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A REVIEW OF THE IMPLEMENTATION OF GOVERNMENT PROCUREMENT POLICY

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A research report submitted to the Faculty of Commerce, Law and Management, University of the Witwatersrand, in partial fulfillment of the requirements for the degree of Masters of Management in Public Policy

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ABSTRACT

When the newly elected democratic government came into office after the 1994 elections, it introduced reforms in the implementation of government procurement policy. The post-1994 dispensation fundamentally changed the old approach to the management of financial resources of the state. Government passed new legislation and adopted progressive policies relating to government procurement. The two major pieces of legislation, namely, the Constitution and the Public Finance Management Act (PFMA) infused the public policy concept of good governance within the realm of public sector procurement.

The government procurement system was required to comply with the five principles of good governance, which are: (1) fairness, (2) equity, (3) transparency, (4) competitiveness and (5) cost effectiveness. These five principles have a universal applicability, as they are practised internationally. Their genesis is related to the period when new public management practices were attracting the attention of both developed and developing countries.

However, the reforms in the implementation of the public procurement policy faced various challenges and imperfections. Given this, the primary aim of this research study is to examine whether the implementation of government procurement policy over the last 20 years has promoted the five constitutional principles that inform the concept of public procurement, as well as evaluate the implications of non-compliance as reflected in the Public Protector and Auditor General's reports.

The policy review applies a qualitative research methodology that analyses the data from official and unofficial documents, including case studies from selected Public Protector reports as well as selected court cases. Reports from the Auditor General and various newspaper articles are also used to evaluate the strengths and weaknesses of the implementation of the revised government procurement policy in the post-1994 era.

The results reveal a disjuncture in theory and practice in how public procurement policy is implemented to achieve the objective of good governance. In the main, government officials from affected departments fail to adhere to the requirements of applying a procurement system that is fair, equitable, transparent, competitive and cost effective. The results show that the cause of this state of affairs is a lack of understanding of what constitutes a procurement system that complies with the requirements of Section 217(1) of the Constitution. Secondly, the perceived overemphasis on socio-economic objectives over commercial considerations contributes to poor policy implementation.

Lastly, the diminishing role of public participation in the processes of awarding tenders has negatively affected the public trust and confidence in public procurement. It is hoped that the recommendations contained in this research report will assist National Treasury in its continued efforts to transform and modernise the public sector procurement.

DECLARATION

I, Lazola Vabaza declare that this research report is my own work. It is submitted in partial fulfillment of the requirements for the degree of Masters of Management in Public Policy at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

Lazola Vabaza

Signature of candidate:……..

Date:……

DEDICATION

In memory of my late sister, an angel sent by God, Nokanyiso ‘Oratile’ Cebe.

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LIST OF ABBREVIATIONS

AGSA	Auditor General of South Africa
AO	Accounting Officer
BAC	Bid Adjudication Committee
BBBEEA	Broad-Based Black Economic Empowerment Act, Act 53 of 2003
CONSTITUTION	Constitution of the Republic of South, Act 108 of 1996
DPME	Department of Performance Monitoring and Evaluation
DTI	Department of Trade and Industry
ECPT	Eastern Cape Provincial Treasury
GDRT	Gauteng Department of Roads and Transport
DPW	Department of Public Works
HDI	Historically Disadvantaged Individual
IEC	Independent Electoral Commission
IMF	International Monetary Fund
LDRT	Limpopo Department of Roads and Transport
MEC	Member of Executive Council
MPAT	Management Performance Assessment Tool
NPM	New Public Management
NT	National Treasury
NTR	National Treasury Regulations, 2005
OCPO	Office of the Chief Procurement Officer
PFMA	Public Finance Management Act, Act 1 of 1999
PPPFA	Preferential Procurement Policy Framework Act, Act 5 of 2000
RDP	Reconstruction and Development Programme
SAPS	South African Police Service
SCM	Supply Chain Management
WB	World Bank

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CHAPTER 1: INTRODUCTION

1.1 Background

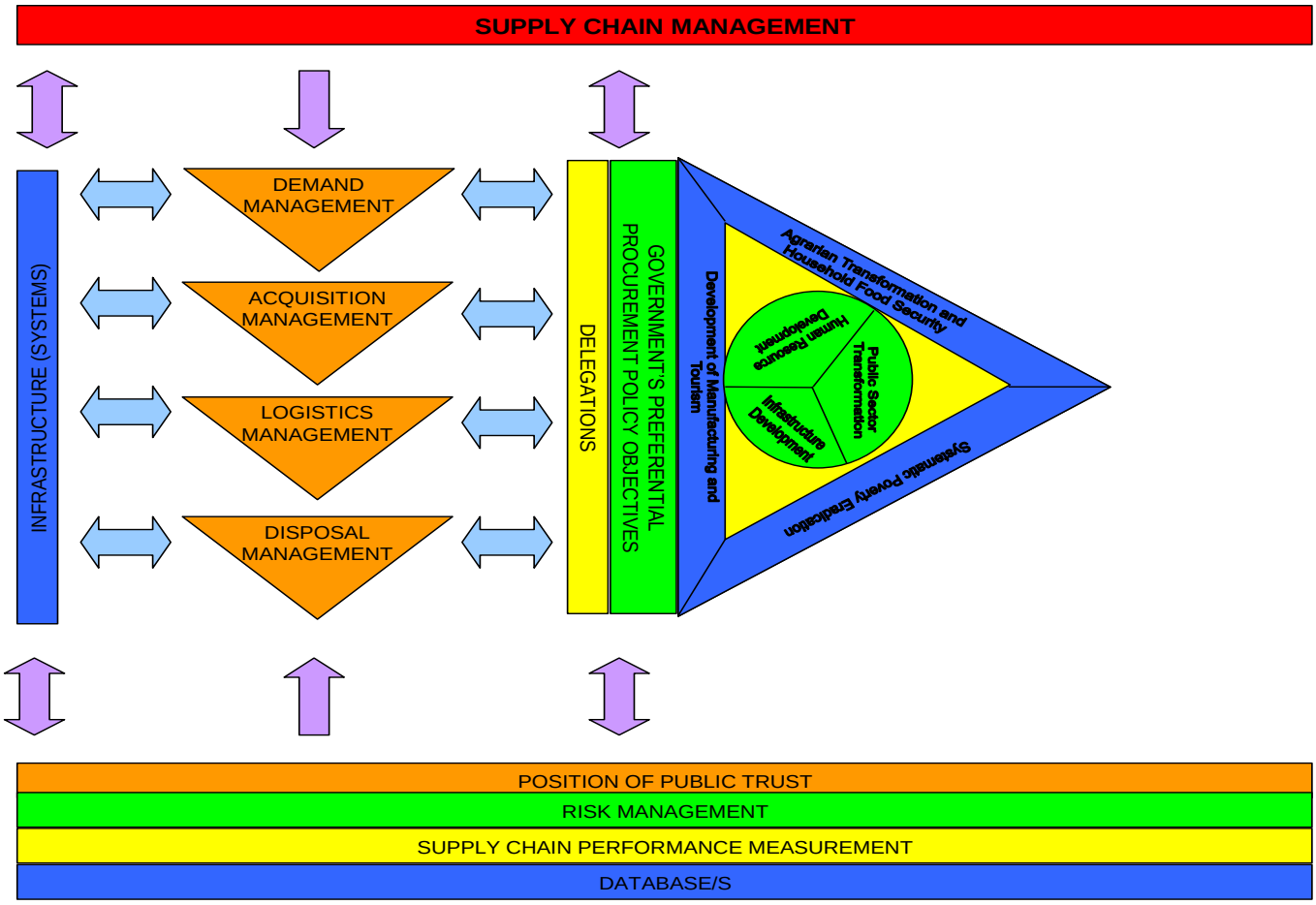
After 1994 the South African government embarked on a process of elevating supply chain management (SCM) philosophy as a management function. A number of policy interventions and implementation strategies on how to promote good governance as a feature of SCM in the public sector were tried and tested. Although the National Treasury has made strides in assisting national and provincial departments in implementing integrated SCM processes, it seems that there are still challenges in the full implementation of the five constitutional principles underpinning government procurement policy. These five principles are the following: (1) fairness, (2) equity, (3) transparency, (4) competitiveness and (5) cost effectiveness.

What is clear is that the democratic government adopted a new approach in the governance and management of financial resources in the public sector by redesigning the public procurement legislative and policy framework. This started in earnest in 1996 when the government passed the Constitution of the Republic of South Africa Act, No. 108 of 1996, and of relevance to this policy review exercise is Section 217 that requires every official in the employment of state machinery to contract for goods and services in a fair, equitable, transparent, competitive and cost-effective manner. Subsequently, the government passed the Public Finance Management Act (PFMA), No.1 of 1999, which gave effect to and reiterated the constitutional requirements of Section 217. The Act sets out broadly the requirements and allocates responsibilities attached thereto. It further imposes a responsibility on the Heads of Departments (HODs) to implement a procurement system that is fair, equitable, transparent, competitive and cost effective. In operationalising the requirements of the PFMA, government issued National Treasury regulations in 2001 that were later revised in 2005. These regulations provide for an SCM system that is fair, equitable, transparent, competitive and cost effective.

In 2000, the government promulgated into law the Preferential Procurement Policy Framework Act No. 5 of 2000 (PPPFA), which provides for the granting of preferences in the procurement process to historically disadvantaged individuals (HDIs), by means of a point-scoring system. Later, National Treasury issued the PPPFA Regulations in 2001, which set out the formulae for the point-scoring system and stipulate the rules and procedures governing the preferences that might be claimed in terms of the PPPFA.

After some time, there was a realisation by government that only a few black people were benefiting from the black economic empowerment programme that was introduced in 2000. Indeed, this led to government revising its empowerment programme and resulted in 2003 in the promulgation into law of the Broad-Based Black Economic Empowerment Act, No.53 of 2003 (BBBEEA). The Act is intended to promote economic transformation in order to broaden the meaningful participation of black people in the economy. In the same year, 2003, the National Treasury issued SCM regulations to establish a policy framework for the implementation of SCM in the public sector. In terms of these regulations, the procurement function is linked to the six elements of SCM framework, which are (1) Demand Management, (2) Acquisition Management, (3) Logistics Management, (4) Disposal Management, (5) Risk Management and (6) Supply Chain Performance. Figure 1 provides a graphic representation of these six elements of SCM in government.

Figure 1: Supply chain management framework



(Source: SCM: A Guide for Accounting Officers / Authorities issued by Nation Treasury in February 2004)

In terms of the SCM: Guide for Accounting Officers/ Authorities (2003, pp. 10–11) the first element, namely demand management, is the initiation phase in the acquisition of goods and services in government. This is the phase where the identification of needs by end-users is required through the completion of the annual procurement plans by departments which are submitted to National Treasury by April of each year. It is followed by the acquisition management phase wherein the actual process of procuring suppliers or service providers to deliver goods or render services is undertaken. There are three methods of procuring goods or services in government, which are (1) Invitation of Price Quotations, (2) Open/Competitive Bidding and (3) Closed/Limited Bidding. These methods are applied during the acquisition management phase of the SCM framework. It is once goods or services are procured that monitoring of

performance takes place in the form of checking inventory and stock levels in relation to goods and management of performance standards, in compliance with a service level agreement applicable to procurement of services. The latter phase is termed logistics management in the SCM framework. Once the procured goods are of no economic usage or are rendered obsolete they are disposed of in line with the disposal management methods under disposal management phase of the SCM framework. These methods include auctioning, letting, selling or destruction that must follow a process that is fair, equitable, transparent, competitive and cost effective. In all these phases of SCM it is of paramount importance to identify risks, and as a result the SCM framework incorporates an aspect of risk management. The final phase of SCM framework is the supply chain performance that measures the efficacy and effectiveness of the whole SCM framework in terms of supporting the delivery of predetermined strategic objectives of a department.

On 10 September 2003, cabinet adopted the Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government. The document states (2003, p. 2) that:

> *Procurement reforms in government started in 1995 and were directed at two broad focus areas, namely the promotion of principles of good governance and the introduction of a preference system to address certain socio-economic objectives. The procurement reform processes were supported by the introduction of a number of legislative measures, including the adoption of the PFMA and the PPPFA.*

Flowing from these reforms which were intended to further strengthen the policy framework governing public procurement, National Treasury developed and published the General Procurement Guidelines premised on five pillars of public sector procurement and they are the following: (1) Value for Money, (2) Open and Effective Competition, (3) Ethics and Fair Dealing, (4) Accountability and Reporting, and (5) Equity. To augment these developments, in 2004 the National Treasury felt it necessary to empower the HODs as procurement was being decentralised to departments.

National Treasury developed and issued the document *Supply Chain Management: A Guide for Accounting Officers / Authorities* in February 2004 to, among other things, empower HODs as accounting officers for the final decision making in procurement-related matters. The guide lays out in detail the processes pertaining to the integrated supply chain management policy and how it should be institutionalised within their respective departments or entities. In addition, to support the interpretation of all these policy initiatives in public sector procurement, National Treasury regularly issues practice notes and circulars to keep officials abreast of developments in the realm of public procurement.

In light of the above background, the primary objective of this policy review is to examine whether the implementation of government procurement policy in the past 20 years as spearheaded by National Treasury has promoted the institutionalisation of good governance as represented by five constitutional principles of public procurement contained in Section 217(1) of the Constitution. The second objective of this policy review is to analyse the implications of non-compliance with these five principles of good governance by government officials in public sector procurement as reflected by the selected case studies. This policy implementation review will apply the qualitative research methodology and in the main will be analysing the official government documents and material that does not carry official status. They include: (1) Acts of Parliament, (2) Government Procurement Policies, (3) Reports of the Public Protector of South Africa, (4) Court Judgments, (5) Reports of the Auditor General of South Africa, (6) Academic Literature and (6) Newspaper articles.

1.2 Problem and Purpose Statement

Despite the production of various reports such as the World Bank Joint Country Assessment Review of 2001, Provincial Government Western Cape: Modernisation Programme of 2009, Management Performance Assessment Tool (MPAT) of 2011/12 and Public Sector Supply Chain Management Review of 2015 documenting the governance reforms during the implementation of government procurement policy, the

problem of lack of full compliance with the five principles of public procurement enshrined in Section 217(1) still persists. There is empirical evidence showing that a number of provincial government departments in the country that account for the largest percentages of budget allocation spending are challenged in properly managing their budget allocations for the delivery of public services. The latter state of affairs dates back to 1997 and was highlighted by Trevor A Manuel the former minister of finance in his 2001 budget speech when he stated that provincial governments, especially the Eastern Cape and KwaZulu-Natal, were the most challenged provinces when it comes to financial management (2001, p. 12).

This persistent challenge of improper procurement management can also been seen from a plethora of examples of the National Treasury Section 100 interventions and other supportive interventions such as the ones in Limpopo Provincial Departments of Education, Health, Provincial Treasury, Public Works and Roads & Transport. There were similar interventions in the Gauteng Provincial Department of Health and in the Eastern Cape Provincial Department of Education, as well as in the Free State Provincial Departments of Provincial Treasury and Police, and Roads and Transport. At national level, the National Treasury assisted the Department of Women, Children and People with Disabilities with its turnaround strategy that included improvement of procurement management.

Secondly, this policy review focuses on the past 20 years in the implementation of government procurement policy as spearheaded by National Treasury to assess only the government's lack of performance in complying with the five constitutional principles of public procurement as far as good governance is concerned. It is argued that there is a disconnect between what the public procurement policy says must be done and what is in fact being implemented on the ground by the government officials. The frequent investigative reporting by public institutions like the Public Protector's office and the Auditor General's office that are tasked with promoting democracy in the country reflects poor governance in public sector procurement. Responding to these challenges, government has in the past 20 years introduced a number of policy interventions,

among others, a good governance performance-monitoring tool called the Management Performance Assessment Tool (MPAT) developed by the Department of Performance Monitoring and Evaluation in the Presidency. The tool is a cross-cutting monitoring mechanism aimed at assessing the performance across government departments in the quality of services delivered and it also assesses how government procurement policy is being implemented in order to promote good governance. Its objective is stated in an MPAT booklet on case stories (undated) which specifies that:

> *the development of a Management Performance Assessment Tool (MPAT) to determine the quality of management practices in Government was sparked by the address of President in a message to Senior Public Officials when he said "we have the resources, we must change the way in which we use them. We must manage government differently* (p. 1).

In the wake of the challenges mentioned above, the primary research question of this policy review study is to determine whether the implementation of the government procurement policy under the guidance of National Treasury has promoted the five constitutional principles of Section 217(1) of the Constitution. The secondary research question that will be addressed in this policy review exercise is the extent of public policy implications for non-compliance with the applicable five principles of public procurement as espoused in Section 217(1) of the Constitution by various government departments and entities mentioned in the reports of the Public Protector and Auditor General. The policy review study will apply a qualitative research methodology that analyses the data that was collected from the primary and secondary sources of information.

The research approach is based on the exploration and analysis of case studies in the field of public procurement that will assist the researcher to develop objective outcomes and findings. Further, this kind of research methodology utilising case studies is relevant to this exercise of policy review as it showed the connection between practice and theory in terms of policy implementation. Finally, the research methodology has enabled

the researcher to find out the cause and effect when analysing the challenges facing National Treasury in fully implementing the government procurement policy that promotes good governance. It is important at this stage to note the link between good governance and the implementation of government procurement policy as Roos and De La Harpe (2008, p. 38) argued that:

> *Section 217 of the Constitution in effect encompasses the important principles of good governance in public procurement by prescribing a public procurement system that has to be in accordance with a system that is fair, equitable, transparent, competitive and cost effective.*

The research report will in addition conduct a literature review that will:

1) Analyse the concept of good governance;
2) Briefly look at the institutionalisation of the government procurement policy by National Treasury; and
3) Link the New Public Management Ideology and Implementation of SCM Policy in government.

Finally, Thai (2001, p. 10) states that:

> *"Although public procurement is perceived as a major function of government, and although government entities, policy makers and public procurement professionals have paid a great deal of attention to procurement improvements or reforms, public procurement has been a neglected area of academic education and research".*

In light of the above concern, it is hoped that this formal assessment and evaluation of how the implementation of government procurement as a public policy issue will add value in the elevation of the principles of good governance in public procurement discourse. In addition, it is intended that this review will positively contribute towards addressing the apparent knowledge gap in public policy studies on South African

government procurement. Lastly, the research study outcomes will hopefully assist the National Treasury in reshaping the future government procurement policy implementation landscape and continue to ensure compliance with the five constitutional pillars of public procurement, namely, (1) Fairness, (2) Equitability, (3) Transparency, (4) Competitiveness and (5) Cost Effectiveness.

1.3 Limitations of the Study

The research study is a policy review with a specific focus on an analysis of the promotion of good governance during the implementation of government procurement policy in the last 20 years. Unfortunately, not much academic literature is available from the pre-1994 period on government procurement that focuses on good governance based on fairness, equitability, transparency, competitiveness and cost effectiveness. Therefore, the policy review study mitigated this shortcoming by relying more on contemporary secondary sources such as research papers that have covered this period.

Secondly, although the reforms in government procurement policy have had a national, provincial and local impact, the scope of the study was limited to case studies at national and provincial level of government. National Treasury is encouraged to conduct a similar policy review study to include local government as well and perhaps compare the findings of this research report to get a holistic view of the disconnect between theory and practice when it comes to the full implementation of government procurement policy by government departments.

1.4 Outline of the Research Report

The research report outline is as follows:

Chapter 1: Introduction

The chapter problematises the research question and provides for a purpose statement that highlights the objectives of the research study.

Chapter 2: Good Governance and the Government Procurement Policy

The chapter is a literature review that looks at the primary and secondary sources of information that are referred to in order to support and critique various aspects of the submissions made in this policy review study.

Chapter 3: Research Methodology

The chapter on research design and methods deals with research methodology that informs the basis of the research findings made in the research paper.

