

# The exclusion of contractors from government contract awards<sup>1</sup>

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## 1 INTRODUCTION

The Constitution<sup>1</sup> provides that when organs of state contract for goods or services, they must comply with, *inter alia*, the following principles: fairness, competitiveness and cost-effectiveness.<sup>2</sup> In brief, this means that organs of state should make use of competition when procuring goods or services. Organs of state should 'shop around' and attract the maximum number of contractors who will participate in such competition. An organ of state should then choose to contract with whoever offers the best deal. In other words the aim is to ensure the attainment of the best value for money – public money should be spent in an effective and efficient manner. Those who participate in government procurement procedures should also be treated fairly and even-handedly; there should be no bias in the award of contracts.

In many instances, depending on the nature and value of a particular contract, organs of state make use of a call for tenders when procuring goods or services: the public is invited to tender for the provision of goods or services.<sup>3</sup> There are, however, certain tenderers or contractors who may be excluded from participation. Legislation provides that an organ of state may (1) disregard or reject a contractor's tender for the non-payment of taxes and/or (2) debar a contractor from future government contract awards for the failure to render satisfactory contractual performance in the past or on the ground of fraud or corruption. In this article, it will be argued that some of the legislative provisions (dealing with the rejection of tenders and the debarment of contractors) have the potential to unduly exclude

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<sup>2</sup> Constitution of the Republic of South Africa 108 of 1996.

<sup>3</sup> Section 217(1). The other principles include equity and transparency.

<sup>4</sup> The words 'tender' and 'bid' are often used interchangeably. The same applies to the words 'tenderer' and 'bidder'. For the purposes of this article, use will primarily be made of the words 'tender' and 'tenderer'.

certain contractors from participating in government contract awards, and so defeat compliance with the principles of fairness, competitiveness and cost-effectiveness in section 217(1) of the Constitution. The debarment of contractors should furthermore comply with the Promotion of Administrative Justice Act (Paja),<sup>4</sup> which provides for the protection of tenderers who participate in government procurement procedures.

First, attention will be given to the legislation dealing with the rejection of tenders for the non-payment of taxes. In doing so, the focus will be on legislation that applies to national and provincial government and legislation that applies to local government. Next, attention will be given to the debarment of contractors. A distinction will be drawn between debarment on the ground of unsatisfactory contractual performance and debarment on the ground of fraud or corruption. An overview will be given of the different legislation dealing with debarment, and a distinction will be drawn between legislation that applies to national and provincial government and legislation that applies to local government. A critique will then be offered of such legislation. Finally, attention will be given to the debarment of contractors and the concept of 'administrative action' as provided for in section 33 of the Constitution and Paja.

## 2 REJECTION FOR THE NON-PAYMENT OF TAXES

### 2.1 Legislation

As noted above,<sup>5</sup> to ensure the attainment of the best value for money in the procurement process, it is important for competition to be sufficiently wide: the aim should be to attract the biggest possible pool of competitors. The rejection or disregard of tenders clearly has the effect of reducing the pool of competitors who participate in government procurement procedures. It is important, therefore, for strict rules to govern the rejection or disregard of tenders: an organ of state should have good reason for refusing to consider a particular tender(s). At all three levels of government, provision is made for the rejection or disregard of tenders.

At national and provincial government level, the Regulations to the Public Finance Management Act (PFMA)<sup>6</sup> provide that an accounting officer<sup>7</sup> or accounting authority<sup>8</sup> must reject the tender of a tenderer who fails to

4 3 of 2000

5 Par 1.

6 Act 1 of 1999, as amended by Act 29 of 1999. See the National Treasury: Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities Issued in terms of the Public Finance Management Act, 1999, *Government Gazette* No. 273 (S. 15 March 2005 - hereafter the PFMA Regulations.

7 The PFMA defines an accounting officer in s 1 as 'a person mentioned in section 36'. Section 36, in turn, provides that all departments and constitutional institutions must have accounting officers. In the case of departments, the head of the department is the accounting officer, and in the case of constitutional institutions, the chief executive officer is the accounting officer. In exceptional circumstances, the National Treasury may instruct that a person other than the head of department or chief executive officer be the accounting officer.

