

## **Procurement corruption<sup>1</sup> (New Agenda 2008)**

### **Introduction**

Open a newspaper on almost any day of the week and you'll find a comment like this: South Africa's current procurement system is designed merely to promote 'a growing band of BEE billionaire brigands allowing their name to be on the stationary of listed companies for lots of money'. Certainly, that is the view of a blogger in response to a recent question posed by Reg Rumney.<sup>1</sup>

Rumney was asking the (rhetorical) question whether 'fronting' (the practice of white-owned companies window dressing their shareholding, boards, management structures or sub-contractual relationships in order to score preference points that would secure them government tenders) is a legitimate form of black economic empowerment.

A related scenario he described is where a genuinely black-owned company wins a government tender without any demonstrable experience, expertise or capacity and promptly sub-contracts the deal to a white-owned company at a discounted price. These problems have arisen because the legal framework for public procurement currently allows what Rumney calls a 'rent' (i.e. a higher tender price) of between 10% and 20% for enterprises where 'historically disadvantaged people' play a relatively more significant role.<sup>2</sup>

These are merely some of the fairly simple ploys adopted by both black- and white-owned businesses to circumvent government's affirmative action policies applicable to commercial relationships with the state, as contained in the Preferential Procurement Policy Framework Act (PPPF Act, No. 5 of 2000) and the Broad-Based Black Economic Empowerment Act (BBBEE Act, No. 53 of 2003).

Others have expressed similar concerns about the problems collectively described as 'fronting', and about manipulation of tenders more generally. For example, then-Public Works Minister Stella Sigcau several years ago signaled government's growing frustration with and intolerance of tender manipulation and non-compliance with its BEE objectives.<sup>3</sup>

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<sup>1</sup> Gary Pienaar, Senior Researcher, Public Ethics, Political Information and Monitoring Service, Idasa. I should like to acknowledge invaluable advice and assistance from Judith February, Manager of PIMS, and my colleagues, Shameela Seedat, Pamela Kambela and Nonhlanhla Chanza. The errors are mine.

These practices represent an unknown proportion of the problems that continue to bedevil the beleaguered public procurement system, but they are a dimension of the problem that generates a disproportionate amount of resentment. Tender corruption extends far beyond the field of black economic empowerment and, clearly, not all BEE deals are corrupt. Similarly, not all procurement corruption has a narrow political party motivation: ordinary greed plays its usual part. Neither are government's broader transformative political and economic goals inappropriate. On the contrary, most South Africans are generally supportive of the inclusive goals introduced into the public procurement process. Indeed, if the public discussion is any measure, they want its transformative and financial objectives to be achieved more effectively.

But in the post-Apartheid South African context, race, class, money and politics often combine to reflect some of our most debilitating weaknesses. These factors consequently provide the context for much of the discussion here. And it is these factors that, together, threaten the integrity of our democratic ideals.

### **Conflicts of interest**

The additional feature of the current system to which Rumney's blogger was referring is the repeated empowerment of those closely associated with the government itself, a feature commonly described as 'narrow' BEE, or 'cronyism'. In this context, 'crony capitalism' is an epithet attached to the all-too-frequent practice of the names of government members or close family members or friends appearing as shareholders in massive tender contracts between, for example, complex commercial joint ventures and the state. It can also be applied to the state's continued reliance on still largely white-controlled oligarchies that dominate much of South Africa's private sector, despite progressive anti-monopoly legislation and an increasingly assertive regulatory watchdog, the Competition Commission.

Business entities are incentivised by preferential procurement laws to permanently restructure themselves in such a way as to position themselves to be able to compete effectively for lucrative state tenders. Frequently, these restructuring exercises take the form of 'empowerment' deals involving the allocation of large share options to black 'empowerment partners'. Often, it is alleged, these partners offer little expertise, but do offer significant access to state business by reason of connections with influential public servants, or with

the ruling party. Thus, for example, share options are exchanged for an understanding that inclusion in an empowerment deal of a well-connected person will result in the company offering the shares or a seat on the board receiving preferential consideration when tenders are, in due course, adjudicated.

Instead of the benefit inuring only to the business enterprise and the state (in the form of the public entity awarding the tender), however, wealthy individuals (black and white) or the ruling party are also a beneficiary – even if only indirectly, as part of the proceeds are skimmed off or are donated to a party-linked trust or the party itself.

The precise extent of crony capitalism in South Africa is unknown, but auditing firms will tell you that, generally, only a fraction (approximately 10-20%) of dishonest activities ever come to light.

Consider this statement by a black South African:

‘Apart from benefiting just a few who are connected to the upper echelons of the ruling party, BEE has resulted in super-wealthy black elites who tend to be recycled time and again.

‘This is not to mean that I have a problem with blacks being rich per se, but can someone tell me why a [Mr X], after winning back-to-back bouts of empowerment on a BEE ticket, still qualifies as a disadvantaged person? ...

