknowledgements**

### **Participants at Brainstorming Meeting, Jaipur, 28<sup>th</sup> June 2004**

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## **Annex C: Adjudication procedures to challenge decisions made in a transparent procurement system**

Decisions made by officials can be disputed should a comprehensive set of rules in respect of each procedure and method along the lines of those contained in SANS 294 be provided. An adjudicator can be appointed to decide if the complainant should have scored more tender evaluation points than the tenderer who was awarded the contract and should have been awarded the contract, and if so, to determine the tenderer's reasonable cost of tendering. Such an adjudicator must act impartially and in accordance with the rules of natural justice (Watermeyer, 2004d).

In terms of the procedures advocated by the Construction Industry Development Board (CIDB) in South Africa, tenderers may dispute the evaluation of their tender offers after the award of the contract, within 10 days of receipt of an unsuccessful tenderer notification, by requesting in writing the head of an organisation, which called for the tender in question, to appoint an adjudicator from the panel of adjudicators to adjudicate on the matter, subject to the tenderer agreeing to pay half the adjudicators fee and lodging a deposit equal to half the estimated fee amount and to waive all rights to overturn the award of the tender to another party and to limit any compensation to the reasonable costs of preparing the tender.

In terms of their recommended procedures (CIDB, 2004):

- i) The tenderer disputing the evaluation shall be entitled to nominate an adjudicator from a panel of adjudicators.
- ii) In the event that the adjudication does not proceed for whatever reason, the tenderer disputing the evaluation may refer the matter to court.
- i) The adjudicator must be provided with the tender evaluation report together with a copy of the tender submissions of the complainant and the tenderer who was awarded the contract within 7 working days of being notified that adjudication will take place.
- ii) Should the adjudicator not receive the copy of the tender submissions within 20 working days, the adjudication shall be abandoned and the complainant shall be notified accordingly.
- v) The adjudicator's decision shall be binding.
- vi) The complainant must be paid his reasonable cost of tendering without delay, should the adjudicator find that the complainant should have been awarded more tender evaluation points than the tenderer who was awarded the contract and should have been awarded the contract, but not before the complainant has paid the adjudicator any outstanding fees not covered by the cash deposit.
- viii) The organisation shall pay the adjudicator fifty per cent of his fees within 30 days of being invoiced, but not before the adjudicator has submitted his findings in writing together with his reasons for arriving at the decision to the head of that organisation.

- ix) The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith.
- x) Wherever possible, the adjudicator shall reach his decision without the process of a formal hearing, generally within 28 days after the dispute has been referred to him for adjudication.

## **Annex D: South African National Standards for procurement**

### **D.1 General**

Standards South Africa, a division of the South African Bureau of Standards, has recently published the following national standards for procurement:

- i) SANS 1914 (2002), *Targeted construction procurement*  
*Part 1: Participation of targeted enterprises.*  
*Part 2: Participation of targeted partners in joint ventures.*  
*Part 3: Participation of targeted enterprises and targeted partners in joint ventures.*  
*Part 4: Participation of targeted enterprises and targeted labour (local resources).*  
*Part 5: Participation of targeted labour.*  
*Part 6: Participation of targeted enterprises in concession contracts;*
- iii) SANS 10396 (2003), *Implementing preferential procurement policies using targeted construction procurement procedures;*
- iv) SANS 10403 (2003), *Formatting and Compilation of Construction Procurement Documents;* and
- v) SANS 294: 2004, *Construction Procurement Processes, Procedures and Methods.*

All these standards were approved by National Committee STANSA TC 5120.61, *Construction standards*, in accordance with the procedures of Standards South Africa, in compliance with annex 3 of the WTO's Technical Barriers to Trade Agreement. Compliance with the provisions of the WTO/TBT agreement requires that particulars of the work programme and draft standards issued for comment be published in a national or regional publication of standardisation activities, a period of at least 60 days be allowed prior to the adoption of a standard to allow for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO, and that comments received be taken into account in the finalisation of a draft standard.

All the standards contain the word "construction" in their title as the aforementioned Construction Standards committee developed them. It should, however, be borne in mind that construction procurement involves not only engineering and construction works contracts, but also supplies contracts that involve the purchase of construction materials and equipment, services relating to any aspect of construction including professional services, disposals of surplus materials and equipment and disposals in the form of demolitions. These standards as such cover the full range of commonly encountered procurements in both the public and private sectors in most industrial sectors.