Chapter 4: Government Procurement Initiatives

In spite of the challenges experienced by National Treasury in promoting good governance during the implementation of government procurement policy, government has put in place mechanisms to address these challenges. This chapter looks at the government procurement initiatives aimed at improving the phenomenon of government procurement.

Chapter 5: Review of the Application of Government Procurement Policy

In this chapter, a summary of evidence emerging from the review of the application of the five pillars of public procurement is discussed. In addition, analysis is provided on the gap between policy objectives and the actual policy implementation as far as the promotion of good governance is concerned.

Chapter 6: Findings and Conclusions

This chapter interprets the findings from the research study and provides a conclusion that offers recommendations on possible solutions to the challenges facing the implementation of government procurement policy as reflected in the selected case studies.

CHAPTER 2: GOOD GOVERNANCE AND THE GOVERNMENT PROCUREMENT POLICY

2.1 Introduction

This chapter is a literature review of the concept of good governance and the discourse of government procurement policy in South Africa. The discussions will be divided into three thematic areas. Firstly, an analysis of the theoretical framework of good governance as a concept of public policy will be discussed. In addition, it is worth noting that the international practices that elevated the role of SCM philosophy into a professional management discourse have had an influence in the shaping of government procurement policy. An example is the New South Wales Treasury that issued a Treasury Circular: Procurement Policy Reform (2004, p. 1) which stipulated among other things the aims of public procurement reforms which are to provide "a concise overarching policy statement on government procurement, based on value for money principles". These principles of good governance in public procurement are also expressed in the United States of America's public procurement system. As Kelman (1990, p. 11), a leading commentator on US procurement policy, notes:

> *[T]he procurement regulatory system has three goals:*
>
> - *Equity – to provide fair access to bidders in competing for government business.*
> - *Integrity – to reduce the chances for corruption in the procurement process.*
> - *Economy and efficiency – to procure at the lowest possible price for goods or services of the quality desired".*

Another critical reference on international experiences in public procurement is Thai (2001, p. 28) who argues that

> *sound procurement regulations are needed in order to increase public confidence in the procedures followed in public procurement, and to ensure fair and equitable treatment of all persons who deal with the procurement system.*

Secondly, a thematic area that focuses on the exploration of the historical and contemporary developments in the implementation of government procurement policy in South Africa. Hugo, Badenhorst-Weiss and van Biljon (2004, p. 3) notes that "[h]istory is the common factor that forged SCM into the management philosophy that it is today". Therefore it is suggested that there is a link between the political dispensation of 1994 and the virtual outlook of the public sector procurement regime. Bolton (2007, p. 8) states that "South Africa's political emancipation in 1994 alone brought about changes to the way in which government procurement is regulated".

Thirdly, there is a literature review on the influence of the New Public Management ideology on public procurement in terms of the promotion of the five principles of good governance.

2.2 Defining the Five Pillars of Government Procurement Policy

2.2.1 Principle of Fairness

According to the definition by Bolton (2007, p. 48) a fair procurement system is as follows: "Government contracts should be widely advertised, all contractors should be familiar with the rules of the competition and all contractors should be afforded enough time to participate in the process." This therefore means that all service providers should be subjected to the same rules of the game when they are conducting business with government and this necessarily requires that no service provider should be favoured or prejudiced in the process. In practical terms, the latter requirement means that everyone who conducts business with government must be treated equally. For example, when a department advertises a tender, it is required in terms of procurement rules to conduct an information session on the specifications that were advertised in order for anyone to have access to the same information as everybody and whoever seeks clarity can be assisted. Although this is a good governance practice introduced by the National Treasury, this practice is sometimes avoided by officials when they prefer to motivate for a deviation from normal competitive bidding processes.

The second form of fairness in public procurement is the one catered for in the General Procurement Guidelines (undated, p. 6) issued by the National Treasury which requires officials involved in public procurement to disclose any conflict of interest. This is a very important aspect of a fair public procurement system. If it is left unattended to, it might lead to a loss of public trust and confidence in public procurement.

The third form is operational in nature and requires that for the implementation of a fair procurement system a yearly invitation for the listing of prospective suppliers on departmental suppliers database should be undertaken (National Treasury Practice Note 8 of 2007/08). The Department of Women, Children and People with Disabilities is one example of a national department that has been lacking in meeting this requirement as for the last 12 months it has not advertised the list of service providers in its suppliers database (MPAT 2013). This is just one example of a conduct that does not comply with the requirement of a fair procurement system.

Lastly, the case studies to be discussed in Chapter 5, which are Courts cases and reports of the Public Protector, are clear examples that show how this principle of fairness has been disregarded and the procurement processes followed were not in line with the intentions of Section 217 (1) of the Constitution.

2.2.2 Principle of Equity

The good governance pillar of equity imposes a duty on those tasked with operating the public procurement system to pay attention to procurement interventions that target SMMEs and the HDIs. The adoption of the 10-Point Plan is one policy initiative by government aimed at promoting access of SMMEs and HDIs to government business opportunities. Bolton maintains that “the reference to equity in Section 217(1) can therefore be said to be aimed specifically at addressing the inequalities and unfair discriminatory practices”.

Indeed, the issue of the equity requirement has been a subject of misrepresentation and misinterpretation by some of the officials implementing the government procurement policy. In one of the case studies to be discussed in Chapter 5 this matter came up for adjudication and what was clear is that the equity requirement cannot be viewed as a standalone principle of good governance. Therefore, it is the researcher's submission that based on a wrong interpretation of the public procurement policies officials have wrongly applied the preference point-scoring system in some instances. Hence, it is submitted that National Treasury does need to roll out a vigorous training programmes specifically designed at looking at the interpretation of Section 217(1), because the current case studies indicate a lack of training both at policy conceptualisation level and policy implementation level.

It is also important to inform the SMMEs and HDIs that the equity requirement in public procurement is not meant to promote low standards of performance when it comes to service delivery. Government is currently suffering from a crisis of governance due the increasing numbers of service delivery protests as result of a poor record of service delivery. The 2015 National Treasury Public Sector Supply Chain Management Review makes reference to this challenge of a poor service delivery record of government that is connected to the weaknesses in public procurement policy implementation (p. 1). Lastly, an analysis of the case studies on the implementation of an equitable public procurement system reveal an abuse of the preference point system to favour certain businesses at the expense of commercial considerations such as quality and price.

2.2.3 Principle of Transparency

The good governance principle of transparency in public procurement is meant to comply with the public policy notion of checks and balances in the management of state resources by the elected representative through the system of government bureaucracy. The National Treasury has instructed departments to advertise government business opportunities in the departmental websites, notice boards, tender bulletins and local newspapers in order to promote transparency in public procurement.

Bolton concurs with the latter statement as she indicates that the aim of implementing a transparent public procurement system is for everyone to be allowed to question any processes followed during the awarding of a government contract (Bolton, 2006, p. 54).

However, this policy review study has found that officials are resorting to measures that deviate from the principle of openness in the tender procedures because the evaluation and adjudication processes are done without the involvement of the public. This is area that National Treasury needs to improve on as this impacts negatively on the promotion of governance in public procurement. There is nothing stopping the National Treasury from allowing the public to be active observers during the evaluation and adjudication stages in public procurement processes. This will require a paradigm shift in the policy implementation phase of public procurement as it will introduce a radical approach to the promotion of the pillar of transparency as envisaged by the Constitution.

Furthermore, it is argued that National Treasury through the 2015 Public Sector SCM Review exercise came to accept that more needs to be done to change the way tender information is accessible to the public. For example, the 2015 Review reveals now the fact that information contained in procurement plans and awarded tenders will now be made public at certain intervals and will impose greater public accountability on officials involved in public procurement (p. 13). This policy review argues that this will drastically cut down on deviations from normal competitive bidding which are commonly disguised as limited bids due to the nature of the work involved. Finally, analysis of the case studies reveals that transparency in public procurement exposes the extent of political meddling in decision making on awarding of contracts. This will be elaborated further during the analysis of the case studies in Chapter 5.

2.2.4 Principle of Competition

The principle of competition within the context of public procurement can be defined as a process where more than one potential supplier or service provider is allowed to submit quotations or proposals for the advertised work of government. This requires that

departmental officials discharging the procurement function conduct a market analysis and develop a sourcing strategy that will allow for maximum competition. This principle of competition in procurement in general must allow a level of trust and partnership between the supplier and a buyer (Hugo, Badenhorst-Weiss & van Biljon, 2004, p. 8). It can be argued that the latter is still a problem in public sector procurement according to the findings on the analysis of the case studies. Some government officials are unable to create this atmosphere because they engage in practices that favour one service provider over others.

Secondly, Bolton (2006, p. 41) argues that:

> *One of the advantages of competition is that an entity making use of competitive procedures is in a position to compare prices, quality, etc., and can choose to contract with the party offering the best possible value.*

In light of the above, it is has been found in the analysis of the case studies that despite the requirement of comparing prices and quality, some service providers do get government work even if they do not meet one of the two requirements, or principles. This therefore means that there is a disconnect in terms of what the National Treasury is instructing departments to do to comply with the policy imperatives of government procurement and what the officials are actual implementing on the ground.

Thirdly, the education of SMMEs about government business processes is one way of promoting competition. The cost of running workshops for SMMEs explaining government procurement processes cannot outweigh the future opportunities to be created for such businesses (General Procurement Guidelines, undated, p. 5). It is encouraging to note that National Treasury has been motivating government departments to run a suppliers day. This indeed is a valuable effort from National Treasury in ensuring that a competitive principle of good governance in public procurement is being promoted.

Fourthly, the other requirement for complying with a competitive public procurement system is value for money. The aim of competing in the business sense is to get value for money. Accordingly, this is linked to the principle of cost effectiveness of good governance (Bolton, 2006, p. 40). In one instance the policy analysis on the case studies found that the government officials involved with the evaluation processes in public procurement applied their minds only to price and left out any consideration to issues of quality and ability by suppliers to do the job. However, it is argued in this policy review that National Treasury must provide guidance on the interpretation of what constitutes competitive pricing as price is not only monetary value but also takes into consideration issues of quality that must also be valued in the quoted amount.

Lastly, the price referencing initiative from National Treasury is commendable and indeed has an impact on promoting competition, as it will cut down on issues of overpricing. Now the public will be made aware of what constitute reasonable prices and suppliers will find it difficult to collude for purposes of defeating competition, as reasonableness of prices will be determined upfront. Since the Eastern Cape Province already has a system of price referencing in place (ECSCM Circular 24 of 2010/11: Procurement Value Management Intervention – Price Benchmarking for Goods and Services), to create uniformity it is recommended that National Treasury develop one price referencing system for the entire government.

2.2.5 Principle of Cost Effectiveness

A cost effective public procurement system as a principle of good governance is one that considers the effective and efficient utilisation of procurement processes from the time the need for procurement is identified up to the time when performance needs to be measured. Therefore, the cost effectiveness requirement imposes a duty on officials involved with procurement to conduct an analysis of the value chain during the procurement of goods and services in the public procurement sphere. For example, in the case of leasing of a SAPS building (to be discussed in Chapter 5), the Public

Protector found that this transaction was not cost effective because of poor demand management or that the needs analysis was not properly done.

The 2015 Review document of National Treasury acknowledges these challenges associated with complying with a cost-effective procurement system especially during the post-tender stage when suppliers provide substandard material and quality products that are compromised (p. 19). This could also be connected to poor articulation of the needs in a poorly drafted specifications document; but sometimes, during the evaluation stages, the functionality criteria (which deal with the previous work record and capacity to deliver of the supplier or service provider being evaluated) are changed to accommodate another supplier or service provider.

It is argued that there is a thin line separating the requirements for competition and cost effectiveness as the principles of good governance in public procurement (Bolton, 2006, p. 44). This is because both principles deal with the competence of the supplier or service provider to deliver as per the requirements of the quotation or tender. In the analysis of these case studies, it is argued that the implementation of poor demand management strategies is the cause for non-compliance to cost effective public procurement. In the main, it is because of poorly drafted specifications or because of the adoption of a sourcing strategy intended to favour a specific supplier or service provider. In these latter cases, politics always play a role or the failure to declare interests. It therefore becomes critical that the public is allowed to participate as observers in the evaluation and adjudication meetings before contracts are awarded. This is in keeping with legal procedure where judges hear in public evidence from both the representatives of the state and the representatives of the accused.

With regard to the costs that are not effective because of poor workmanship it is just a matter of contract management. It is during this stage that issues of risk management should be addressed and indeed the National Treasury has started by issuing the general conditions of contract that are standard across all government contracts for goods. The general condition of contract is largely also applicable to contracts for

services. However, as can be seen from the analysis of the case studies this measure is not sufficient to prevent the imperfections within a system which needs to promote cost effectiveness. Instead, National Treasury should make it compulsory for the evaluation committees to conduct site inspections for all the suppliers or service providers who have submitted responses to an advert for listing in their respective departmental suppliers database. Even if National Treasury is considering the centralisation of a suppliers database for the whole of government. it should allow these inspection visits to take place.

2.3 Theoretical Framework of Good Governance

The public policy concept of good governance can be analysed at two levels, firstly by looking at good governance as an administrative function and secondly, by adopting a developmental approach in unpacking the concept of good governance. One school of thought subscribes to the notion that good governance is an administrative function that begins to ask how state resources will be utilised in order to comply with the applicable regulations and legal framework. Leftwich (cited in Rhodes, 2003, p. 50) defines this notion of good governance as follows:

> *An efficient, open, accountable and audited public service which has the bureaucratic competence to help design and implement appropriate policies and manage whatever public sector there is.*

The other school of thought views good governance from a developmental perspective by asking how state resources will be utilised to the benefit of the country in terms of citizens' participation in decision making. The latter school of thought adopts the definition of Cheema and Rondinelli (cited in Fourie, 2009, p. 1116):

> *Governance is fundamentally a political imperative and cannot be reduced to a purely public administrative function due to the conflation of the political-administrative roles that need to be fulfilled.*

It is an imperative in the context of public policy analysis to understand a dichotomy between these two schools of thought as they place the concept of good governance in

two different contexts with one putting more emphasis on state-society relations and the other strongly focusing on the administrative management of public resources. In the discussions below an analysis is provided emanating from the review of academic literature as far as the concept of good governance and its relevance to the implementation of government procurement policy is concerned.

Governance is a concept of public policy that has a multifaceted outlook. In the public policy arena, it has been defined based on power and authority, state-society relations, institutions, management and distribution of resources, and, a set of rules and norms. The World Bank understands governance to "mean the exercise of power to manage a nation's affairs" (Mkandawire, 2007, p. 679). However, Mkandawire (2007, p. 679) differs diametrically with the World Bank's conceptualisation of governance and states that:

> *The concept of good governance originated among African scholars in relation to state-society relations in Africa, expressing the concern that these be developmental, democratic, and socially inclusive.*

Mc Lennan (2007, p. 6) concurs with this view and defines good governance as having one of its outcomes as greater efficiency and effectiveness in delivery of services. On the other hand, Bang and Esmark (2009, p. 16) define good governance in terms of the conventional liberal ideology:

> *Good governance is not motivated by worries over democratic polity or politics, but rather the need for 'wise policies' to directly and concretely meet and govern the risks confronting reflexive individuals in an ever more globalized society.*

Another definition comes from the Commonwealth Secretariat (2000, p. 5) that tends to lean towards the World Bank's conceptualisation of governance:

> *[G]ood governance is therefore the highest state of development and management of a nation's affairs.*

The researcher notes and is in favour of the latter characterisation of good governance as an administrative function, which is not consistent with to the one espoused by Mkandawire and Mc Lennan. The basis for challenging Mkandawire's and Mc Lennan's conceptualisation of good governance is that they tend to underplay the impact of economic and financial global dynamics on government's ability to effect genuine development. In this instance, Cheema and Rondinelli (cited in Fourie, 2009, p.p. 1115) argue that:

> *[G]lobalisation has not only shaped concepts of economic growth, but has also determined perceptions of governance by the manner in which it defines the roles and functions government takes on as an enabler, facilitator and regulator.*

Yet although Mkandawire argues against the narrow conceptualisation of good governance initially developed by the World Bank and later adopted by the donor community, this narrow view has led to development in Africa. The researcher finds this fixation with the idea of getting the macroeconomic fundamentals right first as a reasonable precursor for good governance instead of focusing on the "emotionally" driven fixation with state-society relations that prioritise issues of equity and inclusivity that cannot be sustainable in the long term. However, Mkandawire (2007, p. 681) disagrees:

> *[T]he actual use of the concept of good governance sidestepped the central concerns of the Africans and rendered the notion purely administrative.*

In addition, Mc Lennan criticises a position that seeks to define good governance as purely an administrative or financial process. Mc Lennan submits that real participation and representation of societal formations in the decision-making processes are of critical importance in the management and distribution of public resources for the bettering of governance. Further, Mc Lennan (2007, p. 7) argues:

> *This would require a focus on the often contested space where leaders, public officials, citizens, interest groups and institutions negotiate the legitimacy and value of decisions and processes.*

In essence, what Mkandawire and Mc Lennan are saying is that in order for good governance to prevail whether viewed from the state-society relations or the management and distribution of public resources it must, among others, be underpinned by issues of consultation, representation, equity and inclusivity. They continue and submit that by purely focusing on economic/financial and administrative considerations at the expense of political processes does not bode very well for good governance and development. Their argument finds resonance with the view of White, Heyman, Favis and Harsovan (2000, p. 11):

> *Increasingly, notions of good governance, democratisation and development have become linked.*

In light of this background one must not lose sight of the fact that the objectives of reforms in government procurement policy were to promote good governance and achieve the aims of the Reconstruction and Development Programme. National Treasury has since put more emphasis on the promotion of the five constitutional principles of public procurement and implied that the requirement of good governance has to be reduced to an administrative compliance matter. Perhaps this approach is not shared by others such as Fourie who maintains that governance cannot just be an administrative exercise outside of the influence of politics (2006, p. 437). However, on the other hand one may argue and state that this is why our Constitution has elevated the status of public procurement to insulate it from political interference. In this regard, Roos and De La Harpe argue that the principle of accountability in good governance in public procurement ensures that anyone who feels aggrieved by the outcome of a government tender award may challenge such a decision in a court of law which is an impartial and independent body (2008, p. 8). Section 217 of the Constitution, which requires a fair, equitable, transparent, competitive and cost-effective public procurement entrenches a culture of good governance in the management of state resources on behalf of the citizenry. Hence Knight et al. (2007, p. 140) submit that:

Strengthening a nation's procurement capacities has the potential to bring about significant benefit. Conversely, failure to do so can severely impact on a nation's welfare and prospects for growth.

There are practical examples that show how the administrative emphasis on good governance can produce the required results as part of the implementation of government procurement policy. Examples are the interventions by National Treasury in the Provinces of Limpopo, Free State, Gauteng and Eastern Cape in 2012 that were aimed at restoring good governance in the management of procurement processes in those affected provinces. In a report back session, Minister of Finance Pravin Gordhan highlighted to the nation that because of systematic failures in those provinces to manage public procurement in line with the five pillars of good governance, the national government had to intervene. The failure to intervene by national government would have led to poor governance and in some instances perpetuated the creeping culture of cronyism in the awarding of government tenders. In addition, the 2015 Public Sector Supply Chain Management Review also reveals that governance in public sector procurement has been compromised by acts of corruption and lack of administrative accountability by government officials (2015, p. 20).

2.4 Institutionalisation of Government Procurement Policy

The institutionalisation of the SCM Policy in government is the responsibility of National Treasury. Section 6(2)(a)–(d) of the PFMA stipulates the functions that must be carried out by National Treasury. National Treasury:

(a) Must prescribe uniform treasury norms and standards;

(b) Must prescribe standards of generally recognised accounting practice and uniform classification systems, in national departments;

(c) Must monitor and assess the implementation of this Act, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions; and

(d) May assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management.