‘If the government is serious about fostering a united and prosperous South Africa, it ought to start placing an empowerment ceiling on all people qualifying for BEE.’<sup>4</sup>

The repeated empowerment of an inner circle, an economic or political elite, either already fabulously wealthy or close to government, or both, is a widely held perception, despite uncertainty about its precise extent.<sup>5</sup>

It is a phenomenon that catches the headlines because it reasonably irks many – for it represents a continued failure to implement government’s legitimate economic policy of widely and equitably *shared* growth. Consider the following examples reported in recent years:

- The sale of membership in the ANC's Progressive Business Forum, which affords access to 'networking opportunities' with key politicians and bureaucrats<sup>6</sup>.
- The ANC 'effectively owns' the Network Lounge, which reportedly leased space to 'a number of parastatals at the party's national conference in Stellenbosch in 2002.'<sup>7</sup>
- New ANC Youth League president, Julius Malema, implicitly recognised the problematic implications of the League's involvement in business and investment activities, when he stated that he wanted the organisation to sell all the assets in its investment arm, Lembede.<sup>8</sup> Reportedly, most of Lembede's assets are shares in companies that have benefited from government tenders.

To understand the implications of the conflicts of interest associated with many such transactions, consider the following scenario: A tender is awarded by a parastatal for a large construction project. When the winning bidder and the parastatal disagree about the scope of work, the parastatal's board supports a decision to revert to the only other (and originally losing) bidder. It also supports a decision to award to the new winner several similar projects, allegedly doubling the value of the order without a further tender.

It might be that these were perfectly rational decisions, taken in the best interests of us, the shareholders, but it might be coincidence that a well-connected company has a significant stake in the new winning bidder – and that a senior member of the board is a regular donor to a political party.

This begs the vital question: Whose side would the board member choose in negotiations concerning the decision change the choice of winning tenderer, and would he recuse himself? If so, would he let the South African public, as stakeholders and shareholders, know the answer?

The considerable extent of 'business moonlighting' by public servants – and, therefore, potential conflicts of interest – was revealed in the Auditor-General's controversial 2006 report, '*Performance audit on declarations of interest by ministers, deputy ministers and government employees*'.<sup>9</sup>

The Report recorded that over 52 000 government employees had interests in more than 20 000 close corporations, or private or public companies. These numbers included numerous national and provincial cabinet ministers, and other

senior, or designated, employees. Designated employees are required by the Public Finance Management Act, 1999 (the PFMA), to make annual disclosures of their financial interests. Non-designated employees are obliged by the Public Servants Code of Conduct only to seek prior permission before performing external remunerative work, which they 'generally fail to do'.<sup>10</sup>

Although the Auditor-General's Report conceded its basis on possibly outdated information,<sup>11</sup> its essential point was that 'an increasing number of public officials are brazenly pursuing business interests, most of which are undeclared and a significant proportion of which have the potential for conflicts of interest as the companies of these officials are cropping up in business transactions with the government'. The Auditor-General called for legislation to more tightly regulate this 'untenable' situation.<sup>12</sup>

The ANC's Tripartite Alliance partner, the South African Communist Party has expressed its concerns about this trend as follows: 'In these circumstances, emerging black capital (at least the key faction most closely associated with the ANC and the state) tends not to be involved with an expansion of the national forces of production, including significant job creation. It is, rather, excessively ... parasitic.

'This emerging class fraction has, typically, not accumulated its own capital through the unleashing of productive processes, but relies on special share deals, 'affirmative action', BEE quotas, fronting, privatisation and trading on its one real piece of 'capital' (access to state power) to establish itself.'<sup>13</sup>

Blade Nzimande, General Secretary of the SACP, has also stated elsewhere<sup>14</sup> that '[t]he passage of the Black Economic Empowerment Act, and a number of transformation charters have created an environment through which SMEs can perform better. However the single biggest problem with the model of BEE that has evolved thus far is that it has tended to focus more on big ownership deals for black people without focusing on the growth and development of, especially, black small and micro enterprises.'

In contrast, the ANC's 51<sup>st</sup> Policy Conference<sup>15</sup> set out a vision of black economic empowerment in 'its broadest sense as an integrated and coherent socio-economic process located in the context of the RDP. Its benefits must be shared across society, and impact as widely as possible'.<sup>16</sup>

While public officials' business interests are not unlawful, they do create a web of underlying informal and unstated networks of interest that overlap with, and may impinge upon, activities of the state, in respect of which we all legitimately expect the state to act impartially in the interests of the broader public interest. Even if the conflicts of interest arising from these overlapping activities occur only in the public's perception, that alone is problematic, as first doubt, then suspicion, then cynicism and, eventually, widespread criminality, take root.

In the context of South Africa's efforts to transform our society from its divided past, these overlapping business interests frequently take on a particularly political character and impact.<sup>17</sup> Consequently, ANC Treasurer-General Mathews Phosa's comment<sup>18</sup> that ANC 'NEC members, like any South African, have a right to participate in business. It's their constitutional right' is both disingenuous and short-sighted. While legally correct, it entirely ignores the clearly negative implications of these intersecting interests.