8 The PFMA defines an accounting authority in s 1 as 'a body or person mentioned in section 49'. Section 49, in turn, provides that every public entity must have an authority

[continued on next page]

provide written proof from the South African Revenue Service (SARS) that it has no outstanding tax obligations or that it has made arrangements to pay outstanding taxes.<sup>9</sup> At local government level, on the other hand, the Supply Chain Management Regulations to the Local Government, Municipal Finance Management Act (MFMA)<sup>10</sup> provide that a supply chain management policy (SCMP) must enable an accounting officer<sup>11</sup> to reject any tender from a tenderer whose municipal rates and taxes and municipal service charges are in arrears for more than three months.<sup>12</sup>

## 2.2 Evaluation

The different legislation referred to above clearly aims to ensure compliance with the principles of competitiveness and cost-effectiveness.<sup>13</sup> From a cost-effectiveness point of view, in particular, it can safely be assumed that a contractor who is unable or unwilling to pay his or her taxes is unlikely to render satisfactory performance under a contract and is likely to cost an organ of state more in the long run. Contractors who do not pay their taxes also have an unfair competitive advantage over contractors who do pay their taxes because they are able to submit lower tenders. Thus, the relevant provisions in the PFMA Regulations and the MFMA SCM Regulations serving as revenue collecting measures also ensure compliance with the principles of competitiveness, fairness and cost-effectiveness. They further ensure that organs of state are not perceived

that is accountable for the purposes of the PFMA. If a public entity has a board or other controlling body, such board or controlling body is the accounting authority, and if a public entity does not have a controlling body, the chief executive officer or other person in charge is the accounting authority. The National Treasury may also in exceptional circumstances instruct that another functionary of the public entity serve as the accounting authority.

- 9 Regulation 16A9 1(d) The National Treasury, Government Procurement General Conditions of Contract (hereafter the GCC) – available at <http://www.treasury.gov.za/showpfma.htm>, use the search engine, click on 'Chief Directorate, Norms and Standards' and then on 'Annexure A' (confirmed access, 25 January 2006) – also provide that an organ of state must not contract with a tenderer whose tax matters are not in order. The organ of state must be supplied with an original tax clearance certificate issued by SARS (clause 32.5). See also National Treasury, Supply Chain Management Office, Practice Note Number SCM 1 of 2006 'Tax Clearance Certificates' par 1.5 and SBD 2 'Tax Clearance Certificate Requirements' – available at <http://www.treasury.gov.za/showpfma.htm>, click on 'Treasury Practice Notes' and then on 'Supply Chain Management Practice Notes' (confirmed access, 25 January 2006).
- 10 Act 56 of 2003. See the Local Government, Municipal Finance Management Act, 2003, Municipal Supply Chain Management Regulations, *Government Gazette* No. 27636, 30 May 2005 – hereafter the MFMA SCM Regulations.
- 11 Section 111 of the MFMA provides that an accounting officer for a municipality 'means the municipal official referred to in section 60' and that the accounting officer for a municipal entity 'means the official of the entity referred to in section 93' and 'includes a person acting as the accounting officer'. Section 60 provides that '[t]he municipal manager of a municipality is the accounting officer of the municipality for the purposes of [the MFMA]', and s 93 provides that '[t]he chief executive officer of a municipal entity appointed in terms of section 93] of the Municipal Systems Act is the accounting officer of the entity'.
- 12 Regulation 58(1)(d)(i).
- 13 See s 217(1) of the Constitution.

by the general public as giving support to those who fail to pay their taxes which, in turn, enhances the integrity of the government procurement process.<sup>14</sup> On a critical note, however, it is submitted that provision should be made for the exclusion of contractors also on the ground of bankruptcy, insolvency or winding-up.<sup>15</sup> These are 'obvious threat[s]' to the ability and continued ability of a contractor to render satisfactory performance under a government contract.<sup>16</sup>

### 3 DEBARMENT<sup>17</sup>

#### 3.1 General

The debarment of a contractor is not the same as the disregard or rejection of a tender, though the consequences are similar. Debarment means that a contractor is excluded or barred from future participation in all government contract awards, whereas the disregard or rejection of a tender, particularly for the non-payment of taxes,<sup>18</sup> generally relates to a particular occasion. In the latter instance (the rejection of a tender), for example, a tender could on a specific occasion be rejected because the contractor's taxes are not fully paid, whereas on a different occasion the contractor's tender may be considered because its taxes are fully paid. The rejection of a tender for the non-payment of taxes can therefore be said to be a once-off decision which is dependent on the circumstances of the particular case. With debarment, however, a contractor's name is blacklisted or removed from an organ of state's list of approved contractors, and such removal is for an extended period of time. A contractor is,

14 Arrowsmith S *The law of public and utilities procurement* (2005) par 12.38. See also the European Community's new public procurement directives. Article 45(2)(f) of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Public Sector Directive) provides for the exclusion of contractors who have not paid their taxes – (2004) *Official Journal of the European Union* L 134/114. The same exclusionary rule applies under Art 54 of Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the Utilities Directive) – (2004) *Official Journal of the European Union* L 134/11.