Having regard to its role as mentioned above, the National Treasury within the context of public sector procurement, is required to drive an SCM policy that meets the following objectives (Bid Committee PFMA – Learner Guide, 2011):

- Give effect to the provisions of Section 217 of the Constitution, 1996;
- Give effect to the provisions of the PFMA;
- Transform the procurement and provisioning functions in government into an integrated SCM function;
- Introduce a systematic approach for the appointment of consultants;
- Create a common understanding and interpretation of government's preferential procurement policy objectives;
- Make a significant improvement to financial management in the broader public sector;
- Promote consistency in respect of supply chain policy and other related policy initiatives in government; and
- Align with global trends and transformation and ensure that South Africa adheres to international best practices. (p. 17).

In cascading the institutionalisation of the SCM policy into government departments, the National Treasury issued National Treasury Regulation 16A where it was stated that all accounting officers should ensure that they apply a supply chain management system that provides for (1) Demand Management, (2) Acquisition Management, (3) Logistics Management, (4) Disposal Management, (5) Risk Management and (6) Regular Assessment of Supply Chain Performance. These six elements of the SCM model have already been discussed in Chapter 1 of this research report.

The institutionalisation of the SCM Policy in government has not enjoyed a smooth transition. The first challenge was the application of an integrated SCM policy that requires end users to work closely with SCM practitioners in delivering on their respective departmental mandates. The new SCM policy broke down the silo mentality in the workplace environment. The second challenge relates to the supportive role

National Treasury rendered to government departments when with regard to the application of the preference point-scoring system. There were reported instances where government departments were awarding contracts to the exclusion of companies owned by white people and this accordingly was inconsistent with Section 217 of the Constitution. The aim of the equity requirement that is one of the five pillars of good governance in the government procurement field is meant to address this, as it never said that companies owned by white people must not be given government work. Instead, the purpose was to find a way to bring HDIs to a position of doing business on equal terms with the previously advantaged individuals. Unfortunately, the National Treasury came in too late to provide clarity on the matters of this nature.

The third challenge National Treasury experienced was during the exercise of realigning of the B-BBEE objectives with the PPPFA Regulations in 2012. The problem arose when the Department of Trade and Industry (DTI) that is the custodian of the B-BBEE Act tried to impose the requirements of the B-BBEE on all government procurement without firstly engaging National Treasury that is the custodian of government procurement policy. Eventually the two departments, DTI and National Treasury, came to an agreement about the accommodation of the B-BBEE objectives within the preferential procurement policy framework that is applicable in the public sector as well.

2.4.1 Historical Perspectives on Government Procurement Policy

Historically, the function of procuring goods and services in government was seen as a menial job of provisioning and stores. Later on government realised the strategic importance of procurement and began to introduce regulatory mechanisms to modernise the function of purchasing of goods and services. In this regard, Bolton argues that this means that the initial role of government procurement had to expand to a certain extent to even allow for the outsourcing of the provisioning of goods and services to private sector (2007, p. 3). At the institutional level, a central body called the State Tender Board before 1994 drove the implementation of government procurement policy. Part of the functions of the State Tender Board was to implement government procurement policies that were based on the agenda of the National Party government.

In the four provinces of the previous dispensation, there were Provincial Tender Boards who only possessed advisory powers when it came to state procurement policy (Brunette, 2014, p. 9).

During this period, there is little evidence that supports a view that the five pillars of good governance formed part of government procurement policy that promoted fairness, competitiveness, transparency, equity and cost effectiveness. The latter view has credence according to Brunette (2014, p. 11):

> *Strong high-level political control meant that the project of Afrikaner economic advance was, at least until the dying days of apartheid, kept on a tight leash, and within the confines of the Afrikaner nationalist project.*

Further, there is also sufficient evidence to argue that the government procurement function was subject to an executive oversight to ensure accountability for government procurement decision-making processes. The promulgation of the State Tender Board Act No. 86 of 1968 shows that during this era there were also problems relating to good governance in the implementation of a government procurement system. For instance, Section 4(2) of the Act states that "No exemption, condonation, settlement or amendment which may be to the prejudice of the state shall be granted, negotiated or made under paragraph *(f)* and *(g)* of sub-Section (1) ***without the prior approval of the Treasury"*** (my emphasis).

Further, Section 4(3) states that: "The board may, ***with the approval of the Minister*** *in* each case, and on such conditions, including conditions regarding compensation (if any) as the Minister may approve, exercise any power which the board may in terms of this Act exercise for and on behalf of the State, for and on behalf of any body established by or under any law,…" (my emphasis). In this respect, Du Toit, Knipe, Van der Waldt and Doyle (2002, pp. 220–221) state that there was a systemic approach applied by the State Tender Board in carrying out its procurement duties and among others, involving the issuing of: (1) State Tender Board General Conditions (ST 36), (2) State Tender Board User Manual, and (3) State Tender Board Circulars. These documents were also

used to update the state officials involved in the provisioning of goods and services about developments in government procurement policies. The main objective was to strictly regulate the terrain of decision making in the government procurement processes with little room for managerial discretion.

It is in light of these perspectives as discussed above that the researcher submits that historically the government procurement policy prior to 1994 was used to strategically favour a specific population group at the expense of promoting the principles of good governance. On the other hand, one must caution against generalisation to the extent of arguing that the non-existence of a government procurement policy that subscribes to the principles of good governance is therefore enough proof that the procurement policy was flawed. Evidence of accountability for procurement by the executive in the form of the minister of finance under the apartheid regime is available.

2.4.2. Reforms in Government Procurement Policy from 1994 to 2004

Following the democratic elections held in 1994, the new South African government used public procurement policy as a tool for socio-economic development. This was aimed at reversing the effects of the implementation of the previous government's procurement policies that excluded the majority of the population from meaningfully conducting business with the government of the day. In 1996, the SA government adopted a 10-Point Plan to affirm and embrace the principles of the Reconstruction and Development Programme (RDP) in public procurement, while ensuring that small businesses are the main beneficiaries of the reforms (Raga and Taylor, 2010, p. 9). It is submitted that the 10-Point Plan was an instrument used to satisfy the equity principle of good governance in public procurement as it promoted contracting out of government work to SMMEs and businesses owned by HDIs. Arendse supports the latter submission and further notes the use public procurement as a policy tool to reverse the imbalances of the past while introducing the five principles of good governance in public procurement in order to provide a framework of public rights and accountability (2010, p. 14).

Subsequently, the new government issued a Green Paper on Public Sector Procurement in South Africa, in which the two objectives of procurement reforms in the public sector were outlined as the achievement of socio-economic objectives and promotion of good governance (1997, p. 7). The Green Paper reinforced the principles of good governance by proposing that tender procedures should be simplified to encourage fairness and transparency. Further, the public advertisement of government requirements in the Tender bulletin and local newspapers was meant to ensure that the market accommodates SMMEs to participate in order to promote competition in the public procurement arena. Hence, Manchidi and Harmond (2002, p. 20) note that:

> *South Africa's public sector procurement reform has focused on small business in the construction industry to redress skewed patterns of business ownership arising from the previous political dispensation and to bring about reductions in levels of poverty by:*
>
> - *Providing access to markets for small businesses and increasing the market share of those businesses that are owned, managed or controlled by PDI's through preferential procurement; and*
> - *Addressing the impediments to effective and profitable participation of such business in government procurement through supply-side interventions, such as emerging contractor development programmes.*

Discussing the second objective of the reforms in the government procurement policies, the promotion of good governance, which is the main subject of this research report, Ambe (2012, p. 242) submits that:

> *Reforms in public procurement in South Africa were initiated to promote the principles of good governance.*

Following these developments, the National Treasury conducted extensive research during the late 1990s to early 2000s, producing a number of discussion papers and policy documents to guide uniformity during the roll-out of procurement reforms in government policy. The major document which was published by National Treasury and

was presented to Cabinet in October 2003 is entitled *Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government ("The Policy Strategy")* which succinctly defines the background to the procurement reforms post-1994. The Policy Strategy (2003, p. 2) states that:

> *Procurement reforms in government started in 1995 and were directed at two broad areas, namely, the promotion of principles of good governance and the introduction of a preference system to address certain socio-economic objectives.*

The policy strategy document among other things was meant to provide guidance on the interpretation of what constitutes a fair, equitable, transparent, competitive and cost-effective public procurement system. It is the researcher's submission that the latter move was the correct one as the promulgation of a number pieces of legislation and policies developed during this period relating to public procurement presented a potential for misinterpretation by government officials involved in procurement.

Another interesting point on good governance during the period of reforms that emanates from the discussions above is that the National Treasury's position on the promotion of good governance can be linked to the narrow administrative conceptualisation of governance advocated by the World Bank. In this case, the World Bank applies the concept of governance to its relationship with the state's management of its affairs or state resources and therefore this is how institutions like the World Bank and International Monetary Fund (IMF) influenced the reforms in SA government procurement policy. In fact, the National Treasury boldly gives credence to this argument, as they conducted a Joint Country Procurement Assessment Review in 2001/2002 with the World Bank (cited in the Policy Strategy, 2003, p. 3). In the summary of findings and recommendations of the Country Assessment Review Report the correlation between good procurement and good governance (2001/2002, p. 9) is highlighted. The report further proposes an overhaul of the legislative framework governing public procurement and the introduction of new institutions such as a National Compliance Office (2001/2002 p. 34).

In the Policy Strategy (2003, p. 25) the concept of good governance as it relates to public procurement system is presented as encompassing the following characteristics:

- “Preserve the highest standards of honesty, integrity, impartiality and objectivity;
- Be fair, efficient, firm and courteous;
- Achieve the highest professional standards in the awarding of contracts, so as to maximise value for money while adhering to international standards;
- Provide clear specifications of requirements which encourage innovation and refer, where appropriate, to relevant technical and other standards;
- Make available as much information as suppliers need to respond to the bidding process, and to define and publicise procurement contact points;
- Manage the bidding process so that genuine competition is preserved and discrimination is avoided;
- Make available the broad criteria intended for the evaluation of bids, to evaluate bids objectively, and to notify the outcome promptly;
- Within the bounds of commercial confidentiality, to debrief un/successful bidders of the outcome of the bidding process so as to facilitate better performance on future occasions;
- Achieve the highest professional standards in the management of contracts;
- Pay promptly for work done in accordance to standards as set by a legal and binding contract; and
- Respond promptly, courteously and efficiently to suggestions, enquiries and complaints”.

If one analyses these above-mentioned characteristics of good governance it is clear that ethics and conduct of the officials dealing with public procurement are subject to high standards. However, the case studies will reveal a different picture of behaviour that is is expected from officials, as in some cases service providers had business relations with officials who are decision makers during the awarding of contracts. This reflects badly on the impartiality of officials as the requirement of fairness for public

procurement imposes a duty upon all officials to act even-handedly when dealing with suppliers and service providers.

2.4.3 Roll-out of SCM Policy in Government post 2004

In this period, the National Treasury issued three key policy documents to strengthen the policy framework and assist with the roll-out of the SCM policy in the public sector. They are (1) General Procurement Guidelines, (2) Supply Chain Management: A Guide for Accounting Officers/Authorities, and (3) Framework for Supply Chain Management. Since the documents have been discussed in Chapter 1 of this research report, it is sufficient to note that their purpose was to reinforce the proper institutionalisation of good governance practice during the implementation of the revised government procurement policy. A new development during the roll-out of the reformed government procurement policy is noted by Brunette (2014, p. 17) where our attention is drawn to the fact that:

> *National Treasury established a new division, responsible for SCM policy for the development of norms and standards, for monitoring and enforcing compliance, and for contract management.*

The division's work was reciprocated in all nine treasuries in provincial governments, SCM Offices were established to roll out the SCM policy, and their role was to issue practice notes and circulars to guide the implementation of procurement policy during this period. In the 2010 financial year, the SCM Office in the Eastern Cape Province conducted Compliance Assessments in the Department of Agriculture and Department of Public Works to ensure that the findings of the Auditor General on non-compliance with the good governance principles of public procurement were addressed. The assessments revealed among other things the misuse of the emergency delegation that is a deviation from competitive procurement. In other instances, issues of conflict of interest were revealed as a non-compliance conduct on part of the officials directly involved with the awarding of procurement contracts. This indeed is an infringement of the fairness principle of good governance in public procurement. In the Western Cape, the Provincial Treasury issued Treasury Circular 36 of 2003 to brief procurement

officials about the impending overhaul of the old procurement practices in order to make way for the full blown implementation of SCM. Furthermore, the circular identified training interventions and the support available from the Provincial Treasury to officials who were still grappling with the interpretation of the revised public procurement system. It is clear that government invested a lot of effort in training procurement officials on the revised procurement system despite persisting reported incidents of non-compliance with the principles of good governance in public procurement.

At the departmental level, the SCM Units were located in the office of the Chief Financial Officer (NTR 16A4.1, p. 50). Brunette (2014, p. 17) concludes that:

> *The effect was to conceptualise procurement as a subset of financial management, and to render it largely a procedural, financial control function, disconnected from strategic decision making.*

Indeed, it is worth noting that this is a misconception, since the definition of procurement in this way tends to relegate the strategic importance of government procurement as a policy tool for socio-economic change and empowerment of vulnerable groups. Even Schapper, Veiga and Gilbert (2006, p. 2) agree and questions this trivialisation of the role of procurement in their analysis of procurement reforms in developing and developed countries and argue that:

> *Public procurement is inherently a political sensitive activity, not least because it involves significant amounts of public money even within the context of a national economy.*

Another feature of the post-2004 reforms had its focus on managerial accountability that played an important role in the implementation of SCM policy as well as in promoting good governance. In the area of public policy discourse, managerial accountability is more of a product of NPM ideology and will be discussed in the next subsection. At this stage, it is worth noting that the roll-out phase of SCM policy put much emphasis on the decentralisation of decision making for procurement in the public sector space. This was

consistent with the PFMA requirement for Accounting Officers/Authorities or HODs or institutions to be held accountable for procurement decision making which was promulgated in this phase of reforms in the government procurement regime.

The Public Finance Management Act deals with the roles and responsibilities of HODs, commonly referred to as Accounting Officers (AOs) in terms of managing the government procurement system. Section 38(1)(a)(iii) of the PFMA states that "The accounting officer for a department, trading entity or constitutional institution must ensure that that department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective". Basically, this Section imposes a duty on accounting officers to institutionalise a procurement system that allows for an equal treatment of suppliers to ensure fairness, advertising of tenders to allow for competition and opening of tenders in public to promote transparency.

Furthermore, the procurement system must allow for the application of a preference point system so that HDIs and SMMEs can benefit from public procurement and the appointment of service providers or suppliers must not only be based on price but take into consideration issues of quality. Section 38(1)(g) of the PFMA further requires that accounting officers "on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board". The relevant transgression relating to the procurement function is the irregular expenditure which is incurred as a result of officials not complying with the five principles of good governance in public procurement. For instance this irregular expenditure takes place when an official involved in procurement accepts a quotation from one supplier to render services without inviting other suppliers to quote as well during the normal cause of work. It also takes place when a supplier is appointed purely because of his or her DHI status. In these latter two example one can clearly observe that the procurement processes that were followed were neither competitive not equitable. Therefore, such conduct in public

procurement leads to an irregular expenditure which the accounting officer is expected to report. Now, to guide accounting officers in avoiding occurrences of irregular expenditure and to implement an envisaged procurement system that complies with the five pillars of good governance, the National Treasury in February 2004 issued the Supply Chain Management: A Guide for Accounting Officers/Authorities (AOS).

In the public procurement arena, the AOS is referred to as a Bible for SCM as it lays in detail the do's and don'ts of SCM in government. In its preface (2004, p. 2), it stipulates that: "This Guide sets out the philosophy behind the adoption of an integrated SCM function across government and will assist stakeholders to understand the responsibilities this implies". This document explains the impact of the changes for Accounting Officers/Authorities at each step of the SCM cycle. Other regulatory documents that have an impact on the accountability of HODs include the National Treasury Regulation 16A and National Treasury Practice Notes/Circulars that are issued by National Treasury at certain intervals depending on the new developments in the public procurement discourse. National Treasury Regulation 16A derives its authority from the PFMA and imposes another duty on the accounting officers to ensure that measures are put in place to curb the abuse of the procurement system. In summing up the responsibilities of the accounting officers in terms of promoting good governance in public procurement it is necessary to take note of the impact of decentralisation of procurement decision making from the former centralised role of National State Tender Board and Provincial Tender Boards. However, Chipkin, Tshimomola and Brunette argue in a newspaper article that this decentralised procurement is failing the state in its mandate to deliver quality services to the population (*Mail & Guardian*, August 1 to 7, 2014). This is because of the increasing number of reported cases of corruption besetting the public procurement system despite decentralisation which was meant to improve the turnaround times for decision making on matters related to the procurement of service to improve on delivery of services. Unfortunately, the politicians seem to benefit from this decentralised arrangement of decision making on public procurement as the accounting officers administratively report to Cabinet Ministers who are politicians. The Public Protector's reports and

newspaper articles are full of stories of alleged political interference in public procurement which borders on cronyism and favouritism at the expense of complying with fair and transparent requirements of public procurement. In Chapter 5 the case studies will show some of these reported cases of corruption and political interference in public procurement.

The aspect of training for officials involved in the implementation of SCM policy was another development that was a confidence booster for those closely linked to the new developments in the implementation of the new SCM system. A Framework for Supply Chain Management was gazetted in December 2003 and at paragraph 5 it categorically states that "The accounting officer or accounting authority of an institution to which these regulations apply must ensure that officials implementing the institution's supply chain management system are trained and deployed in accordance with the requirements of the Framework for Minimum Training and Deployment issued by the National Treasury". The aim of this National Treasury intervention is to ensure that officials at all levels who are implementing the SCM system do so in compliance with the five principles of good governance as espoused in government procurement policy.

2.4.4 Relevance of New Public Management Ideology in Public Procurement

In describing the NPM ideology, Ngoma (2007, p. 42) contends that:

> *The new state is about public choice and entrepreneurship. Entrepreneurship is synonymous with a whole process of re-organising, restructuring and re-engineering government. The consequences of this have included the development of a new technically-oriented, efficiency-driven vocabulary of downsizing, de-layering and de-bureaucratisation of the public sector organisations.*

It is important to highlight the fact that the NPM model is an international phenomenon within the discourse of public management. Hall and Holt (2008) alluded to the fact that

the origins of this new concept in the field of public management can be traced back to public sector reforms in the United Kingdom (UK) (p. 22). There are three major characteristics of the NPM model, namely, entrepreneurial spirit, re-inventing governance systems and transformation of the management behaviour (McCourt & Minogue, 2001, p. 6). The main objective of the NPM ideology is to transplant the private sector culture of doing business into the public sector psyche and in particular the government administrative processes. The model has been applied during the roll-out of government administrative reforms in various countries including those that are located in Europe, Latin America and Africa; its proponents in certain instances were the donor funding institutions like the IMF.

The UK experience where the concept originated was more about changing of management style of delivering public services to the people. As Hall and Holt (2008, p27) submit:

> *The spirit of this managerial reform is one of accountability in which public servants recognise and embrace responsibility for the direct delivery of service by being answerable to the clients and politicians, and open to competition from other potential providers.*

The researcher agrees with the above submission as it is noted that during the roll-out of reforms in SCM policy of the South Africa government post 2004, the emphasis on managerial accountability featured prominently and this was linked to the influence of NPM ideology. Also, the researcher submits that the interest generated by this NPM concept is linked to the need for a mindset shift in the way accountability for the delivery of public services has been exercised In the Latin American countries like Chile and Argentina where the World Bank was instrumental in influencing the application of the NPM ideology in public governance systems, it was used as a ‘carrot and stick’ approach as funding for some of the development projects in those countries had to follow certain methodology in managing state resources and affairs. This meant that these countries had to institute reforms in their governance systems; for example, they had to modernise the state, introduce fiscal discipline and downsize the public service.