Witness the extremely disturbing public perception (85%) of the extent of corruption at the highest levels of government recorded in a recent public opinion survey.<sup>19</sup> Numerous anti-corruption studies have warned of the social phenomenon commonly referred to as 'the fish rotting from the head'. This same survey appeared to find evidence of this trend in the high number of South African adults (20%) who reportedly are willing to buy pirated CDs and DVDs.

Such public perceptions can only be further fuelled by the reportedly 'endemic' nature and extent of corruption in the department of correctional services, according to a recent report to the Parliamentary Portfolio Committee on Correctional Services by the Special Investigating Unit (SIU).<sup>20</sup> The report provides details of a range of fraudulent activities, including tender rigging: 27 officials, some above the rank of director, face disciplinary proceedings for undisclosed business interests.

In similar vein, it has been reported<sup>21</sup> that State Information Technology Agency (SITA) officials admitted to a closed hearing of the Parliamentary Portfolio Committee on Home Affairs that proper procedures were not followed when 'combined contracts worth more than R3.4 billion' were awarded to four IT companies in a project to modernise Home Affairs' identification systems.<sup>22</sup> As the testimony was heard behind closed doors, it is unclear whether the reported irregularities involve any undue benefits to anyone, although the costs of the project have reportedly risen significantly.

In 2006, the Auditor-General found evidence of extensive tender irregularities at CIPRO, the DTI's Companies and Intellectual Property Registration Office. The irregularities included conclusion of tender contracts in disregard of open and fair tendering procedures, while two board members had undisclosed business interests with two of the contracted service providers. In addition, officials at management level had failed to comply with standard declaration of interest procedures in the relevant financial year.<sup>23</sup>

The recent partial leak<sup>24</sup> of the report of the Pillay Commission of Inquiry appears to document similar manipulation of the public tendering system to the benefit of a number of senior politicians and their relatives. A preliminary investigation by Judge Ronnie Pillay's Commission (allegedly hindered by government agencies failing to respond to subpoenas) appears to reveal tenders irregularly awarded by the Rapid Infrastructural Development Agency (Rida), the Coega Development Corporation (CDC) and the Eastern Cape Development Corporation (ECDC). The leaked version of the Pillay Report also finds proof of irregular loans from public funds to relatives of these senior politicians.

### **The underlying pathology**

'The best way that corporate capital knows to create certainty is to buy it...'<sup>25</sup> is one assessment of the way in which South African business has sought the Holy Grail of investment security – by plugging the ethical voids in our legislative framework with money.

These problems persist despite our growing anti-corruption legal architecture. They endure also although government seemingly recognised both the abuse of and inadequate reach characterising the implementation of the PPPF Act, and enacted the BBBEE Act in order to ensure the extension of access to business opportunities to a broader category of previously disadvantaged South Africans.

It seems, however, that the limitations of the former, rather than being resolved, have been compounded by even greater difficulties faced by public servants when evaluating compliance with the BBBEE Act of bids by joint ventures, consortiums and the like. Such is the extent of these challenges that the DTI has published detailed 'Guidelines on Complex Structures and Transactions, and Fronting'.<sup>26</sup>

Moreover, it is not at all clear that the entry into force of the BBBEE Codes of Good Practice will have the desired effect of encouraging broader access to economic opportunities, given the rather weak mechanism that they represent. Section 10 of the BBBEE Act entitled 'Status of codes of good practice' provides only that '[e]very organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act...'. (Emphasis added)

This hardly provides for simple and effective enforcement. South Africans' sensitivities concerning affirmative action no doubt at least partly informed the framing of this provision, but it does leave a gaping hole in the ability of the state to enforce the stemming of what some fear is a wave of crony capitalist relationships that will overwhelm our young democracy the way they have in Malaysia and Nigeria.<sup>27</sup>

In any event, as mentioned earlier, problems surrounding the imperfect implementation of (broad-based) black economic empowerment are not the sole, or even necessarily the primary, concerns characterising public procurement. Plain non-racial and apolitical greed and corruption provide the mundane explanation for a significant part of the problem. Government has, for example, enacted the widely welcomed Prevention and Combating of Corrupt Activities Act (No. 12 of 2004). The Act has simplified the investigation and prosecution of a number of newly-created specific offences relating to tenders.

Despite this tough legislation, however, the hard truth is that the important and well-intended anti-corruption and black economic empowerment legislation requires extensive buttressing by other measures that are themselves either failing us – such as ethics requirements for supply chain practitioners – or do not exist – such as the regulation of party funding. And these failures and absences allow weaknesses in the structure of our economy to threaten the integrity of the economy and, thereby, of the democratic state.

A significant aspect of the reality of the Apartheid legacy for South Africa's economy is that very few black South Africans have had the opportunity to acquire the entrepreneurial skills necessary to start their own commercial enterprises and to grow them into flourishing and expanding businesses. The Preamble to the BBBEE Act accordingly recognises that 'South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills'.

Consequently, the state has seemingly felt obliged to allow those few who have succeeded in this way to lead multiple complex joint ventures that include those still struggling to find their feet.

