

# PUBLIC PROCUREMENT REGULATION IN AFRICA CONFERENCE

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## Regulating public procurement in Southern Africa through international and national standards

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### 1 Introduction

A system is an established way of doing things and provides order and a platform for the methodical planning of a way of proceeding. Systems are underpinned by:

- **processes** - 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;
- **procedures** - the formal steps to be taken in the performance of a specific task, which may be evoked in the course of a process; and
- **methods** - a documented, systematically-ordered collection of rules or approaches

Procurement is the process which creates, manages and fulfils contracts. Procurement commences once a need for goods, services, engineering and construction works or disposals has been identified and it ends when the goods are received, the services or engineering and construction works are completed or the asset is disposed of.

There are six basic activities associated with procurement processes which establish actions and deliverables / milestones associated with the procurement process as indicated in Figure 1. Procedures and methods used in conjunction with policies guiding the selection of options and the application thereof are required to implement these procurement processes. Procurement documents are needed to communicate to tenderers a procuring entity's procedures and requirements up to the award of a contract and to establish the basis for the contract that is entered into with the successful tenderer i.e. the agreed terms and conditions, the prices and the nature and quality of the goods, services or construction works that are required

Procurement processes and procedures need to be managed and controlled (see Figure 1). Accordingly, governance activities need to be linked to milestones in the procurement process. At the same time, policies are required to govern the usage and application of particular procurement procedures, requirements for recording, reporting and risk management, procedures for dealing with specific procurement related issues, assignment of responsibilities etc.

Procurement processes are accordingly underpinned by methods and procedures and are informed and shaped by the policies of the procuring entity. A procurement system accordingly comprises (Watermeyer, 2011):

- a) rules and guidelines governing procedures and methods
- b) procurement documents which include terms and conditions, procedures and requirements
- c) governance arrangements to manage and control procurement
- d) organisational policies which deal with issues such as:
  - i) the usage and application of particular procurement procedures;

- ii) requirements for recording, reporting and management of risk;
- iii) procedures for dealing with specific procurement issues;
- iv) the usage of procurement to promote social and developmental objectives; and
- v) the assignment of responsibilities for the performance of activities associated with the various processes .