Park and Vetterlein (2010, p. 211) cite the World Bank governance strategy which:

> *Identified three mechanism of the NPM policy norm to promote public sector efficacy and good governance:*
>
> - *Internal Rules and Restraints – for example, internal accounting and auditing systems, independence of the judiciary and the central bank, civil service and budgeting rules, and rules governing ombudsman and other internal watchdog bodies that often report to parliament;*
> - *'Voice' and partnership – for example, decentralisation to empower communities, service delivery surveys to solicit client feedback, and 'notice and commitment' regulatory rule-making, and*
> - *Competition – for example, competitive social service delivery, private participation in infrastructure, alternative dispute resolution mechanisms and privatisation of certain market-driven activities".*

Within the African context, in particular South Africa, the NPM norms found expression especially in the implementation period of reforms in government procurement policy. However, at this stage it is important to understand that the NPM is a contested ideology with some arguing that its neo-liberal attachment does not bode very well for the delivery of public goods and services. Indeed concerns have been raised around this ideology here at home as Goodsell (as cited in Cameron, 2009, p. 3) observes:

> *A major criticism of the application of the business model to governance is that it introduces privatised individual values in place of common community ideals.*

In addition, Cameron (2009, p. 4) notes:

> *If public servants are to be managerially accountable, this may detract from the political accountability of politicians.*

On the other hand, these latter views cannot go unchallenged within the South African context, which prides itself on having one of the best constitutions in the world. Hence,

the research study acknowledges that the independence of the civil service is protected under the Constitution.

Another writer opposed to NPM ideology in the African continent is Mkandawire (2007, p. 681), who evaluates good governance driven by the NPM ideology and argues that it relegates the concept of good governance to merely an administrative compliance exercise. In spite of Mkandawire's misgivings about this ideology, it can be argued that attributes associated with this ideology were manifest during the reforms in the government procurement policy. Previously they were introduced in the private sector procurement for cost-saving purposes. The question has always been that of the best way of containing costs while maximising outputs. This then necessarily leads to the second question, which companies often raise whenever efficiencies are brought to the fore. It merely asks what the core business of the company is and therefore how to ensure that resources are utilised in such a manner that profits are maximised.

Within the public sector arena with specific reference to government operations, the issue becomes one of how best to utilise state resources in order to effect change in the delivery of public goods and services. Mc Lennan and Ngoma (2004, p. 2) pose a critical question as to how government can achieve quality governance for sustainable development in these terms:

> *The current situation requires a re-thinking of governance and administration in a context of competing tensions and value systems but with the overall aims to achieve the outcomes of sustainability, equity and peace.*

Hence, the National Treasury has introduced a good governance model in the management of public procurement as well issues of equity and quality in terms of delivery of services to the public.

2.5 Methods of Procurement for Goods and Services in Government

2.5.1 Method 1: Invitation of Price Quotations

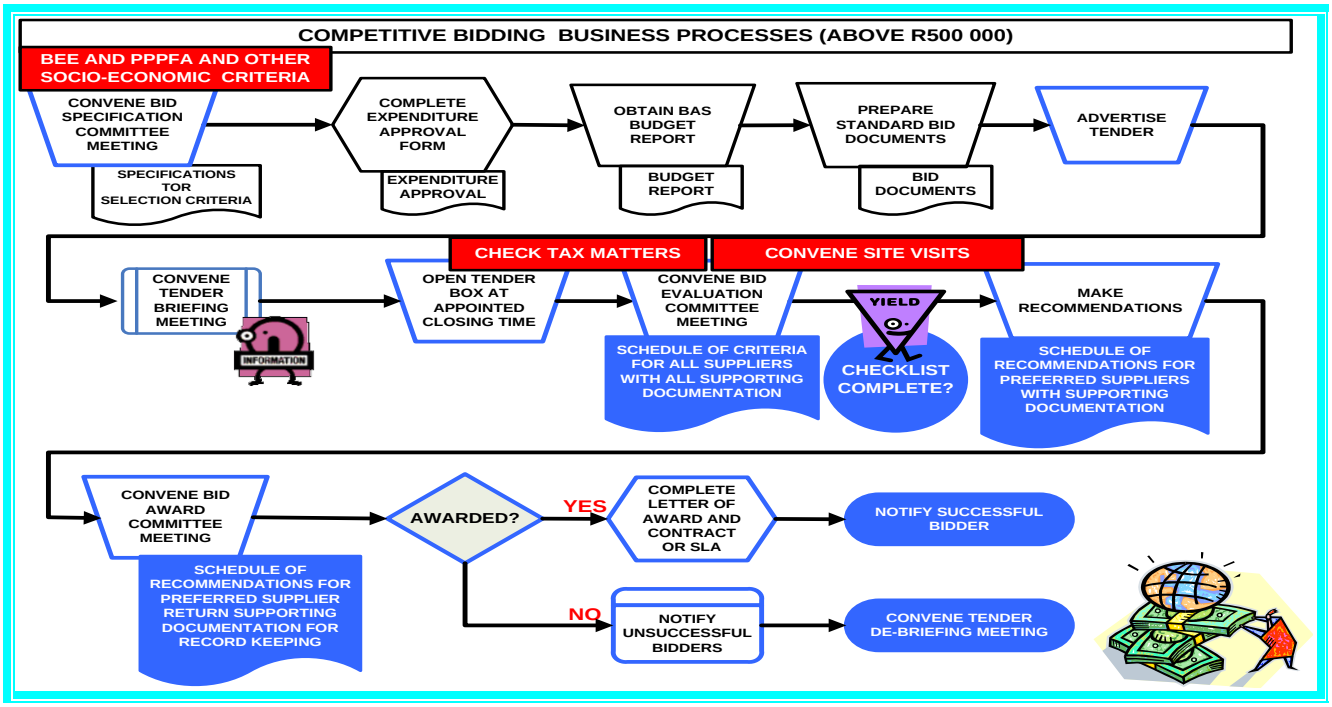
This informal method of procurement for goods and services in public sector procurement is mainly applicable to low-value transactions. National Treasury issued a National Treasury Practice Note 8 (2007, p. 2) which stipulates that "Accounting Officers/Authorities should invite and accept written price quotations for requirements up to an estimated value of R500 000 from as many suppliers as possible, that are registered on the list of prospective suppliers". Furthermore, the invitation of price quotations from the compiled list of prospective suppliers per commodity or service should be done on a rotational basis in such a manner that ongoing competition among suppliers is promoted (PFSA-Acquisition Management Learner Guide: 2009, p. 26). The basis for government to introduce this form of procurement is to ensure that service delivery is not hampered by the cumbersome requirements associated with formal competitive bidding processes.

The request for quotations still requires that a system to be applied must be fair, equitable, transparent, competitive and cost effective. However, the difference with this public procurement method is that the requirements around advertising times, completion of standard bidding documents and the appointment of the three bidding committees do not apply. The latter requirements are not strictly adhered to under the informal bidding method since they have a potential of stifling the participation of SMMEs in government procurement processes. The PPPFA Regulations, 2001 prescribe that the 80/20 point-scoring system must be applied for this form of procurement method. This therefore means that for example when a department invites quotations for rendering of catering services to 100 officials and three quotations are received having prices ranging between R30 000-R500 000, then when evaluating the responsive quotes the department must allocate 80 points for price and 20 points for B-BBEE status level of contributor. It makes economic sense that this method of procurement be the preferred one as it is the quickest way in which government can use procurement as a policy tool to radically pursue its socio-economic objectives.

2.5.2 Method 2: Open / Competitive Bidding

This formal method of public procurement is applicable to every invitation for bids for goods and services that are above the threshold value of R500 000. In terms of the relevant prescripts, Accounting Officers/Authorities should invite competitive bids for all procurement above R500 000 (National Treasury Practice Note 8 of 2007/2008, p. 2). In terms of the phases for procuring goods and services utilising this method, Figure 2 below is a schematic diagram that depicts the acquisition processes that must be followed:

Figure 2: Competitive bidding business processes



(Source: Eastern Cape Provincial Treasury, Procedure Manual for Acquisition Management, 2009)

In terms of the PPPFA Regulations, 2001 it is prescribed that 90/10 point-scoring system must be applied for this method of procurement. This therefore means that for example when a department issues a request for proposal for rendering of professional services, for example technical assistance in drafting a Gender Based Violence Response Policy Framework, and five responsive proposals are received with prices

quoted starting from R500 000, then the evaluation committee must allocate 90 points for price and 10 points for BBBEE status level of contributor. The regime governing this procurement method is a formal one and strictly requires proof that indeed the five pillars of public procurement were correctly applied. The method prescribes that specifications or terms of reference be developed before the invitation of bids in order to satisfy the principles of fairness. Thereafter, an advertisement must be published in the Government Tender Bulletin or placed in a local newspaper and the opening of responsive bids must be a public exercise as per the requirement of transparency. The request for bids must be done through an open market mechanism and this is meant to comply with the principle of competition. Also, National Treasury issued a Circular on the Implementation of Supply Chain Management in 2004 to prescribe a three tier committee approach for all competitive bidding and these committees are as follows: (1) Bid Specifications Committee, (2) Bid Evaluation Committee and (3) Bid Adjudication Committee. The committees function separately from each other to ensure checks and balances and fairness of the process. Their main functions are to recommend to each other with the Apex Committee being the Bid Adjudication Committee that can turn down the recommendations from the other two committees. The other stringent requirement is the publication of awards after the evaluation and adjudication processes. This is meant to allow for the disappointed service provider/s to challenge reasons for the award of a contract if a need arises. The mechanism is a true test for the application of the five pillars of public procurement while at the same time it promotes the proper handling of complaints from the public regarding the way government procurement is carried out.

2.5.3 Method 3: Closed/Limited Bidding

The closed bidding method is applied whereby procurement for goods and services is reserved for a certain category of suppliers or service providers and it is an exception to the rule. In terms of government procurement rules all acquisition of goods and services should follow an open and competitive process in line with Section 217 of the Constitution. However, the policy does allow for deviation from the rules in instances where it is impossible or impractical to source services or goods from an open market

as in the case of emergency or urgency (National Treasury Practice Note 6 of 2007/2008). Also, there are some goods or services that are available only from a limited number of suppliers or service providers, for example, provision of electricity or a specialised research programme. But this method of procurement must be used responsibly by officials as it impacts negatively on the five pillars of public procurement.

2.6 Conclusion

In summary, this chapter on literature review was divided into two broad areas for analysis, namely, the concept of good governance and institutionalisation of the SCM policy in government. Firstly, the analysis started by defining the five pillars of good governance which are (1) fairness, (2) equity, (3) transparency, (4) competition and (5) cost effectiveness.

During the analysis of the fairness requirement of public procurement it was found that challenges still exist, especially when it comes to the issue of disclosure of interest by government officials involved with procurement. This takes place despite a specialised training arranged for Bid Committee members by the National Treasury.

For the principle of equity in public procurement, the policy analysis found that the non-compliance with this requirement is mainly due to the wrong interpretation of the policies governing public procurement.

In the analysis of the transparency principle of good governance, the literature review discussed reforms in the implementation of government procurement policy in order to draw some lessons on how the reforms have improved the status of our government procurement system.

The principle of competition in public procurement is also challenged, as the policy analysis revealed that implementation of good demand management practices to assist

officials with identifying an intelligent sourcing strategy is still lacking. Perhaps cooperation with the private sector might assist in this regard.

In terms of compliance with a cost effective public procurement system, it was found that there is a lack of emphasis by National Treasury on ensuring that departments conduct compulsory site inspection visits to suppliers' or service providers' premises to verify their capabilities and capacities to deliver goods or services in line with the contractual arrangements.

Coming the theoretical framework of good governance, the analysis has shown that the National Treasury pursued a policy strategy during the reforms that is based on the World Bank's approach to good governance and for some this has been problematic because they view the administrative emphasis on governance as neglecting the developmental issues that define what constitutes governance. In this regard, it has been found that the concept of good governance can be understood as either an administrative function or a developmental issue. Furthermore, the research study has also revealed that there is sufficient evidence to support the argument that says that emphasis on good governance during the implementation of government procurement policy by National Treasury was an administrative compliance exercise that was aimed at producing a procurement system that is fair, equitable, transparent, competitive and cost effective.

In support of the National Treasury's approach to good governance, the researcher argues that one needs to look at efforts invested by government in transforming an administrative system of procurement to one that is people oriented. Obviously, the issues of democratising a procurement system are not desirable as there are strict requirements that must be met when dealing with the allocation of state financial resources.

In addition, the literature review has revealed that the issue of public participation initially was high on the agenda of the democratic government as evidenced by the

composition of the State Tender Board. However, there are concerns raised in the literature review that are associated with these reforms as they were raised in the research report of G Quinot to be discussed in Chapter 4. These were the fact that National Treasury proved to have poor systems of monitoring and evaluation of the implementation of government procurement policy as far as compliance with the principles of good governance was concerned.

The Eastern Cape Provincial Treasury Compliance Assessment reports of 2007/08 are one example of this manifestation of non-compliance with the five principles of Section 217 of the constitution. They found that for example in the Department of Agriculture there were challenges with the institutionalisation of SCM in terms of filling of SCM positions and that there were instances where one quotation was accepted without recording reasons for why one quotation instead of three quotations was considered as this infringes the fairness, transparency and competition requirement of good governance in public procurement. In the Department of Public Works in that province, it was found that there was a lack of training for officials involved with public procurement and lack of notification of the awards which negatively affects the promotion of transparency in the procurement system.

Another aspect of this research study is that the researcher in the analysis of the reforms in the period post-2004, which was when the roll-out of reforms in public procurement took place, found that these reforms were a reflection on the transformation agenda of the new government, which at that stage was gaining momentum, as the five pillars of good governance were being articulated in the policy and legislative body of the regime governing public procurement. Unfortunately, at this stage the researcher found that it is also at this stage of the reforms when the signs of disconnect between policy conceptualisation and policy implementation were beginning to show. The reports of the Auditor General attest to this problem of policy implementation of the revised procurement policy. Even the Western Cape Provincial Treasury decided to issue a communiqué to all officials involved with procurement with

a view to limiting the impact of misinterpretation of what constitutes the reformed policy on public procurement.

Linked to the initial finding on equity principle, the literature review has shown that the interpretation of what constitute an equitable procurement system by two key departments, namely, National Treasury and DTI created problems for policy implementation. Therefore, the researcher submits that although government procurement should be a policy tool that is used to redress the imbalances of the past; it is also incumbent upon National Treasury not to shift its emphasis on the implementation of the five pillars of good governance as required by the Constitution.

In terms of the discussions on the NPM ideology and its influence during the implementation of the government procurement policy, the research study found that there are arguments in favour of and against the NPM ideology. In this case, the research study submits that the NPM approach has played an influential role in the implementation of changes in the government procurement policy that has characterised the periods post-1994 and post-2000, and the approach was premised on ensuring managerial accountability. Furthermore, with reference to government procurement policy implementation as it relates to compliance with the five principles of good governance it has been argued that the NPM model has promoted professionalism in public sector procurement as officials doing such jobs used to be categorised as doing menial work. It is prudent to keep in mind that these officials are entrusted with handling allocation of financial resources throughout the process of inviting tenders for goods and services while at the same time they are entrusted with recommending successful contractors to deliver services on behalf of the state. Therefore, it would have been naïve of government not to subject these categories of public officials to some sort of professional accountability.

Lastly, it is argued that the achievements of the implementation of reforms in government procurement policy over the last 20 years driven by National Treasury have ensured that the government improves the SCM skills profile of the relevant officials and

instilled a sense of professionalism. While at the same time, it is argued that the implementation of reforms in the government procurement policy has not gone without major challenges. As a number of government departments tasked with the implementation of this policy have been attracting negative publicity when they were expected to fully apply the five principles of good governance during the implementation of the reformed government procurement policy.

CHAPTER 3: RESEARCH METHODOLOGY

3.1 Introduction

The research methodology and design of this research report follow the approach of collecting and analysing data from various source documents. These include primary sources and secondary sources of information that are relevant to the research study. The field of government procurement is a highly regulated one through legislative and policy prescripts. Therefore, there are a number of pieces of legislation and policies that were promulgated ranging from the periods of 1994 to 2014 that will be referred to as primary sources of information for purposes of this research. The secondary sources such as the procurement reports and case law reports will also be consulted as they form part of the research literature. In addition, academic writings and literature in public policy, good governance and government procurement policy in general will be relied upon.

In this chapter, the preferred method of research which is the qualitative research methodology will be applied. This will be done by adopting a qualitative research approach which will be based on selected national case studies dealing with the subject of public sector or government procurement. The use of a review approach will assist in the research outcomes which objectively are intended to establish lessons and challenges associated with the implementation of government procurement policy in the last 20 years. It is therefore possible to view the research design for this research report as an exploration and explanation of events that shaped the current status of government procurement policy.

The policy review adopts a research approach that describes and analyses the policy framework that guides the reforms within the government procurement regime. It is critical at this stage to again mention that the policy framework has two objectives, namely, the promotion of good governance and the economic empowerment of previously disadvantaged individuals. However, this policy implementation review on government procurement in the last 20 years is limited to an analysis of the application

of the first objective of the policy framework. In conducting this policy review the research study applied the steps that are followed when carrying out a systematic review of policy implementation in line with the National Evaluation Policy Framework.

3.2 Qualitative Research Approach

The research methodology will primarily adopt a qualitative approach which means that the research design will also be focusing at exploring alternatives. On the issue of qualitative research methodology, Neuman (2011, p. 149) argues that:

> *Qualitative researchers are more concerned about issues of the richness, texture, and feeling of raw data because their inductive approach emphasises developing insights and generalisations out of the data collected.*

Further, Strauss and Corbin (cited in Gerhardt 2004, p.8) submit that:

> *Qualitative research is any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification".*

The qualitative approach differs from the quantitative approach of research in terms of the latter being more concerned with numbers while the former puts more emphasis on quality. In this regard, Preshkin as cited in Leedy & Ormond (2009, p. 136-137) states the following:

> *Qualitative research studies typically serve one or more of the following purposes: (i) Description – they can reveal the nature of certain situations, settings, processes, relationships, systems, or people. (ii) Interpretation – they enable a researcher to (a) gain new insights about a particular phenomenon, (b) develop new concepts or theoretical perspectives about the phenomenon, and/or (c) discover the problems that exist within the phenomenon. (iii) Verification – they allow a researcher to test the validity of certain assumptions, claims, theories, or generalisations within real-world contexts. (iv) Evaluation – they*

provide a means through which a researcher can judge the effectiveness of policies, practices, or innovations".

It can be argued that the qualitative approach is the preferred research methodology to illustrate the linkage between good governance as a public policy concept and the five constitutional principles of government procurement policy. In applying the qualitative methodology to the research study, the researcher will reflect on the selected national and international case studies. The reliance on these case studies will help the researcher to better articulate the argument for a paradigm shift in the implementation of government procurement policy as spearheaded by National Treasury, where necessary.

The use of qualitative methodology in the form of the selected case studies has helped the researcher to have insight into what the research problem is about. It is about examining the relationship between policy development and policy implementation. It is about what causes the officials not to comply with the five principles of good governance in public procurement.

In addition it is about the effect at the policy implementation level as now the National Treasury continues to produce procurement initiatives and interventions that at times do not address the imperfections of the system. However, this is not to argue, as shown in the next chapter, that all National Treasury initiatives and interventions have not assisted with the promotion of good governance in government procurement. The selected case studies in this research study have all in one way or the other dealt with the five principles of good governance in public procurement.

A preliminary reading of the reports, cases and newspaper articles was conducted to get an understanding of the unfolding of events that have an impact on public procurement and how they relate to governance as a concept of public policy. A literature review on academic writing and articles was thereafter undertaken to assess if there was a knowledge gap that could be filled in light of the research study findings.