The underlying problem that the black economic empowerment legislation seeks to address is that the pool of those who are becoming individual business successes through securing government contracts is not growing fast enough.<sup>28</sup> This is probably at least partly because of the failure of past public contracts to more effectively or more rapidly ensure the transfer of skills to more than a few joint venture partners or sub-contractors. Of course, this is not a task that the state either can or should be expected to successfully undertake alone – the private sector has a significant responsibility and contribution.

The consequence is that those few high-profile individuals who do achieve success in business are repeatedly re-empowered by the uncritical and short-sighted public accounting authorities who seek merely to get their jobs done by awarding government contracts, or who actively seek to claim the regulatory spaces for personal or sectional benefit. This effect is compounded the larger the contract, as a conversely smaller pool of business leaders possess the acumen and skills to effectively manage the many large contracts required to grow our economy and transform our society.

A fundamental fact of human nature is our limited ability to know and trust more than a relatively small group of people. Hence, without the incentives and the means to look beyond that small group, we tend to stick with those we think we know. BBBEE legislation tries to provide some of those means; other vital means include a track record that enables one to access capital to take on large contracts.

Further vital buttressing that should oblige public sector managers to look beyond this small pool is provided by those ethical rules already included in our legislation. It is these rules that seek – relatively ineffectively – to insulate the state from the corrupting effects of human limitations that include our limited ability to form relationships, as well as our greed.

Which begs the question: Are our ethical rules are adequate to the task?

## **WHAT ARE THE RULES?**

## **The procurement framework**

### **The Constitution**

Section 217 of the Constitution provides that when any organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. It also specifically allows for measures aimed at preferring, protecting and advancing persons, or categories of persons, disadvantaged by unfair discrimination. The section notably is not limited to past unfair discrimination.

### **The PPPFA**

The PPPF Act applies in all spheres of government and to all organs of state and declares in its Preamble that its purpose is to give effect to section 217 by providing a framework for the implementation of procurement policy.

The PPPFA<sup>29</sup> introduced a dual-scale preferential points system. Recognising that historically disadvantaged groups may not be able to compete on equal terms or offer the best price for government contracts, this dual system allows government to take into account factors other than price when awarding a contract. In other words, there is an in-built acknowledgement that government will pay more than it would have if price had been the only factor in the award of public contracts. This is the 'rent' alluded to by Romney.

The problem of 'fronting' is anticipated in Section 2 (g), which allows 'any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act' to 'be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have'.

### **The BBBEE Act**

This Act built on the foundation of the PPPF Act, and expressed ambitious and well-meaning goals. The objectives of the Act are to facilitate broad-based black economic empowerment in ways that extend ownership and management to new entrants economy, including women and rural communities.<sup>30</sup>

## **The PFMA**

The Public Finance Management Act, 1999 (as amended) underpins both of these pieces of legislation, and is blind to colour and political stripe. It provides for the delegation of the state's procurement function from the pre-existing National and Provincial Tender Boards to departmental or public entity accounting officers. The purpose of the PFMA is to render procurement activities more cost-efficient, timely and fairer by allowing senior officials closer to the daily activities of service delivery to manage their own supply chain.

National Treasury's State Tender Board remains in existence to provide assistance for simultaneous or large procurement activities on behalf of several departments, as well as advice. In addition, the Tender Board provides support to other organs of state, for example, in the form of maintaining a database of blacklisted tenderers previously found guilty by a court of transgressing various ethical rules and standards, including fronting, failure to register for tax, or otherwise 'defaulting'.<sup>31</sup>

## **The ethical framework: a 'separation of powers and interests'**

### **The Constitution**

The South African legal and ethical framework provides for a clear separation between personal interests and the public interest.

It also creates a separation of powers between the ruling party as a political organisation, and the members or supporters of that organisation who hold elected or other public office, or are employed as public servants.

The equal rights provisions in the Constitution allow certain forms of managed 'fair' discrimination in favour of previously disadvantaged persons.<sup>32</sup> Further, section 195(1)(d) of the Constitution requires that public services be provided 'impartially, fairly, equitably and without bias', and Section 217 requires a procurement system that is, among other things, fair and transparent.

### **The Public Service Act**

The Public Service Act, 1994, read with the Code of Conduct for Public Servants, 2001, provide that employees must 'serve the public in an unbiased and impartial manner in order to create confidence in the Public Service'.<sup>33</sup> A public servant may not 'engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties'.<sup>34</sup> They must refrain 'from any official action' and recuse themselves from any decision-making process which may result in improper personal gain, and this should be properly declared by the employee'.<sup>35</sup>

Similarly, political considerations may play no part in the provision of public services. Thus, the Code requires that a public servant 'does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group'.<sup>36</sup>

## **The PFMA**

The constitutional requirements are mirrored in Sections 38 (1)(a)(iii) and 51 (1) (a) (iii) of the PFMA, which prescribe that accounting officers / authorities must ensure that the public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

Moreover, the PFMA provides in Section 50(1)(b) that the accounting authority of a public entity/organ of state must 'act with fidelity, honesty, integrity and in the best interests of the public entity' in managing its financial affairs. (Emphasis added) In other words, the interests of the department, for example, as a representative of the general South African population it serves, override any other interests.