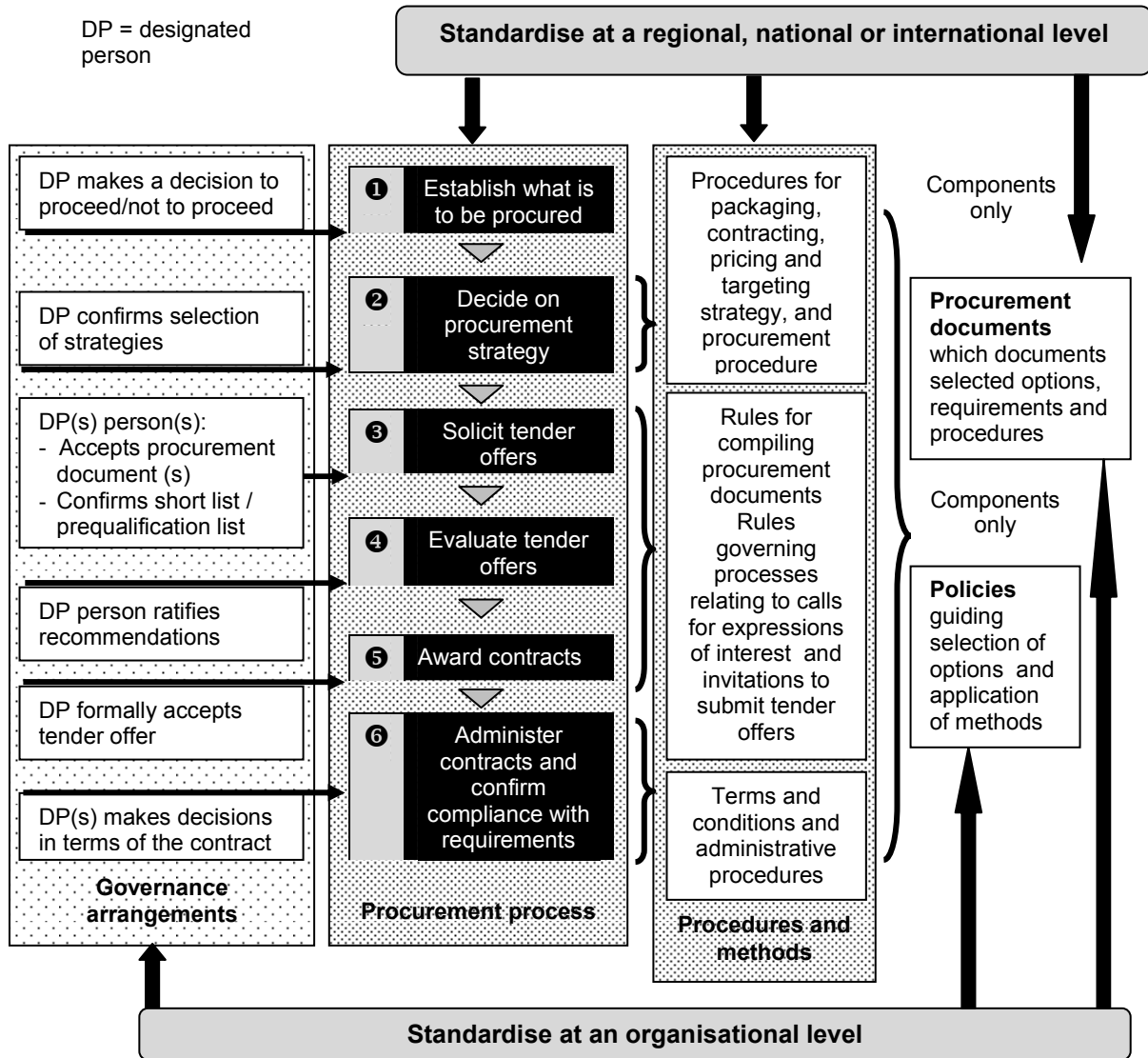


Figure 1: Standardising a procurement system

## 2 The South African legislative framework for procurement

Section 217 of the Constitution of the Republic of South Africa (Act 108 of 1996) establishes the primary and broad secondary procurement objectives in South Africa as indicated in Table 1. Section 217(3) of the Constitution requires that national legislation prescribe a framework within which the preferential procurement policy must be implemented. The Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) was promulgated in response to this constitutional imperative.

Procurement by organs of state (national and provincial departments, municipalities, constitutional entities and public entities) are also governed by number of other pieces of legislation as outlined in Table 2.

**Table 1: Public procurement objectives in South Africa as contained in the constitution**

Objective		Reference
<b>Primary</b>	Procurement <b>system</b> is to be fair, equitable, transparent, competitive and cost effective.	Section 217 (1)
<b>Secondary</b>	Procurement <b>policy</b> 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)

Section 76(4) of the Public Finance Management Act permits the National Treasury to make regulations or issue instructions applicable to all institutions to which the Act applies concerning “*the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.*”

The procurement provisions of the Municipal Finance Management Act are similar to the provisions of the Public Finance Management Act but contain more detail regarding the system. Section 112 permits the Minister of Finance to issue a prescribed regulatory framework for supply chain management that covers a number of specific issues.

The Supply Chain Management Regulations issued in terms of the Public Finance Management Act and Municipal Finance Management Act establish requirements for the governance of procurement processes and establish high level government policy. Each organ of state has to determine its own procedures and policies which are consistent with the legislative framework.

The Construction Industry Development Board Act, 2000 (Act 38 of 2000) defines the construction industry as *the broad conglomeration of industries and sectors which add value in the creation and maintenance of fixed assets within the built environment.* Accordingly, construction procurement involves not only engineering and construction works contracts, but also:

- a) supply contracts that involve the purchase of construction materials and equipment,
- b) service contracts relating to any aspect of construction including professional services,
- c) the disposal of surplus materials and equipment and demolitions.

The Construction Industry Development Board has issued the following prescripts in terms of the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) which are applicable to all organs of state who procuring goods, services or works from the construction industry:

- a) a CIDB Code of Conduct for the Parties engaged in Construction Procurement; and
- b) a CIDB Standard for Uniformity in Construction Procurement (CIDB, 2004) which establishes minimum requirements for:
  - 1) the solicitation of tender offers using standard conditions for the calling for expressions of interest and standard conditions of tender;
  - 2) the use of standard forms of contract
  - 3) a range of standard procurement procedures and methods
  - 4) the formatting and compilation of procurement documents;
  - 5) the application of the register of contractors to public sector contracts.