Further, during the preliminary stages of the research conceptualisation it was found that National Treasury has not yet undertaken a procurement policy review over the last past 20 years that solely focuses on the promotion of good governance in public procurement. Only in 2015 has the National Treasury conducted a policy review on public sector procurement that covers both the policy objectives of promoting socio-economic imperatives and good governance.

The researcher has opted for an analysis of the policy implementation, and to assess the varying degrees of successes and failures in the implementation of good governance principles by relying among other sources on the case law and the Public Protector's and Auditor General's reports, because of the quality and credibility of the source documents. The institutions publishing these judgments and reports are expected to apply high levels of objective standards when they arrive at their findings. For the research study to analyse and provide objective findings on how policy formulation and policy implementation has unfolded in relation to the promotion of good governance in public procurement, one has to pay attention to these published reports. All the case studies deal with the question of the interpretation and application of a government procurement policy that prescribes a contracting system that is fair, equitable, transparent, competitive and cost effective. The significance of the past 20 years relates to the fact that this policy analysis of government policy is not devoid of the influence of the 1994 developments, as already seen in the chapter dealing with literature review.

In addition, the National Evaluation Policy Framework (2011) does prescribe a government policy evaluation exercise that is based on an objective analysis of government projects, policies and programmes. Using the qualitative methodology in conducting a policy review allows for the production of credible and quality outcomes of the findings that may assist government in long-term planning. The systematic review of the procurement policy based on the analysis the application of the five pillars of good governance will provide an indication of the policy challenges and gaps that need

attention from the relevant government departments responsible for policy formulation, implementation and monitoring.

The initial roll out of reforms of public procurement policy mainly targeted the national and provincial spheres of government with local government being addressed post-2004. Hence, the selected case studies are drawn from the national and provincial sphere of government. The Auditor General's report and newspaper articles will be consulted during the discussions on the case studies to strengthen the research report analysis of data and build the researcher's argument around the successes and failures of the implementation of government procurement policy.

3.3 Case Studies

3.3.1 National Case Studies

The national case studies will in the main explore the findings of the Public Protector's reports and the report of the Auditor General of South Africa. They will be used to show how the implementation of the government procurement policy as envisaged by the National Treasury have to a large extent not been complied with in terms of the five principles of good governance as espoused in Section 217 of the Constitution. However, as it is expected of a research report to be objective in its approach, there will be instances where compliance with the principles of good governance will be highlighted in these case studies. A further collection and evaluation of data emerging from court judgments will be undertaken in the analysis of case studies as part of the review of the implementation of government procurement policy. All the selected case studies will be based on reported procurement incidents varying from national to provincial levels of government. In addition, the newspaper articles will draw on the experiences of national and provincial reported cases involving government procurement. However, the reported procurement cases from the local government sphere have been excluded from the research report because National Treasury issued a slightly different set of procurement prescripts for local government.

The policy review divides the five principles of good governance in public procurement and analyses each using the facts and findings of each of the selected case studies. Under each principle of good governance, the findings are analysed to show that there is a disconnect between what the officials are expected to implement in terms of procurement policy and what in actual fact the officials are doing in the implementation of the procurement policy. Newspaper articles were used as well to supplement the findings on the analysis of the selected case studies. Reference was also made to academic commentary in terms of their arguments on what constitute good governance in the context of public procurement.

It was found that the issue of high levels of non-compliance with the five principles of good governance are connected to the question of misinterpretation of what constitutes a fair, equitable, transparent, competitive and cost-effective procurement system. Although in one case the official concerned felt that her failure to declare her conflict of interest was not material, it was found in fact that this impacted negatively on the principle of fairness in the procurement processes. In another case, an appointment of a preferred service provider without following an open and competitive procurement process was declared as irregular conduct, as the principles of transparency and competition were defeated in the process.

The methods of procurement employed by government when sourcing goods or services are also discussed to show in terms of what the policy requires officials to do when they procure goods or services on behalf of the state. During the analysis of the selected case studies on the application of the five principles of public procurement, the researcher also puts across his arguments and submissions in order for the research study to capture his voice.

Since the five constitutional principles of government procurement policy are applied universally, with varying degrees of emphasis on the application of each principle, in this research report reference will be made to international literature that is based on the government policy framework of different countries, documenting the implementation of

government procurement policies from these different countries. The aim of this exercise is to test the universal practice of the principles of good governance in public procurement. Hence, in referring to the international literature on public procurement the researcher will reflect on the interpretation and application of the five principles of good governance in public procurement.

In Chapter 5 of this research study there will be a brief reference to public procurement literature of the United States of America, Singapore and New South Wales. This foreign literature on public procurement will be used in order to generate lessons in their implementation of government procurement policies as a way of promoting good governance. Finally, the research report will show that the procurement policy implementation standards seen in other developed and developing countries are a reflection of the imposition of the IMF and World Bank's notion of good governance.

3.4 Conclusion

In conclusion, the research methodology applied in this policy review provides for a balanced view on the implementation of public procurement policy in the last 20 years in so far as good governance is concerned. It is argued that the use of select case studies served as an objective evaluation method intended to examine whether the government policy objectives have been achieved and whether the policy implementation resonates with what is expected of the policy. This research chapter has made mention of the role of the National Evaluation Policy Framework in this policy review exercise and the framework requirement for government departments to undertake policy review that must be carried out during a five year period. It is important to note that this policy review research approach has demonstrated through the use of the selected case studies and academic literature the causes and effects that characterise the high levels of non-compliance with the policy imperative of promoting good governance in public procurement.

The research methodology analyses the facts and findings of the selected case studies using each case study to demonstrate a failure to comply with the principles of good

governance. The case studies also show what kind of conduct needs to be displayed by officials involved in public procurement to be declared as complying with the five principles of good governance. Indeed this is to show the objectivity in the methodology of arriving at research findings that are addressing the research question.

Lastly, during the collection and analysis of data the focus was more on qualitative outcomes than on quantitative results of the causes of these challenges in the implementation of the policy. The review was more outcomes based in terms of proposing and finding solutions to the problems that continue to beset the full implementation of a procurement policy that is consistent with the requirements of Section 217 of the Constitution. It found that all case studies differ in terms of their non-compliance with the five principles of good governance as in some instances it has been found only one principle of good governance was not applied and others more than one principle was not applied.

CHAPTER 4: GOVERNMENT PROCUREMENT INITIATIVES

4.1 Introduction

The National Treasury as an institution tasked the programmatic implementation of government procurement policy has in the past instituted a review of the state procurement system to ensure value for money (National Treasury Procurement Review Progress Report, 2012). In the review progress report among the initiatives proposed for implementation are the following:

- Preferential Procurement Regulations that were aligned with the aims of the B-BBEE Act and its Codes of Good Practice;
- Guide on the regulations and the revised Standard Bidding Documents issued to assist the Accounting Officers/Authorities;
- SCM Regulatory Framework, which forms part of the Treasury Regulations is in the process of being reviewed; and
- The state institutions are now compelled to:
    - Submit annual procurement plans and monitor performance against plans;
    - Verify names of directors against staff structure to ensure that there are no conflicts of interest;
    - Publish all bids awarded; and
    - Pay suppliers within 30 days.

In this chapter, some of the identified National Treasury initiatives set out to improve the implementation of the government procurement policy will be discussed. They will cover the period of the past period of 20 years since the formation of the democratic state which was characterised by interventions intended to promote and emphasise the promotion of good governance by National Treasury.

4.2 Overview of the Policy Speeches of Ministers of Finance from 1994

The overview will provide a summary of policy developments in government procurement and will be split into two periods, from 1994 to 2004 and post 2004. The period from 1994 to 2004 saw the emphasis in the budget spending on promoting small, medium-sized and micro enterprises (SMMEs) in line with the 10 Point Plan. Attention was also paid to managing government procurement to achieve value for money. Also, in this period the budget speeches were beginning to share government's views on the overhaul of financial management systems which included the public procurement system. The key focus was on the promotion of good governance in public procurement and as a result the government introduced the Public Finance Management Act which had a core message of managerial accountability. Furthermore, the concept of good governance meant for the government that it had to produce quality managers, professional accountability and training of officials.

Building on the public procurement reforms, the post-2004 era was characterised by the modernisation of public services in general. This meant that the procurement function of government which is one leg of SCM had to adapt to international best practices. The areas affected in government procurement were planning for goods and/or services and contract management which had to incorporate private sector ways of doing things. Hence government embraced the concept of public-private partnerships which had a tendency to influence change in the way government does its procurement business. The subsequent government procurement initiatives had much to do with monitoring and evaluation by National Treasury on procurement planning and spending by state institutions. National Treasury made it mandatory that state institutions must submit procurement plans for procurement needs above R500 000 which was a threshold for tendering. As part of procurement value management initiatives, the National Treasury committed to introduce a system of price benchmarking to curb the overpricing and collusive practices that were rampant in the government procurement system. Lastly, to ensure that compliance to general norms and standards of good governance in public

procurement, the National Treasury established the Office of the Chief Procurement Officer late in 2014.

4.3 Procurement Value Management Initiatives

4.3.1 Price Benchmarking

After 2004 the minister of finance, Pravin Gordhan, hinted at government's attitude towards the implementation of tough measures against procurement practices that were not line with the five principles of good governance. in the budget speech of 2010 (2010, pp. 21–22):

> *"Through a combination of corrupt practices, inefficient procurement, poor planning and, in some instances, collusion by [the] private sector, we are not getting the kind of value from our purchases that our people deserve … Greater transparency and accountability in procurement systems will therefore be a key focus of reform in the period ahead".*

Subsequently, Gordhan in his budget speech of 2012 (2012, pp 26-27) stated that:

> *"There are further steps National Treasury will soon take to improve our procurement capability:*
>
> - *We will strengthen fragmentation in the system and strengthen the national procurement architecture.*
> - *National Treasury plans to develop a national price referencing system to detect deviations from acceptable prices.*

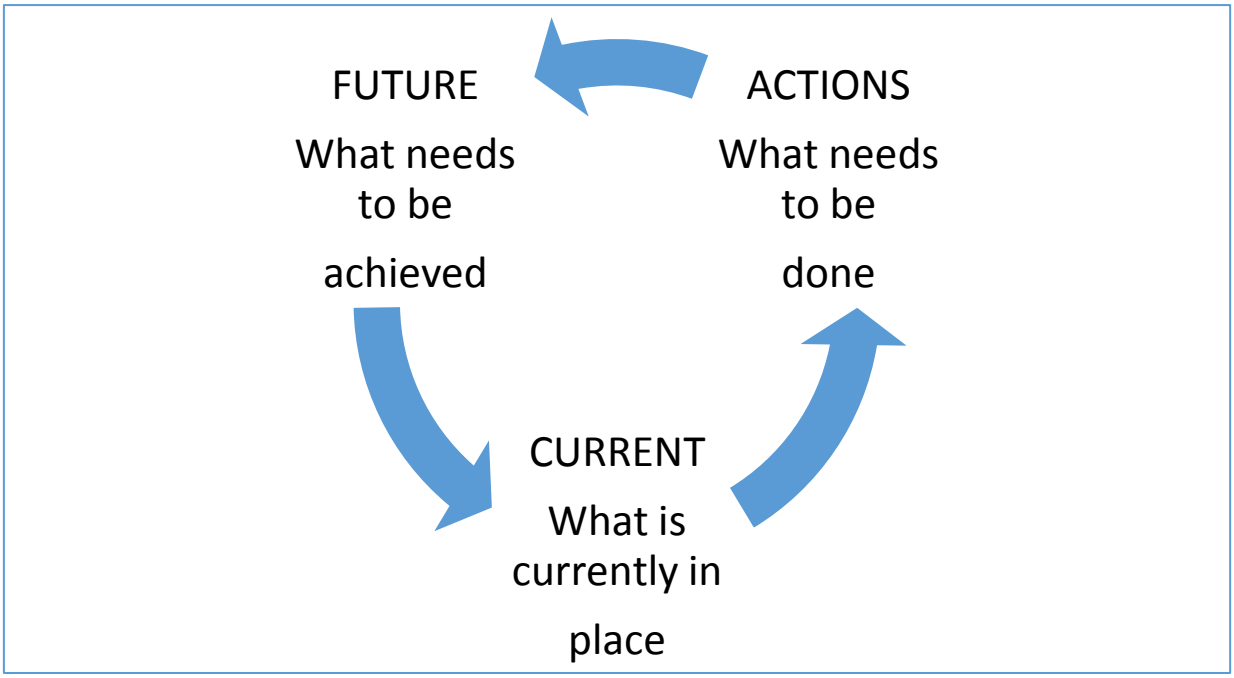
From these selected quotations from the minister of finance's budget speeches, i will argue and that this was an acknowledgement from National Treasury that its emphasis on good governance in the implementation of government procurement policy was experiencing a number of setbacks. The fact that there was a decision taken to introduce a price referencing system or price index within the realm of the government

procurement system was an indication that government was struggling to get value for money in public tenders that were awarded to the private sector.

The price referencing concept that National Treasury is undertaking to develop is based on the price index model that was developed by the Eastern Cape Provincial Treasury that was aimed at providing guidance on the reasonableness of prices for goods and/or services that government wishes to procure. The price index was one of the projects identified in the procurement value management initiative. It was realised that inadequate demand management practices within departments resulted in officials not being able to appropriately consider the reasonableness of prices before awarding procurement contracts based on the quotations or bids obtained. Because of this, certain service providers are charging government departments exorbitant prices, which are paid by departments without further scrutiny. Hence, the price index was introduced to curb the exorbitant prices and provided guidelines to officials as to prices that may be regarded as reasonable (ECSCM Circular 24 of 2010/11: Procurement Value Management Intervention – Price Benchmarking for Goods and Services, 2010, pp. 1–2).

Figure 3 depicts a flow chart for policy development that was followed by the Eastern Cape Provincial Treasury in developing a plan for the implementation of the Price Index.

Figure 3: Cycle of policy development



4.3.2 Office of the Chief Procurement Officer

The announcement about the establishment of the Office of the Chief Procurement Officer (CPO) was made in the budget speech of 2013 by the then minister of finance, Pravin Gordhan. The aim of the office of the CPO was to ensure that the implementation of the government procurement policy complies with the universal standards of good governance (2013, p. 29). As part of the initiation processes for the work of the office of CPO, National Treasury commissioned a research study that in March 2014 produced a report entitled "Research report on the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Office", authored by G Quinot.

The report was frank in its analysis of the current public procurement, to the extent of saying that it was facing crisis. In the executive summary of the report, Quinot (2014) states that:

During the first few months of 2014 alone:

- *the President announced in his State of the Nation Address potentially far-reaching changes to government's approach to in the form of increased central adjudication of tenders in an attempt to curb corruption in procurement;*
- *the minister of finance noted "steps to professionalise the public service and overhaul procurement and supply chain management" in his 2014 budget speech;*
- *the Public Protector found that "organs of state involved in the Nkandla Project failed dismally to follow Supply Chain Management prescripts" and recommended that the President "reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused" in her Report No 25 of 2013/14; and*
- *the Auditor General highlighted supply chain management as a key risk area requiring attention at national departments in his submissions to parliament's standing committee on public accounts.*

One of the report's recommendations is the institutional autonomy of the office of the CPO, so that it plays the role of the regulator that reports directly to parliament. This is informed by international benchmarking, wherein some of the developed and developing countries have established offices of the procurement ombudsman. The advantages of the autonomous CPO are that it can conduct its own investigations without having to rely on police services before it makes its own recommendations. Like the constitutional Chapter 9 institutions supporting democracy, the CPO will be able to hold executive members of government to account without concerns of cutting of funding if its decisions are not favourable to them.

The disadvantages of the regulatory approach to the formation of the CPO are largely based on the reporting and accountability considerations. Also, the fact that implementation of government procurement policy is the preserve of the National Treasury and by introducing an autonomous body to regulate public procurement this

might create unnecessary tensions between the two institutions. In the end, the National Treasury in late 2014 has decided to locate the office of the CPO within the structures of National Treasury and designated its role as more monitoring compliance with public procurement prescripts by the government departments.

4.4 Operationalising Good Governance in Government Procurement

4.4.1 An Introduction to Procurement Plans

The rationale for introducing procurement plans in government procurement systems by National Treasury was to provide a tool that defines the activities, processes and procedures to be utilised for procuring goods, services and capital assets by departments. This tool helps departments to plan for all their upcoming procurement needs and requirements in the forthcoming financial year. However, the procurement plans have proven not to be fully effective as envisaged, leading to procurement that is not planned and not done in a way that complies with the five principles of good governance. In 2011, National Treasury was prompted to issue an Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management, wherein it was prescribed that all departments must complete procurement plans for procurement requirements above R500 000, which is public tender threshold, and the due date for submission of procurement plans was stipulated as 30 April of each year

In the private sector environment planning for procurement is directed at optimal usage of resources in order to attain value for money (Hugo, Badenhorst-Weiss & van Biljon, 2004, p. 16). The advantage of deploying resources optimally during the demand management phase of SCM bodes very well for the ultimate goal of profit making. This is different for the public sector as compliance with rules and regulations is the test for an effective procurement system. However, the latter public sector approach is not supported by the Report on Modernisation Programme: Supply Chain Management of Provincial Government of the Western Cape (2009, p. 16) which argues that “having a

comprehensive procurement strategy is a key consideration to enable a department to deliver on its key objectives and deliver their functions".

4.4.2 Anti-Competitive Practices in Government Procurement

The anti-competitive practices in the government procurement system serve to defeat the principle of competition enshrined in Section 217 of the Constitution. One of the disadvantages of these practices is that they limit the ability of the government procurement system to obtain economic value when competitive bids are invited. Section 4 of the Competition Act No.89 of 1998 defines and regulates the conduct of service providers that may be deemed to constitute anti-competitive practices. Accordingly, Bolton describes them as common strategies to defeat competition and they include: (1) custom-made contracts, (2) level tendering arrangements, (3) collusive tendering and (4) consideration of unsolicited tenders (Bolton 2006, pp. 137–138).

In order to deal with this the government intervened at the policy and legislative level to try to curb these anti-competitive practices. For example, the Prevention and Combating of Corrupt Activities Act No.12 of 2004 was promulgated into law to give crime prevention agencies powers to implement strategies that will prevent and combat corrupt activities that include those acts constituting anti-competitive practices in government procurement processes. Below are some examples of anti-competitive practices in the government procurement sphere:

- Where some of the potential suppliers agree not to submit bids, or to submit cover bids that are intended not to be successful, on condition that parts of the successful bidder's contract will be subcontracted to them.
- Where some of the bidders propose an amount knowing that it is too high or contains conditions they know to be unacceptable so that another bidder can be awarded the contract.
- Where the same suppliers submit bids for various projects and each supplier seems to take turns being successful.