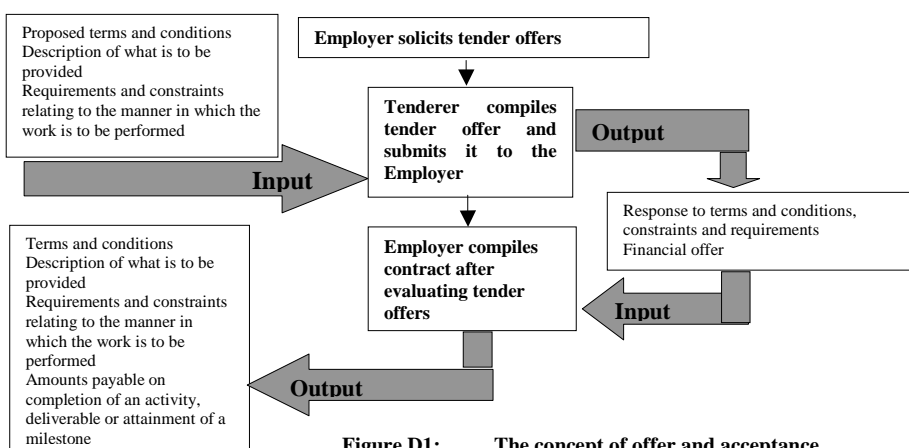
### **D.2 SANS 10403, Formatting and Compilation of Construction Procurement Documents**

Procurement documents are required primarily to:

- a) solicit tender offers; and
- b) form the basis for a contract.

Figure D1 illustrates the concept of offer and acceptance that results in a contract being entered into. Procurement documents provide tenderers with the necessary inputs to allow them to compile their tender submissions. Their tender submissions are in turn inputs into the contract that may be concluded following the acceptance of their tender offer.

In order to have a fair, transparent and equitable solicitation process, employers should provide tenderers with clear instructions as to how they are to submit their tender offers and inform them as to how their tenders are to be processed following their receipt. Uniformity in procurement documentation can be achieved provided there is a complete separation in the component documents (i.e. the conditions of tender, the conditions of contract, the specifications and methods of measurement and payment) that make up a procurement document between the conditions of tender, the conditions of contract, the specifications and methods of measurement and payment. Should this be done, different conditions of contract, or for that matter, payment systems can be used without affecting the remaining component document (Watermeyer, 2004c).



**Figure D1: The concept of offer and acceptance (Watermeyer and Jacquet, 2004)**

SANS 10403 (2003), *Formatting and Compilation of Procurement Documents*, provides a series of standard headings of component documents based on an “offer” and “acceptance” process illustrated in Figure D1 (see Tables D1 and D2) and provides comprehensive guidance on the drafting and formulation of these component documents (Watermeyer and Jacquet, 2004).

### **D.3 SANS 10396, Implementing preferential procurement policies using targeted construction procurement procedures**

SANS 10396 defines targeted procurement procedures as the “process used to create a demand for the services and supplies of, or to secure the participation of, targeted enterprises and targeted labour in contracts in response to the objectives of a preferential procurement policy.” The targeted procurement procedures as described in SANS 10396

and listed below can be used to varying degrees to implement secondary objectives in all four of the categories identified in Table 5 (see main paper) (Watermeyer, 2004a):

- Defining target enterprises (ownership, control, independence, size, declaration affidavits and statements by auditors)
- Defining targeted labour
- Goals associated with targeted procurement procedures
- Resource specifications (drafting principles, standardised resource specifications, structured joint ventures, activating the standardised resource specifications in procurement documents and variations to the standardised resource specifications)
- Incentives for contractors to embrace goals (goal/price mechanism and bonus incentives)
- Third party management support
- Electronic rotating data bases (rosters)
- Equity in tendering entities
- Financial penalties

<b>Table D1: Documents that relate to the “Tender” (See SANS 10403, 2003)</b>		
<b>Contents</b>		<b>Function and broad outline of contents</b>
<b>Number</b>	<b>Heading</b>	
<b>Tendering procedures</b>		
T1.1	Tender Notice and Invitation To Tender	Alerts tenderers to the nature of the supplies, services and engineering and construction works required by the employer and should contain sufficient information to enable them to respond appropriately.
T1.2	Tender Data	States what the applicable conditions of tender are and where they may be found. Tender Data also provides the variables for standardised conditions of tender.
<b>Returnable documents</b>		
T2.1	List of Returnable Documents	Ensures that everything the employer requires a tenderer to submit with his tender is included in, or returned with, his tender submission.
T2.2	Returnable Schedules	Contains documents that the tenderer is required to complete for the purpose of evaluating tenders and other schedules which upon acceptance become part of the subsequent contract.