Best practice guidelines recognised by the Construction Industry Development Board including SANS 294 (SABS, 2004) and SANS 1403 (SANS 2003) and practice notes and standardised procurement issued by the Board enable the Standard for Uniformity in Construction Procurement to be implemented.

There are accordingly two approaches in South Africa to satisfying the requirements of the legislative framework for procurement, namely the guidelines approach (non-construction) and the standards

approach (construction) as outlined in Figure 2. In the guideline approach, guidance and ethical principles are provided to enable users of the procurement system to achieve the end objectives. In the standards approach, standards establish minimum requirements for the conduct of those engaged in procurement processes, generic methods and procedures and standard conditions of tender which place obligations on tenderers and commit employers to certain undertakings in the procurement process including the manner in which submissions are to be evaluated (Watermeyer, 2006).

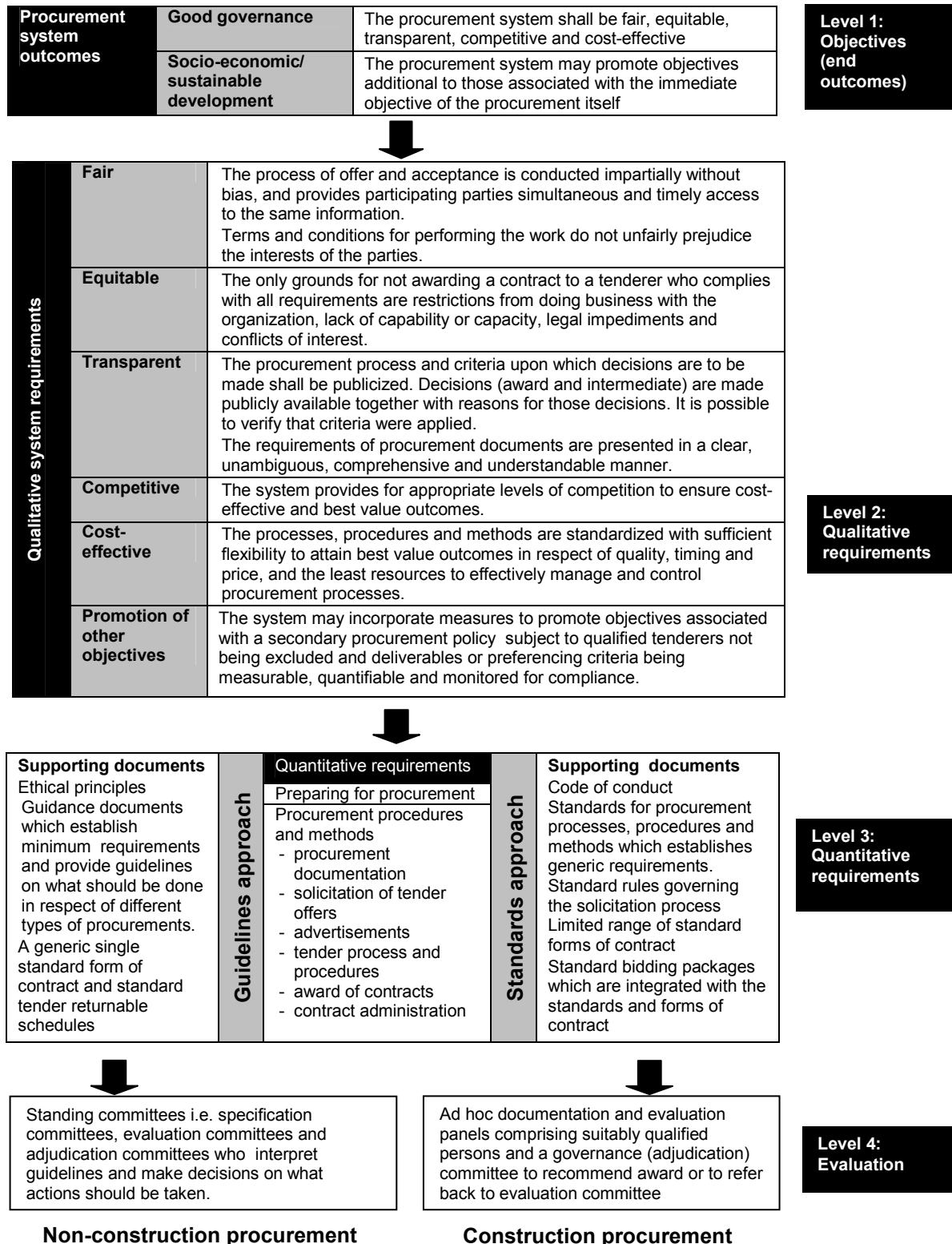


Figure 2: Non-construction and construction procurement systems in South Africa (after Watermeyer, 2006)

**Table 2: Primary pieces of legislation that regulate procurement**

Act	What it does in respect of procurement
Public Finance Management Act (Act 1 of 1999)	Establishes a regulatory framework for supply chain management which includes procurement within national and provincial departments and state owned enterprises.
Promotion of Administrative Justice Act (Act 3 of 2000)	Establishes fair administrative procedures, permits those affected by unfair administrative action to request reasons for such administrative action and requires administrators to respond to such requests. (Administrative actions are presumed to be have been taken without good cause where an administrator fails to respond within the prescribed period.) Provides for procedures for the judicial review of administrative actions and remedies in proceedings for judicial review including the prohibition of an administrator from acting in a particular manner, setting aside the administrative action, correcting the defective action and the ordering of the administrator to pay compensation.
The Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)	Prohibits the state or any person from discriminating unfairly against any person on the grounds of race or gender through the denial of access to contractual opportunities for rendering services or by failing to take steps to reasonably accommodate the needs of such persons.
Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000)	Establishes the manner in which preferential procurement policies are to be implemented
Construction Industry Development Board Act, 2000 (Act 38 of 2000)	Establishes the means by which the Board can promote and implement policies, programmes and projects, including those aimed at procurement reform, standardisation and uniformity in procurement documentation, practices and procedures within the framework of the procurement policy of government, through the establishment of: a) a national register of contractors (and if required, consultants and suppliers) to manage public sector procurement risk and facilitate public procurement; b) a register of projects above a financial value with data relating to contracts awarded and completed and a best practice project assessment scheme; c) best practices Establishes a code of conduct for the parties engaged in construction procurement.
Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)	Establishes a code of good practice to inform the: • development of qualification criteria for the issuing of licenses or concessions, the sale of state owned enterprises and for entering into partnerships with the private sector; and • development and implementation of a preferential procurement policy.
Local Government: Municipal Finance Management Act, 2003 (Act No 56 of 2003)	Establishes a regulatory framework for supply chain management which includes procurement within municipalities and municipal entities.
Prevention and Combating of Corrupt Activities Act, 2004. (Act No. 12 of 2004).	Makes corruption and related activities an offence, establishes a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; and places a duty on certain persons holding a position of authority to report certain corrupt transactions.

#### **4 The legislation governing procurement in Botswana**

The Public Procurement and Disposal Asset Act of 2001 mandates the Public Procurement and Asset Disposal Board in conjunction with the various Ministerial Procurement and Asset Disposal Committees to regulate public procurement for Central Government. This Act empowers the Board to ensure competitiveness, fairness and equitable treatment of contractors during the procurement procedure, as well as to enforce transparency and accountability. The Board is to accomplish this by reviewing all tender packages and tender notices that are issued by government departments, by

responding to complaints from the public and affected contractors (through the operation of the Independent Complaints and Review Committee), regulating the operation of the contractor registration scheme, advertising registrations, tender notices, awards, etc. The Act also reaffirms the Government's power to institute reservation and preferencing policies for the benefit of local suppliers, manufacturers and citizen contractors and requires the Board to adopt and circulate standardised bidding packages and public asset disposal contracts, the use of which is mandatory for all government departments.

Standardised bidding packages were developed following the promulgation of the Act and were finalised during June 2002 after a consultative process with government departments and industry. These documents were developed using a standard set of headings and component documents, conditions of tender, form of offer and acceptance and tender returnables and a range of regional and international standard forms of contract. These standard documents were specifically developed for the Public Procurement and Asset Disposal Board and formed the basis for the corresponding content in the Standard for Uniformity in Construction Procurement (CIDB, 2004), SANS 10403 (SABS, 2003) and SANS 294 SABS, (2004).