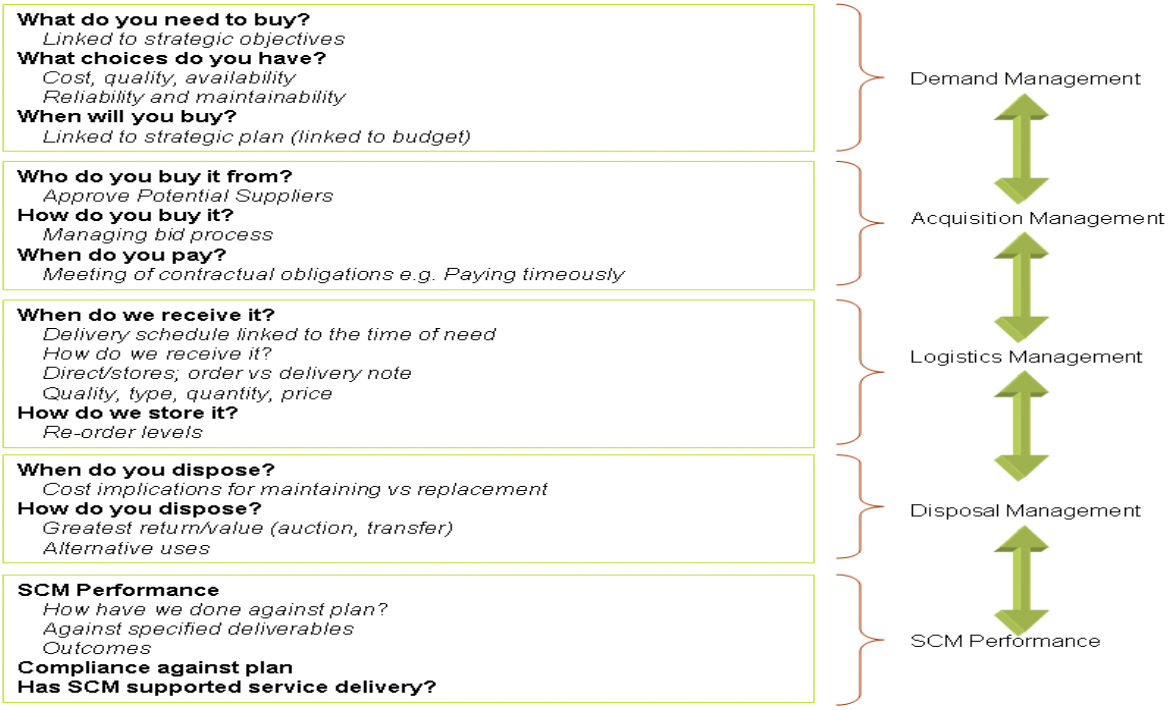
In the meanwhile, the National Treasury has played a collaborative role in this regard as it has also made sure that it works closely with other state institutions such as the Competition Commission and Crime Prevention and Justice Cluster departments to fight occurrence of these practices in government (National Treasury Practice Note, 2010, pp. 1–3). Furthermore, it has instructed all departments to restrict companies found to have committed anti-competitive acts from doing business with government in the future and they must as well be listed as restricted suppliers (National Treasury Database: List of Restricted Suppliers, 2006, pp. 1–2).

All of these measures do indeed provide evidence of dedicated efforts by the National Treasury to promote an ethos of good governance in the implementation of government procurement policy. Despite these noticeable efforts, challenges persist. Firstly, not all departments visit the National Treasury database of restricted suppliers before awarding contracts. It is even worse in government institutions located in rural areas that do not have access to electricity and internet. Secondly, officials are still running businesses that conduct work for government without the required approval or declaring their business interests at the evaluation stages. Lastly, there is still a lack of training in ethics and principles of good governance in the public procurement system.

4.4.3 Project Management Approach to Government Procurement

The SCM framework that was highlighted in Chapter 1 of this research study shows how the elements of SCM link up together in a form of a chain or cycle. This project management approach to government procurement takes into consideration five elements of SCM as they play an influential role government implementation of procurement policy. Figure 4 below is a diagram showing the project management approach to government procurement that is inked to the SCM system:

Figure 4: Project management approach to government procurement to SCM system



(Source: PFSA (University of Fort Hare) Demand Management Learner Guide, 2008)

This project management approach to procurement has been adopted by National Treasury based on international best practices and shows the credibility of our procurement processes, despite challenges associated with its implementation.

4.5 Application of MPAT to Government Procurement

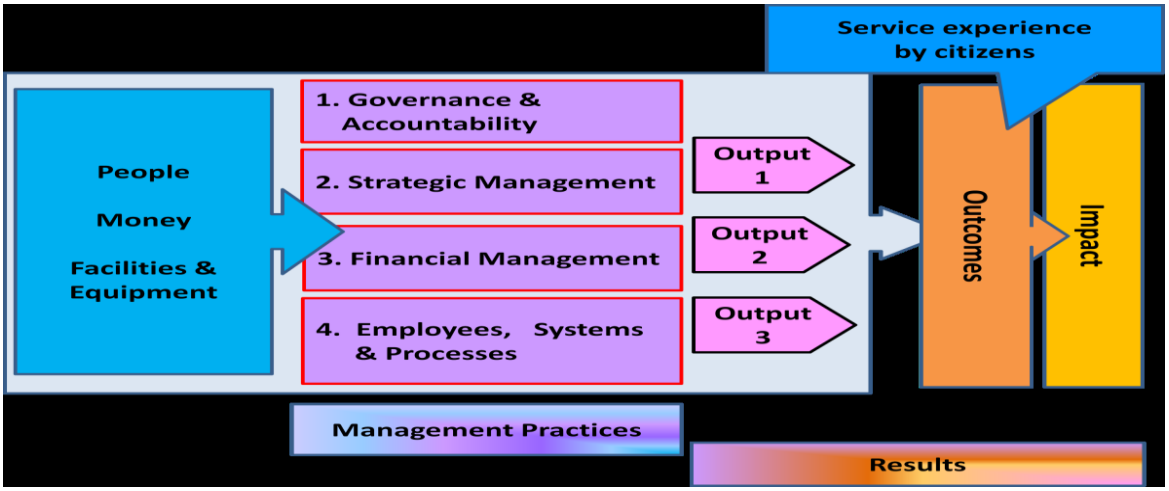
The MPAT introduced by the Presidency in 2011 is one of the policy interventions that is aimed at promoting good governance in the continued implementation of government procurement policy. The Performance Assessment Tool (PAT) Framework document (2011, p. 7) states that "The objectives of the MPAT are to:

- Collate benchmarks for management performance;
- Establish the baseline performance of departments and municipalities;
- Provide managers with useful information to inform improvements;
- Catalyse improvements in management;

- For the worst performers, develop an agreed improvement plan and provide support where necessary; and
- Track improvements against the baseline performance.

Figure 5 below is a diagrammatic depiction of how the MPAT process is applied within the realm of government institutional arrangements:

Figure 5: MPAT process in government



(Source: Performance Assessment Tool (PAT) Framework document, 2011)

With respect to the government procurement system it is important to note that the tool looks at the performance of SCM holistically within the umbrella of financial management in government and measures the performance in the implementation of government procurement policy within the SCM framework. This policy innovation is in line with acceptable international best practices. In terms of areas which are actually measured as standards of performance in SCM which include the implementation of government procurement policy, the following are the key performance areas:

- Demand management
- Acquisition Management
- Logistics Management
- Disposal Management

These key performance areas are important in measuring the management of state resources in a manner that promotes good governance. Among the issues that are evaluated are the availability of procurement plans, appointment of bid committees, bi-annual updating of the suppliers database, how stock is managed and whether a disposal system is place. National Treasury has endorsed this tool of performance measurement as it assists in measuring the performance of departments in implementing a procurement system that is fair, equitable, transparent, competitive and cost effective.

4.6 Conclusion

In conclusion, despite the policy speeches of the Ministers of Finance and good intentions of the National Treasury by developing various strategies to curb instances of non-compliance with the five principles of good governance in public procurement as discussed in this chapter, the policy review still shows that there are still weaknesses in the policy implementation. These challenges will each be discussed below as far as they are non-compliant with the five principles of good governance.

4.6.1 Promotion of SMMEs

The equity requirement in good governance among others relates to the promotion of SMMEs as most of the HDIs who do business with government form part of this sector. In terms of the Budget Policy speeches of Ministers of Finance, the 10-Point Plan previously discussed in Chapter 1 was meant to address the challenges of access to government businesses by the SMMEs. However, the policy review has identified a pertinent challenge to SMMEs beside the issue of access to government business opportunities, and that is the late payment of SMMEs by government departments. The latter is one of the reasons that SMMEs exit early in private business and this is an antithesis to the implementation of an equitable public procurement system. Even National Treasury's effort by issuing an Instruction Note: Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain

Management (2011, p. 8) reminding officials about Treasury Regulation 8.2.3 that requires businesses to be paid within 30 days, it seems if this not yielding the intended policy result. The researcher argues that the issue is not with the policy but lack of consequences for officials who are failing to do their work.

4.6.2 Poor Planning

In order to have a procurement system that complies with the competitive and cost effectiveness requirement of good governance there needs to be proper planning for procurement. The aspect of overpricing and lack of value for money in government are a result of the market having not been tested and a sourcing strategy not having been developed by officials involved in procurement. The National Treasury is in the process of developing a price referencing system, which is already in use in the Eastern Cape Provincial Government. The researcher submits that this is evidence of lack of uniformity in the implementation of a competitive and cost effective public procurement system. In one of the case studies discussed in Chapter 5 that involved the awarding of a building lease contract to house IEC officials which was very expensive in terms of the market standards, it was discovered by the Public Protector that the Accounting Officer of the IEC failed to follow proper demand management because of poor planning for the procurement of the said services. This is a clear case of non-compliance with competitive and cost effective public procurement despite an SCM framework that is in place.

4.6.3 Collusive Practices

These collusive practices are aimed at abusing the Supply Chain Management system and in particular defeating the element of fairness and competition in public procurement. In some instances, procurement officials develop specifications that favour one supplier over others with the intention of awarding a contract to that favoured supplier who in turn pays a certain commission to the official. In other cases, the officials prefer to conduct business with a particular service provider because of

previous work done by the service provider. This is tantamount to colluding between the service provider and the official to defeat the principle of competition in public procurement. It is argued in this research report that although National Treasury has joined forces with the Competition Commission and other law enforcement agencies, cases of collusive bidding continue to take place. Perhaps the National Treasury should consider the option of expelling a government official from working for any government institution once found to have been involved collusive practices.

4.6.4 MPAT processes

This is an overarching evaluation tool of government to assess performance of government programmes and policies in achieving the goals set by government. Implementing a public procurement system that, in practice, promotes the principles of good governance is one of the goals of government. This MPAT tool in the researcher's view is commendable but lacks buy-in from low-level officials dealing with procurement issues on a daily basis. At the departmental level it is mostly senior managers who deal with tools for assessing performance of government programmes and policies. Already the National Treasury has in place a reporting mechanism on the performance of SCM from departments who in the main must report if they have institutionalised SCM in their respective departments. Therefore, the researcher argues that this is a duplication of efforts and policy interventions and might lead to policy implementation fatigue for officials who dealing with procurement on a daily basis.

4.6.5 Other Challenges

Below is a summary of further arguments put forward to highlight challenges of policy implementation relating to public procurement that are identified in this chapter:

- That it is not enough for the National Treasury to spend amounts of time on conceptualising the Price Referencing system as alluded to by the minister of finance; instead they must begin to take implementation lessons from the Eastern Cape Provincial Treasury who have already implemented a price index;

- That National Treasury must also equip officials on the best use of procurement strategies instead of completing the standard template of procurement plans in order to eliminate wastages in the public procurement value chain;
- In order to reduce cases of conflict of interest in public procurement National Treasury should continue to implement the government's decision of prohibiting state officials including Cabinet Ministers and Members of Parliament from doing business with the state. Furthermore, it is argued that good governance in public procurement can be improved if it is made compulsory for all officials in government responsible for procurement decision making to be trained in ethics and code of conduct; and
- To prevent delays in service delivery, National Treasury should accommodate the unique challenges in rural areas that might make it difficult for officials from those areas to check the database of restricted suppliers before awarding government contracts.

CHAPTER 5: REVIEW OF THE APPLICATION OF GOVERNMENT PROCUREMENT POLICY

5.1 Introduction

Government procurement policy prescribes that officials, when acquiring goods and services on behalf of the state, must follow a specific procedure. Indeed, there is a constitutional weight attached to this procedure of acquiring goods and services on behalf of the state and it is dealt with under Section 217 of the Constitution. In terms of the applicable norms and standards, government must acquire goods and/or services by means of an invitation of quotations, an open/competitive bidding process or a closed/limited bidding process. In case of a competitive bidding authorities must invite quotations (i.e. informal bidding process) or advertise a request for proposals (i.e. formal bidding process) from potential suppliers depending on the approved procurement thresholds as determined by National Treasury. Alternatively and in exceptional circumstances a government institution can utilise a closed/limited bidding process whereby a limited number of potential suppliers are requested to submit bids for consideration. However, in all of these forms of procurement processes due observation of Section 217 of the Constitution is non-negotiable. It is expected that all HODs or accounting officers within state departments will implement a procurement system that complies with the five constitutional principles of public procurement. Failure to comply with this requirement attracts heavy sanctions and will constitute a charge of financial misconduct.

The emphasis on good governance in public sector procurement is not unique to the South African situation. In fact when some states were modernising their procurement system they required that fairness, transparency and competition be among the issues that characterised their revamped government procurement systems. This is so with the Singaporean public procurement practices that apply the principle of fairness with the intention of leveling the playing fields for prospective suppliers (Jones, 2002, p. 31). In addition, Jones (2002, p. 31) states that:

The second principle is to ensure that the public is given value for money so that goods and services purchased represent the most effective and efficient use of public revenue.

Another public procurement requirement in Singapore is that all officials involved in the procurement processes must declare their conflict of interest in order to avoid cases of cheating and nepotism (Jones, 2002, p. 35).

5.2 Reviewing the Five Principles of Government Procurement Policy

Section 217 of the Constitution requires that a procurement policy of government must be fair, equitable, transparent, competitive and cost effective. These latter five principles of good governance must be adhered to in the implementation of government procurement policy. Each of these five principles will now be used to analyse collected data that are reports from Public Protector and Auditor General as case studies and case law, academic literature and newspaper articles will support them.

5.3.1 A Fair Procurement System

The first report of the Public Protector to be analysed is the one dated 14 July 2011 and entitled “Against the Rules too: An investigation into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works and the South African Police Service (SAPS) relating to the leasing of SAPS office accommodation in Durban”. It dealt with the procurement of lease office accommodation for both the SAPS Head Office and KZN Provincial Head Office. The two SAPS buildings are the Middestad building located in Pretoria for National Head Office and the Transnet building located in Durban for KZN Provincial Head Office. Roux Property Fund owns both. The cause of disagreement in this investigative report is that the SAPS negotiated a lease contract with Roux Property Fund, which in fact was a deviation from the normal competitive bidding process without furnishing valid reasons for doing so. It is common cause that the Department of Public Works (DPW) is the custodian of all state properties and has leased accommodation on behalf of the state. This therefore

means it is the responsible department for procuring office accommodation for all state institutions. DPW does this by applying the SCM policy.

This report of the Public Protector report (2011, p. 22) found that:

> *Due to the fact that the that the procurement was not cost effective it resulted in a significant potential monetary loss to the state and prejudice to the South African tax payers;*
>
> *Loss of public confidence in the SAPS, DPW and organs of state in general in open and transparent procurement of goods and services; and*
>
> *The perception of potential service providers that they cannot expect fair and equal treatment from organs of state.*

The finding of the Public Protector does note that fairness what compromised in this case because of a negotiated arrangement with the preferred service provider. In applying the re4quirement of fairness it is clear the process was not treating service providers equally as the appointment process was not advertised and open to other potential service providers to bid for the lease.

The second report of the Public Protector to be examined is dated 1 June 2012 and entitled “Yes, We Made Mistakes! An investigation into the alleged improper procurement of communication services by the Department of the Premier of the Western Cape Provincial Government”. The report is concerned with the alleged deficiencies in the procurement of a communications service provider tasked with branding the Provincial Government of the Western Cape.

Two important issues relating to good governance in public procurement policy were examined, the one dealing with poor procurement planning and while the other one relating to the participation of special advisers of the premier in the evaluation phases of

bids. After concerns were raised with this particular procurement process followed by the Premier's Office, the Provincial Treasury of the Western Cape commissioned its own investigation and compiled a report. The Provincial Review Report outcomes were embraced in the Public Protector's report which found that the awarding of the tender revealed lack of control measures and proper application of good governance principles. In terms of the analysis of compliance with the fairness requirement of good governance in public procurement the researcher finds that there is a potential conflict of interest with the participation of the special adviser in this public procurement as the adviser is a political appointee.

The third report of the Public Protector is dated 26 November 2012 and entitled "Procurement Questions: An investigation into the allegations of maladministration and improper conduct by the Department of Mineral Resources pertaining to procurement". A case was lodged by the complainant who worked at the Department of Mineral Resources relating to the extension of a contract for a service provider to render Information Technology (IT) services to the said department.

The complainant alleged that there was bias in the procurement process followed by the Bid Adjudication Committee (BAC) which was chaired by the Acting Chief Financial Officer (ACFO) who it was alleged had a relationship with the IT company whose contract the committee extended without taking into consideration the performance issues raised by the complainant. The Public Protector's report found that there was no violation of the procurement processes in the extension of the IT contract. The report could not find evidence that indicated an existence of a relationship between the ACFO and the IT company. In addition, the Public Protector (2012, p. 36) found that "The resolution of the BAC to recommend the extension of the contract subject to certain conditions was proper and in accordance with its responsibilities as prescribed by PFMA, the Treasury Regulations and the Procurement Policy of the Department". In the light of the outcome of this case, an analysis by the researcher reveals that when someone is alleging irregularities in the award of government contract it must not just be a case of a perceived bias but rather the bias must be actual in order for the process to

be proved to have been tainted. This will at least minimise the potential risk to good governance in the implementation of government procurement policy.

Another feature of a fair procurement system was acknowledged in the fourth report of the Public Protector dated 20 August 2013 and entitled “Inappropriate Moves: An investigation into allegations of maladministration and corruption in the procurement of the Riverside Office Park to accommodate the Head Offices of the Independent Electoral Commission”. It will be discussed later in detail in the section dealing with a transparent procurement system and specifically the question of conflict of interest. This matter arose as a result of the role played by the accounting officer, in this case the Chief Executive Officer, of the Independent Electoral Commission who failed to declare her business relationship with the preferred service provider during the awarding stages in the procurement processes. The analysis on the application of the fairness principle of good governance in this case points out that although strides have been made in transforming the government procurement system, the issue of the declaration of interest still poses a challenge. The case reveals that due the failure to declare the conflict of interests by the Accounting Officer of IEC, the fairness requirement of good governance in public procurement was compromised. As a result, one of the research findings and recommendations in this regard supports the proposition made by Raga and Taylor (2010, p. 26) that the declaration of interest should be extended to include Members of Parliament who are doing business with government. The research study further recommends that Members of Parliament and the Executive be barred from doing business with government in the future.

Returning to the case at hand, the report discovered that indeed the owner of the company which was awarded the contract is a Member of Parliament. The proliferation of similar cases of this nature has also received commentary from the print media which in turn has decried the state of affairs where parliamentarians are doing business with government while not facing sanctions for breaking the public procurement rules. To cite one example of a case that was reported in the print media concerning Brian Hlongwa, the chief whip in the Gauteng legislature, who was being investigated for tender fraud

amounting to over one billion rand (*Mail & Guardian*, August 1 to 7 2014, p. 7). Furthermore, this matter of the conflict of interest has also caught the attention of the Auditor General who reported that it is more rampant at local government level and found that more than half a billion rand in government contracts has been awarded to relatives of the state employees (*City Press*, 3 August 2014, p. 7).

Academia has also taken note of this worrying factor as one of the leading political scholars in South Africa, Booysen (2011, p. 387), warns against this development and how it is an antithesis of good governance:

> *State-business practices in South Africa came to include the award of tenders to persons in ways that bring benefits to those in public office, politically influential individuals effecting awards of state contracts and receiving payments for the leveraging, the inflation of tender amounts, double-payments on contracts, public representatives and officials operating businesses as side-lines, or holding directorships in companies or close corporations with which the state deals.*

Indeed, what Booysen has done in her comments is to confirm the negative effect that politics has on the objective of achieving a fair public procurement system that promotes good governance

In analysing the finding on failure to declare a business interest by the former CEO of the IEC as was found in the Public Protector's report, it is important to highlight that the National Treasury is in the process of promulgating into law the prohibition of government officials from doing business with the state. In the case law dealing with the interpretation of Section 217(1) which prescribes that every government department must implement a fair procurement system when acquiring goods and services, Moseneke DCJ in Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC) at para 20 remarked that public procurement enjoys a constitutional status which happens to be the highest law in the country. This points to the fact that the status of public procurement policy poses a greater responsibility and a high standard of accountability on decision makers involved in the allocation of state financial

resources. This therefore means that a fair public procurement system should allow for a mechanism for an aggrieved party who feels that the public procurement system was misused to approach the Constitutional Court for relief. Further, in analysing what constitutes a fair public procurement system, which is a principle of good governance, the courts have been adamant that when awarding public tenders it is important for government officials to treat all bidders equally. This is done by ensuring that the evaluation criteria are maintained and applied consistently throughout the evaluation phase of tenders.