<b>Table D2: Documents that relate to the “Contract” (See SANS 10403, 2003)</b>		
<b>Contents</b>		<b>Broad outline of contents</b>
<b>Number</b>	<b>Heading</b>	
<b>Part 1: Agreements and contract data</b>		
C1.1	Form of Offer and Acceptance	Formalises the legal process of offer and acceptance
C1.2	Contract Data	States the applicable conditions of contract and associated contract specific data that collectively describe the risks, liabilities and obligations of the contracting parties and the procedures for the administration of the contract.
<b>Part 2: Pricing data</b>		
C2.1	Pricing Instructions	Provides the criteria and assumptions in which it will be assumed (in the contract) that the tenderer has taken into account when developing his prices, or target in the case of target and cost reimbursable contracts.
C2.2	Activity Schedule/Bill of Quantities	Records the contractor’s prices for providing supplies/services/engineering and construction works which are described elsewhere in a specification within the Scope of Work section of the contract.
<b>Part 3: Scope of Work</b>		
C3	Scope of Work	Specifies and describes the supplies, services, or engineering and construction works which are to be provided and any other requirements and constraints relating to the manner in which the contract work is to be performed
<b>Part 4: Site information (engineering and construction works contracts only)</b>		
C4	Site Information	Describes the site as at the time of tender to enable the tenderer to price his tender and to decide upon his method of working and programming and risks.

These targeted procurement procedures enable undertakings made by tenderers at the award stage to be clearly defined to make them contractually enforceable, measurable and quantifiable. This in turn allows these undertakings to be monitored and evaluated, and ultimately verified and audited.

#### D.4 SANS 1914, Targeted Construction Procurement family of standards

Resource specifications are required to specify and describe contract participation goals at tender stage. Tenderers can either tender contract participation goals (i.e., offer to engage targeted enterprises, targeted labour or a combination thereof in tendered amounts), or agree to achieve specified contract participation goals in the performance of the contract. Organisations can then evaluate tenders in terms of the tendered contract participation goals and financial parameters, or prescribe minimum contract participation goals, which are to be achieved in the performance of the contract. They can, thereafter, use the resource specification to monitor and verify that the contractor achieves the contract participation goal in the performance of the contract and sanction them, should the goal not be achieved (Watermeyer, 2000).

SANS 1914 comprises six parts, the generic structure of which is outlined in Figure D2. Each part enables certain targeted procurement procedures associated with a preferential procurement policy, as described in SANS 10396, *Implementing Preferential Procurement Policies using Targeted Construction Procurement Procedures*, to be implemented. Each part:

- a) describes the general requirements for engaging targeted enterprises and/or targeted labour on a contract for the provision of supplies, services or works, as relevant;
- b) specifies the contract participation goal (the value of a percentage of the value of the contract which represents the inputs of targeted enterprises and/or targeted labour in the performance of the contract);
- c) sets out the methods by which the contract participation goal will be measured, quantified and verified in the performance of the contract; and
- d) describes the means by which:
  - i) progress towards the attainment of the contract participation goal is to be monitored;
  - ii) compliance with requirements will be verified and monitored; and
  - iii) the contract participation goal will be adjusted to accommodate variations to the scope of the work in the performance of the contract.