The standardised bidding packages were revised during 2006 and only implemented after the publication of the Public Procurement and Asset Disposal Regulations of 2006. These regulations provide separate methods and procedures for soliciting and evaluation procedures in relation to supply, service and works and requirements relating to the functioning of the governance structures. It also establishes rules governing certain processes and procedures.

A PPADB Operations Manual was published in 2008 through a study financed by the European Commission (Finnigan, 2008). This manual is designed to assist procurement staff in the management of procurement and asset disposal with a standard set of procurement policies, procedures and practices. All civil servants, contractors, consultants or private sector firms, suppliers involved in procurement activities are bound by the policies, procedures and practises appearing in this manual. In the event of a conflict between this manual and the Public Procurement and Asset Disposal Act, the statutory provisions of the Public Procurement and Asset Disposal Act (take precedence).

## 5 Developing a standardised procurement system

Procurement is a process and can therefore be standardised. The starting point in the development of any procurement system is to determine the objectives for the system. Objectives associated with procurement systems typically relate to good governance (primary objectives) and, particularly in developing countries, to the use of procurement to promote social and national agendas (secondary or non-commercial objectives). Procurement systems are increasingly being challenged to address sustainable development objectives in order to reduce negative impacts on the environment and contribute to the alleviation of poverty.

An analysis of the system objectives of the World Bank, the World Trade Organization's Government Procurement Agreement, the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on the Procurement of Goods, Construction and Services and the objectives of a number of other organisations and governments may be captured in the following system objectives (Watermeyer, 2005):

- a) **primary objectives:** the procurement system shall be fair, equitable, transparent, competitive and cost-effective
- b) **secondary objectives:** the procurement system may, subject to applicable legislation, promote objectives additional to those associated with the immediate objective of the procurement itself

These objectives or end outcomes, which are the same as those contained in one of the most modern country constitutions, namely the Constitution of the Republic of South Africa (Act 108 of 1996), may be applied to both the public and private sectors as well as to NGOs and donor organisations. Such objectives establish overarching performance requirements for a standardised procurement system documents.

Standards for methods and procedures associated with the soliciting of tender offers and the award of contracts can be developed around these system objectives at a national and international level. It is possible to develop a generic set of procedures and methods covering the universe of options that are commonly encountered in the soliciting and evaluation of tender offers and the formatting and compilation of procurement documents. ISO 10845 parts 1 to 4 (ISO, 2010 and 2011), which are based on the Standard for Uniformity in Construction Procurement (CIDB, 2004) and SANS 294 (SABS, 2004) and SANS 10403 (SABS, 2003), provides a set of generic methods and procedures to address these issues (see Table 3).

There are many international, national and regional standard forms of contract (i.e. a contract between two parties with standard terms that do not allow for negotiation). These forms cover a wide range of contracting types, many of which satisfy the aforementioned primary objectives. These forms are, however, drafted around other objectives relating to the allocation of risk and the management and administration of the contract which vary depending upon the nature of the work. It is accordingly not possible to provide a single generic form of contract which enables contractual risk to be managed across the different categories and types of procurement that may be encountered. It is, however, possible to make use of standard forms of contract within families of standard contracts that have been developed by international organisations such as those published by the International Federation of Consulting Engineers (FIDIC) and the Institution of Civil Engineers (NEC3). (The FIDIC and NEC3 forms of contract cover engineering and construction works and professional services while NEC3 forms of contract also cover supply, term service and framework contracts.)

It not possible to standardise governance arrangements and policies at a national or international level as different policies and governance arrangements will need to be adopted to deal with different procurement context, e.g. between public and private sectors, between the different tiers of government and between government departments and state owned enterprises. Accordingly, some procedures and methods can be standardised at a regional, national or international level and others only at an organisational level as indicated in Figure 1.