Subsection(2) continues in this vein:

'A member of an accounting authority ... may not act in a way that is inconsistent with the ... [his/her/its] responsibilities' ... in terms of this Act' ... or 'use the position or privileges of, or information obtained as ... [a member of an] accounting authority, for personal gain or to improperly benefit another person'.

Subsection (3) provides for a mechanism that goes some way to preventing some of these abuses. Thus, a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business

interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority, and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

General Procurement Guidelines were issued<sup>37</sup> in terms of the PFMA establishing the procurement process on the 'five pillars' of:

- Value for Money
- Open and Effective Competition
- Ethics and Fair Dealing
- Accountability and Reporting
- Equity

By Circular,<sup>38</sup> National Treasury has issued a mandatory Code of Conduct for Bid (i.e. tender) Adjudication Committees, which is applicable to all members of accounting authorities when they participate in that authority's procurement function. The need for yet another Circular clearly reflected the failure of previous guidelines to stem the flow of tender irregularities.<sup>39</sup>

The Circular provides explicitly<sup>40</sup> that the integrity of members of the Bid Adjudication Committee must 'never be compromised and the highest level of professional competence must be maintained', and they must ensure that fair procedures are followed in evaluating tenders.<sup>41</sup>

However, the value of the check represented by bid committees in preventing the possibility of the practice of designing the foot to fit the shoe, is determined in large part not only by the absence of any corrupt intent, but also by the diligent presence and participation of competent members of bid committees.<sup>42</sup>

Hearings before Parliament's Standing Committee on Public Accounts (SCOPA) on 5 March 2008 revealed that 3 of 6 members of Eskom's tender adjudication committee did not attend meetings regularly.<sup>43</sup> The recently replaced<sup>44</sup> Chairman of Eskom's Board told SCOPA that, after some members had left, some time elapsed before they were replaced. He apparently did not consider the activities of the committee sufficiently important to appoint interim members, despite the fact that the Code provides for this eventuality.<sup>45</sup>

While not necessarily producing corrupt outcomes, such inattention can lead to weak governance and opportunities for certain narrow interests to pervert the very purpose of these committees. In any event, the fact that only half of the

members of Eskom's committee were present at several meetings, means that it appears to have breached the provisions of the Code<sup>46</sup> requiring a quorum of 60% of its members. The implications for the validity of any tender awarded at these meetings are potentially serious.

An even more vital check on the dishonest manipulation – or even casual inattention – that can characterise tender adjudication, is the Circular's prescription of a procedure for members of the Committee to declare their interests annually.<sup>47</sup> At each meeting of the Committee, each Committee member and each official providing 'administrative support' to the Committee must also sign a declaration that they will 'not purposefully favour or prejudice anybody'.<sup>48</sup>

The Code also requires in strict and unequivocal terms<sup>49</sup> that an attendance register must be signed by members at each meeting; that this register must include a declaration of interests, including 'all gifts and invitations accepted to social events received from suppliers or potential suppliers, irrespective of the value'; and that the register form part of the official minutes.

The Code also requires<sup>50</sup> that no discussions may take place until each member (including the chairperson or vice-chairperson) declares every reasonably possibly relevant interest concerning any matter serving before the Committee and until affected members have recused themselves.

With all these safeguards in place, why then are there so many problematic tender decisions?

The Public Service Commission's (PSC) 2008 annual report on the State of the Public Service recorded a disturbingly widespread failure by senior managers – among those most likely to be involved in supply chain management on behalf of an accounting authority – to annually register their financial interests. Although the number registering their interests has improved from 62% to 85% over the past three years,<sup>51</sup> the PSC expressed the view that 'these figures ... remain an indictment on the political and administrative leadership', particularly as national departments scored an average of just 70% and five national departments had a compliance level of 0% - despite the fact that the PSC had highlighted the issue in its previous annual report.

Unfortunately, the PSC's report fails to name the defaulting departments, so we are unable to try to determine the potential impact of this dismal failure on particular tender contracts.

Clearly, however, bureaucrats' declarations of financial interest and their recusal from participation in processes involving bids by entities in which they have a documented stake, cannot promise a comprehensive solution to a chain of relationships that do not involve only direct, 'hard' financial interests. Thus, the exchange of seemingly discrete and objectively awarded public contracts for promises of future employment or political support will probably remain largely in the realms of political gossip and rumour.

### **Is there a solution?**

Given the inveterate opacity surrounding these 'soft' aspects of the undeniably complex process of tender adjudication, what tools remain that may more effectively proscribe the sometimes legal, but always immoral and corrosive, practice of looting the state's coffers for sectional or private gain?

The annual declaration of financial interests by senior public service managers remains an important control measure, although it clearly needs better enforcement. So does the requirement that all officials recuse themselves from participation in decisions in which they may have an interest. The public interest imperatives of value for money, equity and fairness<sup>52</sup> must be protected. Every effort must be made to ensure that any contracted service provider is providing the best possible service available at the best possible price, bearing in mind other legitimate and necessary public policy imperatives, such as equity.