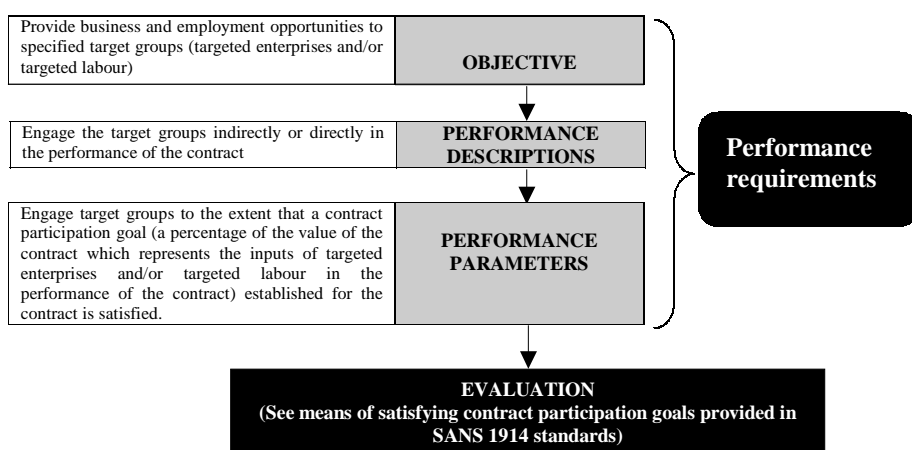


Figure D2: Structure of SANS 1914 performance based resource standards

The SANS 1914 family of standards may be used to measure, quantify, verify and audit the socio-economic deliverables relating to the engagement by a contractor of targeted enterprises and/or targeted labour in the performance of a contract. These standards enable goals (targets) for the engagement of targeted enterprises and targeted labour to be set in a standard quantifiable, measurable and auditable manner.

The target groups are all users defined and as such must be defined in the contract. This permits users to choose the target group, which they wish to target e.g. women, youth, low wage earners, small-scale enterprises, local enterprises etc. The specifications also permit the employer to establish the terms and conditions under which targeted enterprises and targeted labour are to be engaged.

Parts 1, 3, 4, and 6 of the SANS 1914 standards facilitate the targeting of enterprises throughout the supply chain as indicated in Table D3 and are particularly suited to services and engineering and construction works contracts. They also provide a particularly useful means of promoting business linkages between large and small contractors.

<b>Table D3: SANS 1914 resource standards</b>			
<b>Part</b>		<b>Target groups provided for**</b> (TE= targeted enterprise; TP= targeted partner; TL= targeted labour)	<b>Means of satisfying contract participation goals (CPG) requirements</b>
<b>#</b>	<b>Title</b>		
1	Participation of targeted enterprises	Targeted enterprises (TEs) (and targeted partners (TPs) who are TEs)	By one or more of the following: <ul style="list-style-type: none"> <li>- performing the work as a TE Prime Contractor</li> <li>- subcontracting portions of the contract to TEs</li> <li>- obtaining supplies from Suppliers who are TE</li> <li>- purchasing materials from Manufacturers who are TEs</li> <li>- obtaining bonds and insurance policies from TEs</li> <li>- engaging service providers who are TEs</li> <li>- engaging non-TEs who in turn engage TEs -entering into a Joint Venture with one or more TPs</li> <li>- engaging non-TEs who in turn enter into Joint Ventures with TEs</li> </ul>
2	Participation of targeted partners in joint ventures	Targeted partners (TPs)	By forming a joint venture at the Prime Contract level with one or more TPs

3	Participation of targeted enterprises and targeted partners in joint ventures	Targeted Partners (TPs) and targeted enterprises (TEs) who are not necessarily TPs	By: <ul style="list-style-type: none"> <li>- forming a joint venture at Prime Contract level with one or more TPs</li> <li>- engaging TPs as subcontractors/ service providers/manufacturers and suppliers</li> </ul>
6	Participation of targeted enterprises in concession contracts*	Targeted enterprises (TEs) (and targeted partners (TPs) who are TEs)	By one or more of the following: <ul style="list-style-type: none"> <li>- by engaging one or more TEs;</li> <li>- by engaging non-TEs who in turn enter into Joint Venture agreements with one or more TPs;</li> <li>- by engaging non-TEs who in turn engage one or more TEs</li> </ul>
<p>*Suitable for use in public private partnerships  **Target groups need to be defined by the employer in contracts.</p>			

#### **D.5 SANS 294, Construction Procurement Processes, Procedures and Methods**

SANS 294, *Construction procurement processes, procedures and methods*, provides processes, methods and procedures for the establishment within an organisation of a procurement system that is fair, equitable, transparent, competitive and cost effective. SANS 294 is as such designed around the system requirements set out in Table 10 in the main text.