ISO 10845-1 (ISO, 2010) establishes the framework for the development of an organisation's procurement policy, including any secondary procurement policy. BS 8534 (BSI, 2011), which is complementary to BS ISO 10845-1 (BSI, 2010) and BS ISO 10845-2 (BSI, 2011) provides recommendations and guidance on the development within a public or private sector organization of policies, strategies and procedures for the procurement of construction in the built environment:

## **6 Regulating procurement through international and national standards**

International and national standards may be used on a voluntary or mandatory basis. Such standard can be referenced in national and regional regulatory texts. Several countries make reference to international and national standards in regulatory texts e.g. Canada, China, Europe, Japan, South Africa and the United States of America. Direct referencing of international and national standards in whole or part avoids reproduction of the standard in the legal text and eliminates the need to obtain permission for the use of copyright. References can be dated in which case only the dated version of the standard applies or undated if the latest edition is to apply (ISO IEC, 2007).

South Africa's public sector procurement in the different spheres of government could have been significantly simplified and implemented in a systematic, uniform and auditable manner had ISO 10845 parts 1 to 4 been available when the Act and regulation governing procurement were being formulated. It would have also aligned non-construction and construction procurement practices as the standards are sufficiently generic to accommodate all categories of procurement.

The Public Finance Manage Act requirements would have remained unchanged and not much would have changed in the Supply Chain Management Regulations as they simply provide the framework within which public sector procurement may take place including the ethical principles and governance arrangements. All that would have been required is to reference ISO 10845 parts 1 to 4 in the regulations and to identify the standard forms of contract which may be used with minimal project specific amendments.

**Table 3: Parts and outline of contents of standards published under ISO 10845 Construction Procurement**

Part of ISO 10845	Outline of content
1: Processes, methods and procedures	<p>Describes processes, methods and procedures for the establishment within an organization of a procurement system that is fair, equitable, transparent, competitive and cost-effective. It:</p> <ul style="list-style-type: none"> <li>a) describes generic procurement processes around which an employer can develop its procurement system,</li> <li>b) establishes basic requirements for the conduct of an employer's employees, agents, board members and office bearers when engaging in procurement,</li> <li>c) establishes the framework for the development of an employer's procurement policy, including any secondary procurement policy, and</li> <li>d) establishes generic methods and procedures for procurements, including those pertaining to disposals.</li> </ul> <p>Informative guidance is provided on the establishment and management of procurement processes, an approach for obtaining best value procurement outcomes and various types of procurement procedures including targeted procurement procedures.</p>
2: Formatting and compilation of procurement documentation	<p>Establishes, in respect of supply, services and engineering and construction works contracts, at both main and subcontract level,</p> <ul style="list-style-type: none"> <li>a) a format for the compilation of <ul style="list-style-type: none"> <li>1) calls for expressions of interest, and</li> <li>2) tender and contract documents; and</li> </ul> </li> <li>b) the general principles for compiling procurement documents.</li> </ul>
3: Standard conditions of tender	<p>Sets out standard conditions of tender which</p> <ul style="list-style-type: none"> <li>a) bind the employer and tenderer to behave in a particular manner;</li> <li>b) establish what a tenderer is required to do in order to submit a compliant tender;</li> <li>c) make known the evaluation criteria to tenderers; and</li> <li>d) establish the manner in which the employer conducts the process of offer and acceptance and provide the necessary feedback to tenderers on the outcomes of the process.</li> </ul>
4: Standard conditions for the calling for expressions of interest	<p>Sets out standard conditions for the calling for expressions of interest which</p> <ul style="list-style-type: none"> <li>a) bind the employer and respondent to behave in a particular manner,</li> <li>b) establish what is required for a respondent to submit a compliant submission,</li> <li>c) make known to respondents the evaluation criteria, and</li> <li>d) establish the manner in which the employer conducts the process of calling for expressions of interest.</li> </ul>

The Municipal Finance Management Act and associated Supply Chain Management Regulations could have been significantly shortened and simplified as there would have been no need to provide the level of detail as is currently the case. It would have been possible to have one standard legislative framework to regulate procurement for all organs of state.

Currently the requirements in the Supply Chain Management Regulations are of a sufficiently high level that they do not clash with the provisions of ISO 10845 in any way. Accordingly, no changes to the regulations are necessary. It is possible for National Treasury to simply require the application of ISO 10845 and standard forms of contract through a Treasury Instruction. If this is done, all that would remain is for an organ of state to establish its procurement policies, processes, procedures and methods in accordance with the provisions of ISO 10845 and address in this document the topics outlined in Table 4. This would eliminate the need for every organ of state to develop their own standard operating procedures and would enable most of the current practice notes, treasury instructions and best practices to be withdrawn. (Annex A of each part of ISO 10845 contains commentary on the clauses while some of the other annexes provide comprehensive guidance on how to implement certain aspects of these standards).