The case of Robcon Civils / Sinawamandla 2 Joint Venture v Kouga Municipality and Another (2106/09) [2010] ZAECPEHC [19] involved a challenge by an aggrieved bidder to a contract award made by the Kouga Municipality. The facts of the case are as follows: the municipality invited tenders for the construction of an access road and appointed an agent to manage the tender processes on its behalf. However, the agent recommended the appointment of an aggrieved bidder but its decision was reversed by the Kouga Municipality, which instead appointed another bidder. This award was done while the aggrieved bidder was still requesting reasons for the award and a false impression was created that the award had not yet been made as repeated requests for extension of validity period were being made by the appointed agent. Eksteen J para [24] found that the conduct of the Kouga Municipality did not follow a procurement process that was fair, equitable and transparent.

Lastly, when analysing the interpretation of what constitutes a fair procurement system as discussed in the preceding case studies, the researcher found that this shows a pattern of lack of equal treatment and even-handedness of service providers by some government officials in which their conduct borders on favouritism, which is outlawed in the public sector procurement. This infringes one of the objectives of reforms which is to promote good governance in government procurement policy.

5.3.2 An Equitable Procurement System

One way that government is using its spending power to promote the socio-economic empowerment goals of the country is to implement an equitable procurement system. This is allowed in terms of Section 217 of the Constitution and the use of the Preferential Procurement Policy Framework Act is designed to make available government business opportunities to those previously marginalised groups in our country (Manchidi and Harmond, 2002, p. 10). The principle of an equitable procurement system was a subject of the report of the Public Protector dated 19 December 2013 and entitled "Poisoned Processes: An investigation into allegations of maladministration by the Department of Public Works, Roads and Transport in Mpumalanga in the awarding of tenders for shop leases in Pilgrims Rest". This case relates to the renting out of a national heritage site to private business by the Mpumalanga Provincial Department of Public Works, Road and Transport. A complainant in this case alleges, among other things, that there was a contravention of the tender processes in the awarding of the lease contract. Public Protector made a remarkable pronouncement on the matter and found that the procurement process that needed to be followed is subject to Section 217 of the Constitution, the Preferential Procurement Policy Framework Act No.5 of 2000 (PPPFA) and National Treasury regulations. Further, in her application of the law to the facts (2013, p. 58) the Public Protector found that:

> *The contract to lease Building A74, Highwayman's Garage awarded to Mangwanyane Trading, whose bid did not score the highest points on price or the highest points overall, was in violation of Section 2(1)(f) of the Preferential Procurement Framework Act which provides that the contract must be awarded to the tenderer who scores the highest points. It was also in breach of the SCM policy which states that the Bid Evaluation and Bid Adjudication Committees should ensure that scoring has been fair, consistent and correctly calculated and applied; and*
>
> *The instances of unsigned recommendations by all the members of the BAC, as well as final awards not properly signed and dated by the HOD may not only be*

further illustrations of incomplete record keeping by the Department, but may also be impediments to vesting proper accountability for the procurement processes and decisions with the Accounting Officer (HOD) in terms of Section 36 and 49 of the PFMA.

The Preferential Procurement Policy Framework Act No.5 of 2000 which was promulgated into law was partly aimed at redressing the imbalances of the past. It was the second objective of the Act which forms part of reforms in the implementation of government procurement policy. As stated earlier the government has issued a set of regulations to operationalise PPPFA and to ensure that price is not the sole determining factor in the awarding of government contracts, but points were also made available for HDIs and RDP goals. Later, the PPPFA Regulations were aligned with the B-BBEE objectives in 2011 and they amended the preference point-scoring system applied by government to award contracts. The Preference Point Scoring System was revised to allocate 80 points for price and 20 points for B-BBEE status level contributor instead of HDI and RDP goals, for state procurement below R1 million, and 90 points for price and 10 points for B-BBEE status level contributor instead of HDI and RDP goals, for state procurement above R1 million as per the Preferential Procurement Regulations, 2011. For example this means that a bidder is allocated combined points out of 100 points and the highest scoring bidder is the winning bidder.

These provisions extend as well to bidding processes for the sale and letting of state assets. Balshaw & Goldberg (2005, p. 16) elaborate on this development and they further argue that the “Broad-based BEE has been described as an investment that is a matter of survival for South Africa and the economy. It is aimed at effecting a more equitable distribution of economic wealth and has been branded as the essential second wave of transformation after democratisation and the political miracle”. This conceptualisation of BBBEE is aimed at achieving the government’s objective to use public procurement as a policy tool to achieve wealth redistribution through an equitable procurement system.

Coming back to the facts to the case at hand, the Public Protector's report found that during the allocation of the lease contracts, the application of the principle of equity in public procurement was not followed and thereby defeated one of the aims of good governance in the implementation of government procurement policy. At this juncture the researcher argues that although the principle of an equitable public procurement system is a policy imperative that promotes good governance by inviting public tenders which serve to promote previously disadvantaged individuals (HDIs), it should not be blindly applied at the expense of public interest. Therefore, the wrong application of the equity principle by the evaluation committee reflects a deep-seated problem of interpretation by officials who think equity means reverse discrimination, which is outlawed by the Constitution. Hence an urgent intervention by National Treasury is required to instruct officials that the country has sufficient policies and laws aimed at promoting SMMEs and HDIs, but the Constitution is the highest law of the land.

The equity principle of good governance in public procurement was again discussed in a case lodged in Equality Court at Bhisho in the Eastern Cape. The facts of the case are as follows: a complainant alleged that the tender conditions were so stringent that they unfairly excluded previously disadvantaged persons. As a result thereof, the complainant sought an order declaring the procedure for the awarding of the tenders as being inconsistent with Section 217 of the Constitution. Froneman J in Manong Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport and Others (2/2008) [2008] ZAEQL 2 at para [33] determined that "the test here is whether these requirements could be said to be reasonable given the stated aim of the first respondent, in terms of the empowering legislation, to advance the empowerment of previously disadvantaged groups and persons". Further, at para [34] the learned judge found that "the requirements of practical experience and functional expertise in the present procurement policy are rationally connected to the unobjectionable goals of providing safe and durable roads to the public without wasting public money. There is no indication before me that there are no previously disadvantaged groups or persons sufficiently experienced and qualified to satisfy the functional requirements in the procurement policy". The researcher argues that in the final analysis the equity

principles cannot be applied blindly to the extent of promoting mediocre work from the suppliers or service providers who happen to be HDIs or SMMEs. The aim of the principle is to create access to government business opportunity but not to compromise quality of the work to be rendered by the suppliers or service providers.

In summary, these case studies on equity as a requirement of good governance in public procurement show that as much as government is very keen to redress the imbalances of the past it must guard against defeating the primary aim of procurement which is to acquire goods and services of good quality at reasonable prices. Lastly, the researcher submits that the requirement of equity in public procurement policy must be equally understood within the context of upholding public interest which is also a concept of public policy.

5.3.3 A Transparent Procurement System

The rationale for having a transparent procurement system in government is to ensure that public interest is considered at every stage of awarding a government contract. One of the requirements is that the government business opportunities must be at least advertised in the Government Tender Bulletin and/or a local newspaper and indeed this is a necessary condition for transparency. Hence, the National Treasury requires that above the R500 000 threshold all government contracts must be advertised in the Tender Bulletin and/or in a local newspaper. In addition, National Treasury instructed all state institutions to advertise awarded contracts and provide a mechanism for handling complaints from unsuccessful bidders.

The other issue closely linked to the requirement for a transparent procurement system is the role of politics which has a tendency to compromise the independence of the public sector procurement. In the same report of the Public Protector which investigated the participation of special advisers of the premier of the Western Cape in the procurement processes it was pointed out that the influence of politics or political intervention in procurement matters is frowned upon by our legal system as this could lead to a potential conflict of interest and necessarily raise a red flag for corruption in the

procurement system. Furthermore, the Public Protector (2012, p. 92) found that: “The involvement of Special Advisers of the Premier in a procurement process of the Department unavoidably raises suspicion and, as happened in this case, the perception of political involvement and influence in the process. It therefore impacts on the application and violates the spirit of the provisions of Section 217 of the Constitution, as far as the requirements of fairness, transparency and competition are concerned”.

What is of concern is that these allegations of political interventions are not only limited to procurement in government departments but also extend to public entities. For example, in a case involving an award of a tender by ESKOM, the country’s electricity utility, one of the unsuccessful bidders raised a matter of political meddling and impropriety (*City Press*, 7 September 2014, p. 14). The analysis on the implementation of a transparent public procurement system again reveals the role of politics. This shows the interconnection between fair and transparent procurement principles of good governance. However, it is surprising after all these instances have taken place the National Treasury has not yet initiated a policy regime that provides for the curbing of such instances in order to ensure that the government procurement system is beyond reproach. This can easily done by preventing politicians from participating in government contracts

Another case study is the report of the Public Protector dated 10 October 2012 and entitled “On The Point Of Tenders: An investigation into Allegations of Impropriety and Corrupt Practices Relating to the Awarding of Contracts for Goods and Services by the Limpopo Department of Roads and Transport (LDRT)”. It deals with an investigation into the appointment of a service provider who it is alleged misrepresented its company composition and its capacity to deliver. The LDRT appointed the service provider to project manage the construction and maintenance of roads, intermodal facilities, traffic stations and cost centres. At the evaluation stages of the procurement phase certain bidders were disqualified by an evaluation committee that applied strict tender conditions and based their award decision on non-compliance with administrative requirements while at the same time appointing a company that was also not fully

complying with the strict conditions. The Public Protector found that the advertisement for the tender did not comply with the National Treasury regulations. In addition, the case further attracted media attention due to the political actors implicated in the alleged procurement irregularities. In spite of this, the *Sunday Independent* (7 September 2014) reported that the Limpopo Provincial finances were getting back to normality after National Treasury intervention to curb looting of state financial resources due to similar cases as the one under discussion. However, analysis of the case study revealed an element of bias from the officials in terms of defeating the requirement for transparency. This case has shown how lack of consequences in Limpopo especially in the area of public procurement has made the goal of promoting good governance degenerate without fear of the law. The National Treasury came in late as these appointments lacking transparency were awarded in any case. The researcher wishes to submit that had the evaluation and adjudication processes been open to the public such disregard for the principle of transparency would have been averted in the final analysis.

A related aspect of a transparent public procurement system is a prerequisite for an open procurement process that is free from favouritism and bias. This matter was addressed in a case involving SANRAL v The Toll Collect Consortium (796/2012) [2013] ZASCA 102 where SANRAL invited tenders for the operation of the N2 South Coast Toll Plaza. Four tenders were submitted and the contract was awarded to the preferred service provider. One of the disappointed bidders challenged the award and the basis for the challenge related to the evaluation of quality as a functionality criterion. The tender advertised followed a two-stage bidding process which means that tenders will first be evaluated based on capability or quality as a functionality criterion and then move to the second stage which is evaluation of price. Accordingly, Wallis JA at para [9] summarised the basis of the challenge as an alleged irregularity in the tender adjudication process which was being neither transparent nor objective. He explained the concept of a transparent procurement system at para [18] and said that “It requires that public procurement take place in public view and not by way of back door deals, the peddling of influence or other forms of corruption. But, once a tender is issued and

evaluated and a contract awarded in an open and public fashion that discharges the constitutional requirement of transparency".

In light of the above, the researcher concurs with the latter finding because if the government procurement system does not promote openness and transparency this might lead to the loss of public confidence in the management of public resources. This ties up with the MPAT results for the 2011/12 financial year that imply that there is a link between lack of transparency and corruption in government procurement (DPME, 2012, p. 7). The analysis of these cases reveals that the levels of compliance required to satisfy the principle of transparency in public sector procurement should be evaluated in the light of standards that allow for a maximum participation of the public. In addition, the researcher found that some of the newly proposed measures by National Treasury (2015 Public Sector Supply Chain Management Review, p. 23) to enhance transparency serve to assure that indeed good governance in the public sector procurement is being emphasised by National Treasury. These measures include:

- Developing and prescribing a public disclosure framework which governs transparency within the SCM process;
- Prescribing that all information in the bid process be disclosed publicly;
- Improving the accessibility of information through a designated website;
- Improving the quality of information and encourage its strategic use;
- Creating an environment for public participation in bid processes; and
- Building capacity of all relevant stakeholders to participate in SCM.

5.3.4 A Competitive Procurement System

For a public procurement system to be declared as competitive it should provide for equal opportunity to all prospective bidders. Again, it is imperative to refer to the report of the Public Protector on the alleged improper procurement of communication services by the Department of the Premier of the Western Cape Provincial Government, when defining what could be viewed as a competitive procurement system. The report (2012, p. 53) pointed out that "demand management is a key element of the procurement

process of an organ of state to ensure that it complies with the constitutional imperatives of competitiveness and cost effectiveness". This demand management element is the first phase of the SCM framework and it refers to the planning phase for procurement as this is the phase where the need is established and a sourcing strategy to satisfy the need is identified. Under demand management, the decision to advertise request for tenders in the government tender bulletin is a sourcing strategy that must follow certain procedures relating to the closing time and allows for competition as the request is open to everyone to compete. Therefore, in the report discussed earlier on the Allegations of Impropriety and Corrupt Practices Relating to the Awarding of Contracts for Goods and Services by the LDRT, where the Public Protector (2012, p. 15) stated that "no indication could be found during the investigation that the HOD applied his mind to the disqualification of bidders. He made no efforts to ensure that the awarding of the bid to On-Point was in accordance with the principles of a system that promotes competition and cost effectiveness in the interests of the Department and the public"

Also, in the case involving the CEO of the IEC, the Public Protector in addressing what she noted as a non-compliance to a competitive procurement system, among others, she (2013, pp. 10–18) found that:

> *Treasury Regulations provide for deviation from procurement policy in the event of an emergency. There was no motivation from the Commission's EXCO to deviate from a tender process in line with Treasury Regulations. The procurement of the Commission's building was not motivated as an emergency. In any event the circumstances of the move do not qualify as an emergency as defined in paragraph 4.7.5.1 of the Treasury Guides which provides that an emergency is a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.*

The ideal way that Adv. Tlakula could have mitigated and managed this conflict was through declaration of the relationship and recusal from the procurement process. By her participation in the procurement process involving her Chairperson and co-director where they have a common interest in Lehotsa Investments, her independence and objectivity in the entire process may have been compromised;

As the Accounting Officer of the Commission at the time, Adv. Tlakula was expected to ensure that the Commission's supply chain management processes give effect to the core principles of behaviour as envisaged by the five pillars of procurement which are fairness, equity, transparency, competitiveness and cost effectiveness. Fairness includes compliance with ethical standards, recognising and dealing with conflicts of interests or the potential thereof; and

Adv.Tlakula's improper conduct and maladministration in this regard, in particular the non-compliance with relevant procurement prescripts as well as her undisclosed and unmanaged conflict of interest had the impact of:

Risking of loss of public confidence in the Electoral Commission as an organ of state in open and transparent procurement of goods and services.

Accordingly, a deviation from competitive bidding has added more questions than answers in this particular case. With respect to the procurement processes followed, as previously noted it was an exception to the rule. As National Treasury Regulation 16A6.4 states: "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority". The reasons for deviating from the competitive procurement system may differ from case to case as in some instances the services can only be obtained from a single service provider, for example if there is only one institution of higher learning that produces a specific research solution. In other instances there is only one service provider that

produces electricity in the country (i.e. ESKOM) or in cases of emergency where the roof of a hospital building is leaking and patients are exposed, then an SCM unit is allowed to appoint a single service provider to fix the leaking roof. This deviation process is succinctly captured very well by Brunette (2014, p33), where it is stated that:

> *The procedure for invoking an exception is relatively straightforward. When the need arises SCM practitioners prepare a written justification to be forwarded for authorisation to the accounting officer. Once authorised, the exceptional procurement can proceed. In cases where the procurement is valued at R1 million and over a report must be prepared and sent to the National or Provincial Treasury and the Auditor General within ten working days of purchase.*

Unfortunately, this was not done when the Chief Executive Officer of the IEC compromised one principle of good governance in the implementation of the IEC procurement policy.

The other case study is the one of the Public Protector that dealt with the requirement of a competitive procurement system in a report dated 20 August 2013 entitled “Pre-Empted Appointment: An investigation into allegations of maladministration, abuse of power and irregular expenditure in the appointment of a legal firm as service provider for the Department of Finance in the North West Province”. The background to this case concerns a law firm that was appointed by the Department of Finance in the North West Province to handle disciplinary cases of certain officials. Furthermore, the evidence revealed that another service provider was appointed to render recording services for the same cases. Both appointments in one way or the other are alleged to have contravened the applicable SCM prescripts.

In the report, the Public Protector noted firstly that the legal firm was appointed prior to the advertisement for competitive bids and secondly, the point-scoring system followed did not comply with the Preferential Procurement Policy Framework Act (PPPFA), Act No. 5 of 2000. Thirdly, the Public Protector (2013, p. 46) found that “Only Rustenburg based attorneys were requested to quote, whereas the officials charged for alleged

misconduct were all based in Mahikeng and that the disciplinary process would be conducted in the Mahikeng area". Therefore, in terms of what transpired in this case it is possible to conclude that the principle of competition in this procurement was not applied in order to prefer one service provider over others. It is alleged that the confusion based in the fact that since the law firm previously worked with the office of the relevant MEC it was assumed by the official in the Ministry that the procurement processes would allow for such a deviation from competition. Now it is important to repeat that there are four strategies that are commonly used to defeat the requirement of competitiveness in government procurement defined by Bolton (2006, pp. 137–138). In this case it can be safely argued that the conduct of the officials falls within the first and second categories of anti-competitive practices (custom-made contracts and level tendering arrangements), hence the title of the report is "Pre-empted appointment".

The principle of competition was also dealt with in various cases that relate to the circumvention of the principle of a competitive procurement system which was investigated by the Auditor General in report dated June 2011 and entitled "An investigation into procurement of various contracts at the Gauteng Provincial Department of Roads and Transport". In brief the facts of case are as follows: a request was made by the Member of the Executive Council (MEC) for the Provincial Department of Roads and Transport in Gauteng to the Auditor General to investigate the awarding of certain contracts and determine if they were awarded in accordance with the applicable SCM prescripts. The Auditor General (2011, pp. 7–10) made the following damning findings:

- *Bids were advertised for a period shorter than the prescribed 21 days. The reasons for the deviation were not recorded and approved a required by Treasury Regulations TR16A6.3(c);*
- *Competitive bidding processes were not always followed in the procurement of goods and/or services in accordance with the threshold values set by the National Treasury and the Departmental Supply Chain Management policy (GDRT SCM policy);*

- *In cases where the prescribed SCM processes were not followed, the deviations were not recorded and approved by the accounting officer or reported to the National Treasury and the AGSA as required by TR16A6.4;*
- *In respect of all procurement in excess of R30 000, the application of the 80/20 and 90/10 principle was not adhered to as prescribed;*
- *Contrary to Section 11(a) of the PPPFA, the department did not perform proper costing exercises prior to going out on tender in order to establish the department's financial obligation before making a commitment;*
- *The evaluation criterion was changed after the closing of the bids, in contravention of Section 4.11 of the SCM: A guide for accounting officers/authorities, February 2004 (SCM guide);*
- *The scoring and awarding of points to bidders during the evaluation process were inconsistent and inaccurate; and*
- *A centralised filing system to maintain all documentation relating to SCM policies and processes was not available. This is in contravention of Section 217 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1998) (Constitution) and Section 38(1)(a)(iii) of the PFMA which promote a transparent system.*

Finally, the principle of competition which is one of the fundamentals of good governance underpinning government procurement policy was discussed in JFE Sapela Electronics (Pty) Ltd and another v Chairperson: Standing Tender Committee and others (as cited in Bolton, 2006, p. 144). In this case, Erasmus J held that "[a]llowing one tenderer to deviate from the [tender] specifications and to tender on the basis that all the work specified will not have to be done, while other tenderers tender on the basis that all the work specified will have to be done, results in a tender process which is procedurally unfair because it affects the competitive position of tenderer". One's reflection on this requirement of a competitive procurement system, as shown in this chapter during discussions on the methods of procurement in government, the National Treasury has maintained that the acquisition of goods and services should follow an

open and competitive bidding processes unless it is impossible or impractical; only then are officials allowed to deviate. This must be understood as not a contradiction to the emphasis on the promotion of good governance especially since the tax payers' money is what is utilised.