It is also evident, however, that these measures are insufficient. What additional measures might be useful in improving the integrity and efficiency of the public procurement function?

- The PFMA Draft Amendment Bill may go some way towards clarifying and strengthening both the public procurement framework and its component procedures.
- Idasa has long campaigned for the legislated transparency of, and clear thresholds for, donations to and funding of South African political parties.<sup>53</sup> Without this vital monitor of the flow of funds from the state to political parties via the private sector, South Africans will justifiably continue to feel increasingly uneasy about whether personal or sectional interests are overwhelming the legitimate developmental objectives of the state.

The ANC's 2007 Polokwane Policy Conference for the first time contained a clear commitment, albeit in general terms, to the introduction of legislation to regulate public and private funding of representative political parties.<sup>54</sup>

However, no legislation was introduced during the current session of Parliament. South Africa is, therefore, likely to face more bruising revelations in the forthcoming 2009 general election campaign.

- Idasa has also long advocated the introduction into South African law of post-employment restrictions for public servants. Thus, a public servant would be prohibited for, say, up to two years, from accepting employment with a company that had secured a contract with that official's erstwhile employing department or agency. Based on international experience, Idasa believes that the introduction of a 'cooling off' period after resignation and before taking up an offer of employment in the private sector will bolster public confidence that the 'revolving door' syndrome of jobs for favours plays no (significant) part in public procurement decisions.

Government recently introduced into Parliament the Public Service Management Bill.<sup>55</sup> The Bill includes a provision introducing a one-year restriction on officials closely involved in any procurement decision accepting employment with a private entity in a contractual relationship with the relevant public entity or department.

While Idasa believes that the existing proposal doesn't go far enough, both in terms of the maximum period of restriction and the narrow scope of official functions included (it is limited to those 'participating in the award of work to service providers'), it is a welcome step in the right direction.

- Finally, the use of a 'blind trust' is a simple mechanism that could be extended to a wider spectrum of public servants. The obligation to 'place the administration of the interest under the control of an independent person or agency' any financial interests that 'may give rise to a conflict of interest' (emphasis added) is already imposed on members of the national and provincial cabinets. In terms of the provisions of the Executive Members Ethics Act,<sup>56</sup> members of the executive are prohibited, during their term of office, from having 'any communication with' or giving 'any instructions to' that person or agency.<sup>57</sup> The costs of such administration are borne by the state.

Given the extreme levels of suspicion that continue to characterise procurement processes in South Africa, it may be of assistance to require officials involved in making these decisions to subject themselves to similar controls. Judging by the Public Service Commission's and the Auditor-Generals' reports, regular declarations of interests and recusal from participation in such decisions are proving too difficult to implement and enforce.

It may prove to be simpler and more effective to require members of an accounting authority's team to place all relevant financial interests under administration immediately upon joining that team and for the duration of that membership.<sup>58</sup> The cost to the state may be well worth the benefit arising from enhanced public confidence in the public procurement process.

## **Conclusion**

In politics, perception sooner or later takes root in reality. Will citizens, in significant numbers, lose confidence that their legitimate interests are taken seriously by the state, and that they have a stake in a shared future? Can we afford to allow the delivery deficits described here to contribute toward a growing democratic deficit?

Our common human nature will never allow the complete elimination of corruption. However, our very birth as a constitutional state owes much to lessons learned by other members of the human family. We have the opportunity to learn from others' experiences in this field too. Many South Africans are growing increasingly concerned that we are inexplicably failing to apply the full range of available remedies that, at least, may serve to defuse some of resentment and anger felt by the dispossessed.

## **End Notes**

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<sup>1</sup> 'Fronting = BEE?' *Mail & Guardian* Online -Thought Leader 28 February 2008

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<sup>2</sup> The 2001 Regulations to the PPPF Act contain the following definition: 'Historically Disadvantaged Individual (HDI)' means a South African citizen –

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ("the Interim Constitution"); and / or

(2) who is a female; and / or

(3) who has a disability...'.<sup>3</sup>

<sup>3</sup> 'Combating corruption and fronting' by Mahadi Moloi in *Building Women* December/January 2006, p 32.

<sup>4</sup> 'Black economic disempowerment' – Lazola Ndamase, Thought Leader – *Mail & Guardian*, 26 February 2008

<sup>5</sup> See, for example, the *Business Times* of 15 July 2008 claims that 'Nearly a third of the members of the ruling party's highest decision-making body are directors of empowerment companies worth billions...the ANC's 87-member national executive committee includes 28 individuals who have interests in more than 69 companies. ... More than R300-billion worth of empowerment transactions have been concluded since 1994...'. See also, Richard Calland 'Old and nouveau: A congealing overlap of money and politics' *Mail and Guardian* online, 27 September 2005. 'The tribute to Brett Kebble by Khanyo Gqulu ... ("Our north, our south, our east and west") ... illustrates at least two things about the new South Africa. Firstly, that there is more than one elite-building project going on. Secondly, that the interplay between money and politics has reached epidemic proportions.'