**Table 4: Topics which should be covered in an organisation's policies, processes, procedures and methods**

Topic		Comment
1	Conduct of those engaged in construction procurement process or procedures	Establish general requirements as well as requirements for confidentiality and non-disclosure agreements State how conflicts of interest, the receipt of gratifications, hospitality, gifts, breaches of the code of conduct and the placing of contractors under restrictions are to be dealt with
2	Procurement activities, key actions, responsibilities and gates	Identify : <ul style="list-style-type: none"> <li>• procurement activities, key actions, responsibilities and gates associated with the formation and conclusion of contracts</li> <li>• the activities, key actions, responsibilities and gates associated with the issuing of batch, task or package orders associated with framework agreements</li> </ul>
3	Roles and responsibilities in relation to the procurement processes, activities and controls	Establish composition, roles, responsibilities and mandates of specification panels, evaluation panels, adjudication committee, disposal committees and delegated authorities
4	Complaints and challenges	Establish procedures and responsibilities for dealing with complaints
5	Secondary procurement policy	Establish the organisation's preferential procurement policy and identify permitted targeted procurement procedures
6	Usage of standard procedures	Establish conditions which need to be satisfied in order to utilise each of the procurement procedures provided for in ISO 10845-1. Establish specific requirements relating to the usage of framework agreements and lists of approved contractors Establish procedures for disposals
7	Procurement documents	Establish requirements for procurement documents and the use of standard templates Identify which of the permitted forms of contract may be applied and under what circumstances Establish requirements for guarantees, retention amounts, delay damages, price escalation, insurances, communications, intellectual property rights, disputes etc
8	Administering calls for expressions of interest and invitations to submit tender offers	Establish requirements including those relating to the advertisements, issuing of procurement documents, clarification meetings and issuing of addenda, receipt and safeguarding of submissions, opening of submissions, evaluation of submissions, notice to unsuccessful tenderers and respondents, debriefing of tenderers and respondents, furnishing of written reasons for actions taken, requests for access to information, unsolicited proposals etc.
9	Award of contracts	Establish requirements relating to the award of contracts
10	Administration of contracts	Establish procedures for increases in the final contract amount above an allowable percentage Establish requirements for records and reporting including performance reports Establish procedures for the administration of contracts, lodging and release of bonds etc Establish requirements for invoicing
11	Occupational health and safety	Establish requirements for health and safety

The referencing in Regulations issued in terms of Botswana's Public Procurement and Disposal Asset Act of 2001 would have greatly simplified matters and facilitated the early implementation of the Act as most of the Regulations would be superfluous. Had this been done, each government department

would have simply had to establish its procurement policies, processes, procedures and methods in accordance with the provisions of ISO 10845 and address in this document the topics outlined in Table 4. There would also have been no need to provide the Operations Manual and have to navigate through plethora of text which might potentially clash with each when performing a procurement procedure.

The observation is made in BS 8534 (BSI, 2011) that *in procurement systems such as those used by the World Bank, the United Nations Commission on International Trade Law (UNCITRAL) and the European Union, each category of procurement is dealt with separately with the provision of its own implementation guidelines or regulations. ISO took the view that this compartmentalized approach caused confusion and made procurement unnecessarily complex. Therefore, ISO 10845 (all parts) introduced an alternative approach of first developing a generic procurement system and then identifying the methods and procedures best suited to particular categories.* Accordingly, the adoption of ISO 10845 in the Regulations issued in terms of the Public Procurement and Disposal Asset Act would have simplified matters and enabled different categories of contracts to be dealt with in a uniform manner.

## 7 Conclusions

The ISO 10845 series provides a generic and standard set of processes, procedures and methods for a procurement system that is fair, equitable, transparent, competitive and cost effective. These standards apply to public or private sector client organizations in the development and implementation of their procurement systems. These standards, if referenced in a legislative framework for procurement offer an attractive and practical alternative to the current approach in Southern Africa whereby regulations, Treasury instructions guidelines and best practice as well as organisational standard operating procedures are required to implement a procurement system, the essence of which is framed in legislation.

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