5.3.5 A Cost-Effective Procurement System

The requirement for a cost-effective procurement system is synonymous with the concept of value for money within the SCM context. In this respect, a cost-effective procurement system is not only focused on the lowest price offered but considers holistically the issues of efficiency and effectiveness from the time when the need is identified, goods are procured and completion of contract performance (Bolton, 2006, p. 43–44). The General Procurement Guidelines issued by National Treasury respect this principle of cost effectiveness within the test of value for money (undated, p. 4). This requirement came up for discussion in the report of the Public Protector relating to the leasing of the SAPS building, where it was found that the procurement process applied was not cost effective. Also, the MPAT results for the 2012/13 financial year indicate that most departments are challenged in the area of demand management and this results in an inefficient and ineffective procurement (DPME, 2013, p. 40). The principle of cost effectiveness in the public procurement system which says that the price is not the sole determinant on a decision on whether to award a contract to prospective bidder(s) was once again restated in Allpay Consolidated Investment Holdings & Others v The Chief Executive Officer of the South African Social Security Agency & Others (678/12) [2013] ZASCA 29. The facts of this case are as follows: the tender that is in dispute is for the payment of social grants. The South African Social Security Agency (SASSA) invited tenders for paying of social grants on SASSA's behalf and awarded the contract to the successful bidder. This decision was subsequently challenged by the unsuccessful bidder on the basis of apparent irregularities in the procurement system that was followed. The bone of contention by the aggrieved bidder is that the preferred bidder was awarded the contract despite its failure to fully comply with the conditions laid out in the request for proposal. Nugent JA at para [36] submitted that "There are cases in which the value to be had from goods or services is a compromise between

their quality and their price. In such a case both elements would be weighed against one another simultaneously to reach the appropriate compromise". In this instance the learned judge was probably restating the principle of the requirement for cost effectiveness in public procurement.

In conclusion on the principle of cost effectiveness it is needs to be pointed out that in summarising the meaning of a cost-effective procurement emanating from the case studies, it can be observed that the attainment of value for money is paramount. This is because to appoint a service provider based on the lowest price only with no capacity to deliver will compromise the quality of the product with the possibility of paying extra money to fix the poor quality of the product. It is therefore a step in the right direction that National Treasury is now putting emphasis on matters of suppliers' good performance record, skills, quality, experience, previous performance and value for money (2015 Public Sector Supply Chain Management Review, p. 17)

5.4 Conclusion

In this chapter the research study has argued that one of the goals of government procurement policy as far as the application of good governance principles is concerned is to impact positively on the way the public financial resources are managed. Further, the research study concurs with the approach that seeks to crystalise the five principles of good governance in the public sector procurement into a regulatory framework and to ensure that a strong criminal sanctioning of conduct that contravenes the principles of good governance in public procurement is in place.

In essence, the review indicates that almost all the cases in this research study reflect instances of blatant disregard for the letter and spirit of Section 217 of the Constitution. They represent a culture among state officials who are either willfully contravening the five principles of government procurement policy or show signs of incompetence in implementing a government procurement policy that is premised on a fair, equitable, transparent, competitive and cost-effective system. On the other side, it appears that the implementation of government procurement policy cannot be understood outside of

the political governance environment and the kind of society that produces state bureaucrats who are meant to apply the fundamentals of good governance. This view is supported by Mashele & Qobo (2014, p. 83), who argue that:

> *Inclusive societies are not difficult to describe. They are characterised by low levels of inequality, strong and effective public institutions, vibrant civil society formations, materially modest politicians, low levels of conspicuous consumptions, and respect for and equality before the law. In such societies there are fewer scandals, and politicians embezzling public funds or caught up in all manner of sleaze are fairly rare. The political culture is that of personal responsibility, meaning that if you are found to have done something criminal, corrupt or morally indefensible, you fall.*

Linked to the above view is the fact that National Treasury which is the custodian of the state financial resources has not been oblivious to its mammoth task of tackling tendencies that are not in line with Section 217 of the Constitution. This is evident from a number of policy interventions such as the charging of state officials for irregular, unauthorised, fruitless and wasteful expenditure incurred by the state, and must be commended.

In addition, the superior courts in our land have also been seized with these matters as they relate to the interpretation of the five principles of good governance of the implementation of the government procurement policy. These judiciary institutions called upon to adjudicate the interpretation of Section 217 of the Constitution include the High Courts, the Supreme Court of Appeal and the Constitutional Court. In the main, their cases for adjudications have been characterised by allegations of irregularities in the awarding of government contracts lodged by unsuccessful bidders. The two common parties which are government departments/entities and disappointed service providers have been resorting to superior courts to decide on whether the public procurement process that was followed was in fact fair, equitable, transparent, competitive and cost effective. Reflecting on the way the judiciary has interpreted Section 217 of the Constitution, the following conclusions are drawn:

- The elevation of government procurement system to enjoy a constitutional status paints a picture of a state that is serious about the promotion of good governance in the management of its financial resources; and
- The compliance with the five principles laid out in Section 217 of the Constitution places a high standard of accountability for officials involved in the government procurement processes.

CHAPTER 6: FINDINGS AND CONCLUSIONS

6.1 Introduction

This chapter addresses the findings on the policy review of the application of the five principles of public sector procurement in promoting good governance It provides conclusions to the mission of the research study which is articulated in Chapter 1 of the policy review. What the policy review intended to achieve was to examine whether the implementation of government procurement policy in the past 20 years, as spearheaded by National Treasury, has promoted the institutionalisation of good governance as represented by five constitutional principles of public procurement contained in Section 217 (1) of the Constitution. The second objective of this policy review is to analyse the implications of non-compliance with these five principles of good governance by government officials in public sector procurement as reflected by the selected case studies. In other words, the question to be answered by this research paper is whether there was a disconnect between the theory of public procurement policy represented by the legislative and policy framework of SCM and the practice which is the implementation of the public procurement policy as reflected by the selected case studies.

The motivation for using case studies is that it is possible to make the connection between actual practice and the theory behind its objectives. Therefore, using case studies, one is able to pick up the disjuncture and recommend appropriate interventions when necessary. In order for the researcher to confidently argue that there are indeed policy gaps and challenges in the implementation of public procurement policy then one has to use an objective tool of assessment. In this case, it was a selection of case studies based on reports from the office of the Public Protector and Auditor General were used. This was supplemented with the academic literature, case law and relevant articles from national newspapers. The case studies that were used in this research study all emanate from institutions that are independent from government, which makes more sensible to use their information that in likelihood would be independent. However,

care must be taken when referencing the newspaper articles that are not subject to any review and may not be objective in the process.

A literature review was conducted on the concept of good governance and institutionalisation of government procurement policy. Each of the five principles of good governance was defined and analysed to get an understanding of theory that informs the implementation of government procurement policy. The literature review assisted in identifying the imperfections and challenges in the policy implementation. The research study has found that the National Treasury developed a legal framework that must guide the policy implementation processes, but when it is time for the officials to implement the policy they were challenged in terms of policy interpretation. The case studies have revealed this, and how these challenges manifest themselves, leading to non-compliance to the SCM prescripts. Part of the literature review discussed the forms of procurement in government and how they relate to the five principles of good governance.

The research methodology adopted in this policy review is the qualitative research methodology. The motive for applying the qualitative methodology is because the analysis of policy implementation requires an element of analysis of events that reflect on how the policy in practice was being applied, therefore the qualitative research methodology assisted in that regard. Secondly, the research methodology assisted in properly contextualising the relationship between the cause and effect when one analysed the challenges associated with the implementation of the public procurement policy. Thirdly, the data that was collected and analysed consists of primary and secondary sources of information made up of official and unofficial documents. Most of the official policy documents were sourced from the website repository of the National Treasury. The case studies were formal reports obtained from the website of the of offices of the Public Protector and the Auditor General. The supplementary documentation such as the court judgments were also downloads from the internet whereas the academic literature was a mixture of articles downloaded from websites storing scholarly journals and readings from published textbooks. The newspaper

articles were clippings from various newspaper publications. In addition, these documents assisted the researcher in relating theory to practice during the analysis of the implementation of public procurement policy. ,

How the policy analysis was carried out is that the researcher firstly analysed the legislative and policy documents of government, such as National Treasury, which is an institution of government that generated these policies. In the analysis of these documents, the research found that the SCM practice standards set out by National Treasury in the promotion of good governance were quite high. Further, these SCM high standards were benchmarked against international standards applicable in countries which have no problems with resources to effect such policy requirements. This might be one of the reasons that the SCM policy documents were subject to misinterpretation since they needed users to be subjected to thorough training. Also, the turnover in the development of legislative and policy documents between the period of 1994 and post 2004 was very high which might have led to what I term “policy development fatigue”.

In the policy review exercise it is important to highlight that the research study found out that the implementation of the reforms in government procurement policy were not immune to flaws and imperfections within the context of public policy. Therefore, the research findings show that the objective of emphasising the promotion of good governance during the implementation of government procurement policy by National Treasury was also characterised by major weaknesses and pockets of excellence in some instances. The format of this chapter is as follows: there will be findings on each principle of good governance in the public sector procurement and they will be accompanied by the recommendations of the research study.

Further, the research study also found that there was a disjuncture in theory and practice in how the public procurement policy was supposed to be implemented to achieve the objective of good governance. This is revealed in the analysis of the selected case studies on the reports of the Public Protector, Auditor General and case

law. In the main, the research study has shown that government officials from the affected departments, when acquiring goods or services, failed to adhere to the requirements for the implementation of a procurement system that is fair, equitable, transparent, competitive and cost effective. In addition, the results reveal that the causes for this state of affairs are firstly the general lack of understanding by some government officials of what constitutes a procurement system that complies with the five requirements of Section 217(1) of the Constitution and secondly the perceived overemphasis on socio-economic objectives over commercial considerations which contributed to the challenges of policy implementation; lastly, the diminishing role of public participation in the processes of awarding tenders has impacted negatively on public trust and confidence in public procurement.

In terms of what the research study seeks to achieve the researcher submits that the research study has shown that although the South African government of the post-1994 era embarked on a process of elevating SCM philosophy as a management function, the implementation of government procurement policy is not fully compliant with the five pillars of good governance. It seems that in the last 20 years the implementation of a government procurement system that is fair, equitable, transparent, competitive and cost effective has not been fully complied with as evidenced by the sample of case studies emanating from the Public Protector's reports, Auditor General's reports, judgments from our superior courts and newspaper articles. However, having highlighted all of these challenges the research study has also been able to show that National Treasury is not turning a blind eye to the challenges highlighted but is vigorously intensifying its interventions at a policy level to tighten the monitoring and compliance mechanism in order to the ensure that public officials comply with SCM prescripts.

In addition, the research study has shown that the new approach in governance and management of financial resources in the public sector since the introduction of the Public Finance Management Act (PFMA) has paved the way for reforms in government procurement and provisioning systems. Therefore, it is hoped that this review of the

implementation of government procurement policy spearheaded by National Treasury in promoting good governance in the management of state financial resources during the past 20 years might, through the research study's proposed interventions, yield some results.

The aim of the research study in assessing the achievements and failures of policy implementation of government procurement policy in the past 20 years has been satisfied. It is hoped that the recommendations made in the research study will assist the National Treasury in future when it is implementing policy changes in the public sector procurement environment. Below are the detailed findings accompanied the recommendations of what could be done to remedy the gaps in policy implementation and improve on the mission to promote good governance in public procurement.

6.2 Finding 1: Principle of Fairness

The theory on the good governance principle of fairness in public procurement is laid out in policy documents of National Treasury such as the General Procurement Guidelines. The document suggests that in order for the public procurement system to effectively promote the fairness principle there needs to be a level of equal treatment of suppliers and service providers by the government officials involved in procurement. Furthermore, there is a need for the fairness principle requires that government work must be publicised in a public space to allow for easy access to the public of government business opportunities. However, in practice the outcomes of the case studies and literature review on the application of the principle of fairness has revealed firstly that officials are applying the limited bidding method or alternatively engage in direct negotiations with their preferred service provider without valid reasons and this is meant to circumvent the normal competitive bidding processes. Secondly, there has been an increase in the reporting of procurement complaints by aggrieved parties relating to the unequal treatment of service providers by some officials of state departments.

Recommendations:

- The research study recommends that National Treasury must craft a standardised government procurement complaints resolution policy across all departments so that aggrieved parties and government officials use one set of documentation and mechanisms for reporting and resolving alleged cases of unfair public procurement practices. A register of resolved cases must be made public and posted on the website of the relevant department;
- It recommends that government should pass a law that prohibits Members of the Executive and Members of Parliament from doing business with the state; and
- It further recommends that a list of state officials found to have contravened the ban on doing business with the state should be made public and be accessed via the National Treasury website.

6.3 Finding 2: Principle of Equity

In theory the National Treasury legislative and policy documents such as the 10-Point Plan and the Preferential Procurement Policy Framework Act require that a preference mechanism be put in place to fast track the participation of SMMEs and HDIs in the economic activities of the country. However, the research study found that in practice, as revealed by the selected case studies, there was clear evidence that public procurement is used as a policy tool for empowerment of HDIs through the application of the PPPFA and this is done with improper motives. The requirement of equity during the implementation of the government procurement policy did not usher in a paradigm shift in the acquisition processes wherein the role of price was supposedly being superseded by the socio-economic objectives. This is very incorrect and should be discouraged as both price and socio-economic objectives of governments are catered for in the 100 points of the preference point system. Also, if the equity requirement is used as an excuse for rendering of sub-standard of public service then this might lead to a rise in service delivery protests against government.

Recommendations:

- The research study recommends that National Treasury develops a special training manual that will solely focus on the interpretation and application of the Preferential Procurement Policy Framework Act in order to empower all officials involved in public sector procurement; and
- It further recommends that government conduct public information sessions targeting SMMEs and HDIs to sensitise them that although public procurement can be used as a vehicle for their empowerment, this should not be done at the expense of compromising quality by quoting lower prices for goods or services to be rendered as this will not be in the public interest and their own business interest.

6.4 Finding 3: Principle of Transparency

The policy as envisaged by the National Treasury requires that in theory a transparent public procurement system should allow for the public to question and scrutinise decision making related to the awarding of government contracts. In practice the research study has found that although National Treasury has put in place a solid policy framework to govern the handling of government procurement processes in a transparent manner, but the challenges associated with its implementation still remain a problem Furthermore, the influence of politics in public procurement is a culture that needs to be discouraged at all levels of public procurement. It is a welcome effort that the 2015 Review conducted by National Treasury has proposed measures to deal with this unwarranted culture.

Recommendations:

- The research study recommends that all proceedings of Bid Committees meetings should not only be limited to office buildings but a timetable be drawn up and advertised in local newspapers of the upcoming committee meetings and it is proposed that they take the form of town hall meetings with the public being allowed to be observers in the proceedings;

- The research study further recommends that future meetings of all Bid Committees be advertised in all departmental notice boards; and
- Further recommends that the television sets that are placed in the reception areas of departments be used to screen live all Bid Committee meetings.

6.5 Finding 4: Principle of Competition

In terms of the SCM prescripts it is required that the procurement of goods and services must follow normal competitive bidding processes in order to comply with the principle of competition to promote good governance in public procurement. However, the research study found in practice, firstly, that in the case studies that dealt with the principle of competition in public procurement that the officials implicated lacked ethics in applying what is required in terms of the government procurement policy. Secondly, in most of the case studies analysed it was difficult to understand valid reasons for deviating from the normal competitive bidding process. Thirdly, it was possible to conclude from the facts of some of the case studies that officials had predetermined outcomes of the procurement processes to favour certain companies even if it meant sacrificing quality of the service in the process. On the other hand, the research study has identified a positive practice initiated by National Treasury, which, if its implementation is closely monitored, could immensely aid the required result in the upliftment of SMMEs: that is the Suppliers Day, which is a platform for the businesses to showcase their business acumen and talents to all departmental officials.

Recommendations:

- The research study recommends that National Treasury should be the only delegated authority to approve deviation from normal competitive bidding processes for items or services of high value;
- In addition, the research study recommends that departmental officials must be made to complete a checklist that will validate their compelling reasons for applying limited bidding. Further, they must publish cases with accompanying

reasons why they opted for limited bidding in their respective departmental websites so that the public can access such reasons; and

- Lastly the study recommends that the private sector must be allowed a platform to share with government officials the best practices for developing sourcing strategies that allow for maximum competition.

6.6 Finding 5: Principle of Cost effectiveness

In theory the National Treasury, as stated in the General Procurement Guidelines document, requires that during the public procurement phases the resources of the state must be utilised effectively and efficiently in order to comply with the good governance principle of cost effectiveness. The academic literature has identified poor demand management and badly drafted specifications as a major contributing factor in the failure to ensure effective and efficient utilisation of resources. While the research study found that the requirement for value for money is an overarching theme raised in some of the case studies dealing with the principle of cost effectiveness in government procurement, the issue of the lowest or highest price as the sole determinant in the awarding of contracts has proven to be a misconception. Instead departments are encouraged to follow a two-stage bidding process, where functionality/capability is evaluated first and price thereafter.

Recommendations:

- The research study recommends that National Treasury immediately implement a price index or guidelines to assist departments in assessing the reasonableness of prices for goods and services;
- Also, the research study recommends that National Treasury develop a standard procedure manual on contract management that will be applied by all government departments; and
- Lastly, the research study recommends that for generic goods or services there should be standard specifications or terms of reference in order to minimise the tampering with the specifications or terms of reference for the benefit of the already identified supplier or service provider.

6.7 Way forward

The research study is a policy review that has analysed the public policy issue of public procurement in so far as the promotion of the requirement good governance by National Treasury is concerned. It is hoped that the following lessons will help National Treasury with the future review of the public procurement policy:

- That the relationship between the conceptualisation phase of the policy and the implementation phase thereof is not a straightforward matter;
- That if there is a long period without conducting a policy monitoring and evaluation exercise of the policy implementation this breeds a long-term culture of non-compliance that is difficult to counter.
- Continuous training interventions should also allow for specialisation in SCM.
- The persistent cases of non-compliance to Section 217(1) show that more emphasis needs to be placed on what constitutes a fair, equitable, transparent, competitive and cost effective public procurement system.
- That in future the implementation of this policy should be reinforced by a consequences-based approach so that others can see the dangers of non-compliance with a fair, equitable, transparent, competitive and cost effective system.

Finally, the National Treasury is encouraged to view the recommendations of this policy review exercise for what they are meant to achieve which is to contribute to efforts aimed at improving the status of public procurement in South Africa.

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