<sup>6</sup> *Cape Times* of 19 February 2007

<sup>7</sup> *Mail & Guardian* 14 March 2008

<sup>8</sup> *Mail & Guardian* of 22 April 2008

<sup>9</sup> Auditor-General Report 19 of March 2006, cited in 'SA Democracy Incorporated: Corporate fronts and political party funding', by Vicki Robinson and Stefaans Brummer, ISS Paper 129, November 2006

<sup>10</sup> Robinson and Brummer, above, at p7

<sup>11</sup> from CIPRO, the Department of Trade & Industry's Companies and Intellectual Property Office, see Robinson and Brummer at p 8

<sup>12</sup> Robinson and Brummer at p7

<sup>13</sup> Blade Nzimande, *Bua Komanisi*, special edition, May 2006

<sup>14</sup> 'Broaden Black Empowerment', Address to Soweto Small Business Executive Council, 18 April 2006

<sup>15</sup> held in Stellenbosch in December 2002

<sup>16</sup> Paragraph one of the Resolution on Black Economic Empowerment, available at [www.anc.org.za](http://www.anc.org.za)

<sup>17</sup> This is quite apart from the recently-uncovered anti-competitive collusion of various private businesses involved in producing bread, a staple food for many South Africans, and in supplying pharmaceuticals to the state.

<sup>18</sup> *Times* of 15 July 2008 'Gravy train on track'

<sup>19</sup> TNS Survey, reported in the *Cape Times* of 24 June 2008

<sup>20</sup> See <http://www.pmg.org.za/report/20080520-briefing-special-investigations-unit-investigation-department> (date accessed 15 July 2008) and the *Cape Times* 21 May 2008

<sup>21</sup> *Cape Times* 13 and 23 June 2008

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<sup>22</sup> Home Affairs' Director-General has denied and irregularities in the tender adjudication procedure followed. However, Home Affairs Minister, Nosiviwe Mapisa-Nqakula, has reportedly asked the Auditor-General to investigate

<sup>23</sup> Report of the Auditor-General 245/2006, 18 September 2006. The Public Service Act, 1994 (Act No. 103 of 1994) (PSA), chapter VII, sections 30 to 31 stipulate that every government employee shall place the whole of his or her time at the disposal of the state. No officer or employee shall perform or engage in performing remunerative work outside his or her employment in the public service, without permission granted by the relevant executing authority or an officer authorised by the said authority. The problem is that this and related provisions are not observed or enforced.

<sup>24</sup> *Daily Dispatch* 10 July 2008

<sup>25</sup> Robinson and Brummer, above, at p 8

<sup>26</sup> undated, previously 'Statement 002'

<sup>27</sup> After a lengthy delay in resolving both these weaknesses and the inconsistencies between the PPPF Act and the BBBEE Act, a Draft Public Finance Management Bill, 2008, appears to be making its way into the public domain. The Draft Bill declares the intention to repeal the former and to strengthen the Codes of Good Practice promulgated in terms of the latter.

<sup>28</sup> Thus, the Executive Report on The Progress of Broad-Based Black Economic Empowerment in South Africa (August 2007), prepared by Consulta Research, an affiliate company of the University of Pretoria's Business Enterprises Unit for the Presidency and the DTI, concluded, at page 31 (bullet-point 4 of Paragraph 12.1): 'A concerning conclusion was the fact that Enterprise development scored the lowest...'

<sup>29</sup> in Section 2, and in its Regulations of 2001

<sup>30</sup> Specific methods mentioned in Section 2 are-

'(a) promoting economic transformation in order to enable meaningful participation of black people in the economy;

(b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;

(c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;

(d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;

(e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;

(f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and

(g) promoting access to finance for black economic empowerment.'

<sup>31</sup> See *inter alia* Circular dated 19 February 2008, which refers to finding of a court of law in terms of the provisions of the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004.

<sup>32</sup> Section 9

<sup>33</sup> Clause C.2.2 of the Code

<sup>34</sup> Clause C.4.5

<sup>35</sup> Clause C.4.6

<sup>36</sup> Clause C.2.7

<sup>37</sup> undated – available on [www.treasury.gov.za/divisions/sf/sc/default.aspx](http://www.treasury.gov.za/divisions/sf/sc/default.aspx)

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<sup>38</sup> dated 24 March 2006

<sup>39</sup> The purpose of this latest Circular is to provide further clarification of earlier guidelines on the mandate, role, function, composition, duties, meeting procedures and conduct of Supply Chain Management (SCM) Bid Adjudication Committees. The guidelines are explicitly stated to be supplementary to the Code of Conduct for the Public Service as contained in Chapter 2 of the Public Service Regulations, 2001, as well as to the Code of Conduct for Supply Chain Management Practitioners, issued on 5 December 2003 as practice note number SCM 4 of 2003. Treasury Regulation 16A 6.2 stipulates that an institution's supply chain SCM system must, *inter alia*, provide for the adjudication of bids through a bid adjudication committee, the establishment, composition and functioning of bid specification, evaluation and adjudication committees and the selection of bid adjudication members. Signaling an inability by many public entities' accounting officers to adequately and fairly implement the new SCM procedure, this Code found elaboration shortly thereafter in a further Circular dated 27 October 2004. It provided detailed guidance regarding the implementation of the SCM process, including the establishment, composition and powers of largely separate specification, evaluation and adjudication committees.