SANS 294:

- a) describes generic procurement processes around which an organisation may develop its procurement system and place their own control points to manage their procurement;
- b) establishes minimum requirements for the conduct of an organisation's employees, agents, board members and office bearers when engaging in procurement, namely that they:
  - i) discharge their duties and obligations timeously and with integrity;
  - ii) behave equitably, honestly and transparently;
  - iii) avoid conflicts of interest; and
  - iv) not maliciously or recklessly injure or attempt to injure the reputation of another party;
- c) establishes the framework for the development of an organisation's procurement policy including any preferential procurement policy;<sup>13</sup>
- d) establishes generic methods and procedures for procurements including those pertaining to disposals; and
- e) provides standard conditions of tender and conditions for the calling for expressions of interest which place obligations on tenderers/respondents and commits employers to certain undertakings in the procurement process including the manner in which submissions are to be evaluated.

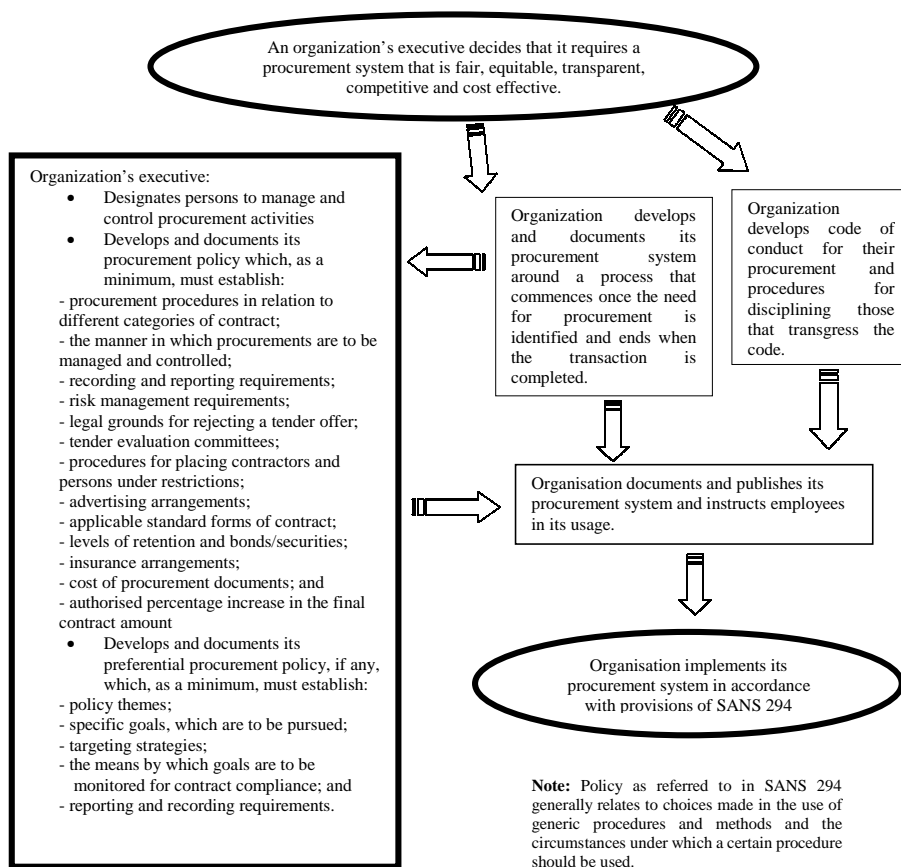
SANS 294 provides the generic processes around which an organisation can develop its procurement system as illustrated in Figure D3 and the standard generic methods and procedures described in Tables 2 to 4. It contains the full range of methods and procedures other than those pertaining to e-procurement that public and private sector organisations may require in their procurements without prescribing when and under what circumstances such methods may be utilised or imposing the manner in which procurement is to be managed and controlled. Being generic in nature, it does not impose matters of policy on organisations. It rather establishes a comprehensive rule based framework within which an organisation may develop its procurement policy in order to implement the wide range of standard procurement methods and procedures.