<sup>40</sup> in Clauses 2.5 and 2.11, respectively

<sup>41</sup> More particularly, it provides that:

- 'all necessary bid documents have been submitted;
- disqualifications are justified and that valid and accountable reasons / motivations were furnished for passing over of bids;
- scoring has been fair, consistent and correctly calculated and applied; and
- bidders' declarations of interest have been taken cognizance of.' (Emphasis added)

Despite the eye catching wording of this last requirement, it is of doubtful utility in providing Bid Committees with a ready-made red flag alerting them to any possible high-profile connections the bidder may have, for the simple reason that a bidder with a political agenda is unlikely to declare it.

SCM Practice Note 4 of 2006 [dated 30 March 2006] does require bidders to sign a declaration notifying members of the accounting authority involved in evaluation and adjudication of tenders of any default or misconduct, including fraudulent misrepresentation of preferential points, relating to previous tender contracts in which the bidder was involved. Such default or misconduct may, on conviction, lead to contractual penalties, contract cancellation and blacklisting for up to ten years.

But this and other Practice Notes fail to deal with the matter at hand. The inclusion of a family member, or a person with political connections, among a bidder's interested parties, or the existence of an intention to divert profits to a political party, are not currently prohibited activities. The political connections of a tenderer are, therefore, a factor that may play an undetermined, unregulated and largely implicit role in the decision to select a successful bidder. The part played by such connections or intentions in contractual decisions by an organ of state thus remain, to a large extent, in the eye of the beholder. But the sense of injustice and resentment are real enough.

The absence (from National Treasury's website) of any Regulation or Practice Note providing clear guidance on the manner in which such potentially politically sensitive information should

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best be balanced, means that the possibility remains that it serves merely as an implicit reminder to Bid Committee members where their narrow partisan loyalties may lie.

The Circular provides also for the 'option' that the Bid Adjudication Committee may, 'if and when required to do so', consider for approval the recommendations of the Bid Specification Committee. The stated purpose of the Bid Adjudication Committee's involvement is 'in order to ensure that a proper and unbiased specification is compiled for the specific requirement and that proper Terms of Reference are drawn up for the service required, clearly indicating the scope of the requirement, the ratio between price and functionality, the evaluation criteria as well as their weights and values' and that the preference points system is properly applied.

Given the currently extremely high perception of corruption at senior levels of government, it might be advisable to make this check compulsory.

<sup>42</sup> Thus, the Code requires that committee members 'must be familiar with and adhere to all relevant SCM legislation, policy, guides, practice notes and circulars' (Clause 2.10).

<sup>43</sup> Idasa staff member's notes

<sup>44</sup> July 2008

<sup>45</sup> in Clause 4.5

<sup>46</sup> of Clause 3.4

<sup>47</sup> Clause 2.12

<sup>48</sup> Clause 2.13

<sup>49</sup> in Clause 5.4

<sup>50</sup> Clause 6.1 should be read with the provisions of Section 50(3) of the PFMA

<sup>51</sup> *Principle 1: A High Standard of Professional Ethics Must Be Maintained*, at page 20

<sup>52</sup> enshrined in the PFMA

<sup>53</sup> IDASA submission to the African Peer Review Mechanism, Richard Calland and Judith February, December 2005 and 'The Funding of Political Parties, Democracy and the Right to Know', Judith February and Richard Calland, 30 April 2004

[http://www.idasa.org.za/Output\\_Details.asp?n=1&RID=575&OTID=4&PID=43](http://www.idasa.org.za/Output_Details.asp?n=1&RID=575&OTID=4&PID=43)

<sup>54</sup> The Conference Resolution reads, in relevant part:

#### **'FUNDING**

63. Conference believes the resourcing of the movement is fundamental to its ability to carry out the mission of the ANC. Conference therefore adopts the following policy positions from the Organisational Review document and the Policy Conference:-

- o The ANC should champion the introduction of a comprehensive system of public funding of representative political parties in the different spheres of government and civil society organisations, as part of strengthening the tenets of our new democracy. This should include putting in place an effective regulatory architecture for private funding of political parties and civil society groups to enhance accountability and transparency to the citizenry. The incoming NEC must urgently develop guidelines and policy on public and private funding, including how to regulate investment vehicles.'

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<sup>55</sup> b47-08 of 17 June 2008

<sup>56</sup> No. 82 of 1998, read with Clause 3 of the Code of Conduct promulgated in terms of the Act (on 28 July 2000)

<sup>57</sup> Clause 3.7 of the Code

<sup>58</sup> Such a requirement is included in the United Kingdom Civil Service Management Code, Volume 2 of 2000, paragraphs 4.3.8 - 4.3.9