The processes, methods and procedures embodied in SANS 294 are based on an underlying requirement for the procurement system to be fair, equitable, transparent, competitive and cost effective. This necessitates that the following two important principles be adhered to (Watermeyer and Jacquet, 2004):

- i) All evaluation criteria must be made known to tenderers or respondents in the procurement documents.
- ii) The only grounds for not awarding a tender to a tenderer are:
  - a) The tenderer is under restrictions from participating in the organisation's procurement process, for engaging in corrupt and fraudulent practice, or has principals who are under such restrictions.
  - b) The tenderer cannot demonstrate that he or she possesses the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, reputation, and the personnel to perform the contract.
  - c) The tenderer does not have legal capacity to enter into the contract.
  - d) The tenderer is insolvent, in receivership, bankrupt or being wound up, has its affairs administered by a court or a judicial officer, has suspended its business activities, or is subject to legal proceedings in respect of any of the foregoing;
  - e) The tenderer does not satisfy the legal requirements, if any, stated in the organisation's procurement policy.
  - f) The tenderer may not be able to perform the contract in the best interest of the organisation owing to conflicts of interest.

SANS 294 is based on the premise that, subject to prevailing legislation, preferential procurement policies are implemented using one of the following methods:

- a) preferences at the short-listing stage;
- b) accelerated rotation on an electronic database where the nominated procedure is used;
- c) tender evaluation criteria; and
- d) breaking down (unbundling) of projects into smaller contracts to facilitate the participation of targeted enterprises.



**Figure D3: Establishing a procurement system within an organization in accordance with the requirements of SANS 294 (Watermeyer and Jacquet, 2004)**

SANS 294 also standardises:

- i) requirements for the preparation of specifications;
- ii) conditions of tender framed around the obligations of the tenderer and the undertakings of the employer;
- iii) conditions for the calling for expressions of interest framed around the obligations of the respondent and the undertakings of the employer;
- iv) requirements for advertisements;
- v) tender procedures (receipt of tender submissions and opening of tender submissions);
- vi) evaluation of tender submissions (disqualification of tenders, test for responsiveness, arithmetical errors, ranking and scoring of responsive tenderers, risk assessment, negotiations with tenderers, and tender evaluation reports);
- vii) award of contracts (finalising the contract and notifying unsuccessful tenderers);
- viii) contract administration; and
- ix) resolution of disputes.

The generic conditions of tender and conditions for the calling for expressions of interest contained in SANS 294 include an obligation on the parties in dealing with each other to act in a manner consistent with the code of conduct provided for.

SANS 294 satisfies Schooner's goals outlined in Table 1 (see main paper) as indicated in Table D4.

<b>Table D4: Manner in which SANS 294 satisfies Schooner's systemic goals (Watermeyer, 2004d)</b>	
<b>Systemic goal (see Table 1)</b>	<b>Provisions of SANS 294</b>
Competition	Procedures are based on optimising competition. Where tender offers are invited from a limited number of tenderers in terms of particular procedures, a minimum of five tenderers are approached to submit tenders save for very low value tenders, where a minimum of 3 tenderers are approached.
Integrity (rules of conduct for those engaged in procurement)	A code of conduct regulating the actions of employees, agents, public office bearers and board members is provided. The conduct of tenderers is also regulated through the standard conditions of tender. Organisations are required to take disciplinary action against transgressors of the code of conduct and are encouraged to place contractors who engage in corrupt and fraudulent practices under restrictions for participating in the organisation's procurement for periods of time.
Transparency	The procedures and methods relating to procurement are comprehensively documented in the form of rules and make provision for the disclosure of information relating to tender opportunities, tender awards, notifications of unsuccessful tenderers etc. The standard conditions of tender and conditions for calling for expressions of interest ensure that full information relating to the manner in which the procurement is to be conducted and the submissions are to be evaluated. The rules are developed to the extent that it is possible for an adjudicator to confirm if tender procedures were followed in terms of a challenge procedure.
Efficiency (administrative and transactional efficiency)	A generic procurement processes is provided complete with control points. Executives of organisations are required to designate persons to manage and control procurement activities. The rules provide comprehensive operating procedures and standardise procedures and methods.
Customer satisfaction	Sufficient flexibility is provided through the provision of a wide range of procurement procedures and evaluation methods to facilitate the satisfying of end users and clients with the outcomes of the procurement process.

Best value (value for money)	Tender offers may be evaluated on the basis of the financial offer alone, the financial offer and quality, financial offer and preferences, and financial offer, preference and quality. Sufficient flexibility in the selection of procurement procedures and contracting and targeting strategies is provided to facilitate the obtaining of best value for money.
Wealth distribution	The permitted preferencing arrangements facilitate wealth distribution in a manner that is least likely to compromise other systemic goals.
Risk avoidance	Requirements for the assessing of risk are provided to ensure that the successful tenderer does not impose an undue commercial risk on the organisation. Guidance is provided on selecting an appropriate form of contract to collectively describe the risks, liabilities and obligations of the contracting parties and the procedures for the administration of the contract.
Uniformity	Procurement processes, procedures and methods are standardised as well as the manner in which preferential procurement policies are implemented and procurement documents are compiled and formatted. (SANS 10396, SANS 1914 and SANS 10403 form part of the normative references)



## Endnotes

- 1 Sections 1.1 and 1.2 are based on the official IWOGDA project outline.
- 2 In so far as procurement policies favour domestic firms and products, they can impede international commerce. Such impediments may be prohibitive to the extent that they ban purchases from foreign service providers. Alternatively, they may be similar in some respects to an import tariff. It is the market access dimension to discriminatory procurement practices that has often provided the rationale for including disciplines on government procurement policy in international trade agreements, including multilateral accords. (Evenett and Hoekman, 2004b)
- 3 The GPA extends the basic principles of GATT – non-discrimination, national treatment and transparency – to the tendering procedures of specified government entities. The major substantive disciplines imposed by the GPA are its non-discrimination, competitive tendering, and transparency provisions, complemented by the domestic review and multilateral enforcement mechanisms. (Evenett and Hoekman, 2004b)
- 4 Bumiputera are ethnic Malays and other indigenous groups of Malaysia who make up 58% of the population (Nambiar, 2004).
- 5 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts makes provision for the open procedure, restricted procedures, competitive dialogue, negotiated procedure, design contest.. These procedures are all covered by the procedures described in Table 2. The dynamic purchasing system provided for in the directives is covered by the nominated and quotation procedures described in Table 2.
- 6 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 provides for the an ‘electronic auction’ i.e. a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.
- 7 Some degree of latitude needs to be made regarding decisions within an area of power granted to an official. SANS 294 establishes the boundaries for discretion and the means by which courses of actions are to be judged. It should be noted in this regard that every procedure that is adopted requires officials to make a determination regarding the capability and capacity of tenderers. Frequently, officials may exercise more discretion in coming to a decision regarding capability than deciding between courses of action within a particular procedure.
- 8 This observation is supported by other researchers (see Evenett and Hoekman, 2004b).
- 9 Standardization and related activities – general vocabulary (1996).
- 10 Several international organisations and agencies publish guidelines and standard bidding packages to facilitate procurement on projects, which they fund, or to satisfy their own procurement needs. International and national standards, on the other hand, are developed by technical experts on a consensus basis (general agreement, characterised by the absence of sustained opposition to substantial issues) in terms of a transparent process whereby interested parties (both public and private) are afforded an opportunity to comment on the documents before they are finalised. The South African Standards for construction procurement were approved by a National Committee, which is representative of interests in the field of construction in accordance with the procedures of Standards South Africa (the national body responsible for the development of national standards in South Africa), in compliance with annex 3 of the WTO Technical Barriers to Trade Agreement.
- 11 The Institute of Directors in Southern Africa’s code of ethics states that “*Fair competition is fundamental to the free enterprise system, directors support laws regulating restraints of trade, unfair practices, abuse of the unscrupulous use of economic power and avoidance of collusion.*” The King II Report on Corporate Governance in South Africa, which is applicable to all companies listed on the main board of the Johannesburg Stock Exchange, large public enterprises, banks, financial and insurance entities, and large unlisted public companies, lists seven characteristics of good corporate governance, namely: discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. These seven characteristics need to be reflected in an organisation’s procurement system (Watermeyer, 2004d).

- 12 SANS 294 provides rules for a wide range of generic procedures and methods including those pertaining to secondary (non-commercial) objectives. It balances transparency imperatives with those of flexibility in the pursuit of best value procurement outcomes (see Table 10). The selection of specific procedures by a country may exclude those procedures that intrinsically have an unacceptable measure of discretion. This overcomes objections to the adoption of a common set of detailed and rigid rules which in addressing corruption issues in one country solely through transparency, may deny other countries the chance to develop regulatory systems that are suitable to their socio-economic conditions (see Rege, 2001).
- 13 Policy as referred to in SANS 294 relates to choices made in the use of generic procedures and methods and the circumstances under which a certain procedure should be used.