15 See generally Arrowsmith (fn 14 above) par 12.35.

16 *Ibid.*

17 Debarment is also sometimes loosely referred to as 'blacklisting', 'exclusion' or 'suspension'. Strictly speaking, however, suspension (in particular) is different from debarment because, unlike debarment, suspension is of a temporary nature. On debarment generally, see Arrowsmith (fn 14 above) pars 12.31–12.42. For literature on debarment and suspension in the United States, see Schooner SL 'The paper tiger surs: Rethinking suspension and debarment' (2004) 5 *Public Procurement Law Review* 211–217; Brian D 'Contractor debarment and suspension: A broken system' (2004) 5 *Public Procurement Law Review* 235–239; Madsen M 'The government's debarment process: Out-of-step with current ethical standards' (2004) 5 *Public Procurement Law Review* 252–254; Shaw SA 'Access to information. The key challenge to a credible suspension and debarment programme' (2004) 5 *Public Procurement Law Review* 230–234; Bednar RJ 'Emerging issues in suspension and debarment. Some observations from an experienced head' (2004) 5 *Public Procurement Law Review* 223–229.

18 See par 2.1 *supra*.

in other words, excluded from participating in all government procurement procedures.<sup>19</sup>

The debarment of contractors clearly reduces the pool of competitors who participate in government procurement procedures and accordingly has the potential to defeat the principles of competitiveness and cost-effectiveness.<sup>20</sup> The debarment of a contractor may also result in non-compliance with the principle of fairness<sup>21</sup> if an organ of state does not follow proper procedures, for example, by allowing the contractor an opportunity to be heard.<sup>22</sup> At all three levels of government, legislation is in place which makes provision for the debarment of contractors. First, attention will be given to the debarment of contractors on the ground of non-performance or unsatisfactory performance under a previous government contract. Thereafter, attention will be given to the debarment of contractors on the ground of fraud or corruption. In both instances (non-performance and fraud or corruption), an overview will first be given of the different legislation which makes provision for debarment, and a critique will then be offered of such legislation

## 3.2 Debarment for unsatisfactory contractual performance

### 3.2.1 Legislation

At national and provincial government level, the PFMA Regulations provide that an accounting officer or authority 'may disregard the bid of any bidder if that bidder, or any of its directors . . . have failed to perform on any previous contract'.<sup>23</sup> At local government level, on the other hand, the MFMA SCM Regulations provide that an accounting officer must be able to reject the tender of a tenderer 'who during the last five years has failed to perform satisfactorily on a previous contract with the municipality or municipal entity or any other organ of state after written notice was given to that [tenderer] that performance was unsatisfactory'.<sup>24</sup> An accounting officer must also be able to reject the tender of any tenderer if that tenderer, or any of its directors 'has willfully neglected, reneged on or failed

19 In the case of the debarment of contractors on the ground of non-performance or unsatisfactory performance under a previous government contract (see par 3.2 below), it does not appear as though such contractors are, strictly speaking, 'blacklisted'. Contractors who have rendered unsatisfactory contractual performance in the past are, however, prevented by legislation from obtaining contracts for an extended period of time after such unsatisfactory performance as will be seen below (par 3.2.1). Their exclusion from government contract awards can therefore be regarded as falling within the general meaning of 'debarment'.

20 Section 217(1) of the Constitution.

21 *Ibid*.

22 See par 4 below, where it is argued that the decision to debar a contractor from future government contract awards amounts to 'administrative action' within the meaning of s 55 of the Constitution and Paja, thus entitling the affected contractor to, *inter alia*, an opportunity to be heard.

23 Regulation 16A9 2(a)(m).

24 Regulation 38(1)(d)(i).

to comply with any government, municipal or other public sector contract during the past five years'.<sup>25</sup>

### 3.2.2 Evaluation

The legislation discussed above clearly aims to ensure compliance with the principles of competitiveness and cost-effectiveness.<sup>26</sup> From a cost-effectiveness point of view, in particular, a failure on the part of a contractor to render satisfactory performance under a previous government contract leads to the logical assumption that the contractor is unlikely to render satisfactory contractual performance in future. The debarment of contractors on the ground of unsatisfactory performance thus ensures that organs of state conduct business with only responsible and reliable contractors which, in turn, ensures the efficient use of taxpayers' money.<sup>27</sup>

To ensure compliance with the principle of fairness (and competitiveness), however, it is important to guard against the unfair treatment of contractors. It appears that the rules that apply to national and provincial government are stricter than the rules that apply to local government. At national and provincial government level, no time period is attached to the failure on the part of a contractor to render satisfactory performance under a previous contract to justify the rejection of its tender – the PFMA Regulations simply refer to the failure to perform on 'any previous contract'.<sup>28</sup> A contractor's tender could therefore, on a literal interpretation, be rejected, regardless of when or how long ago it failed to perform under a previous contract. A contractor's tender could, for example, be rejected because twenty years ago it failed to render satisfactory performance under a contract. This would clearly be unduly harsh. It is, furthermore, not necessary for a contractor to have been at fault in the non-performance of a previously awarded contract to justify the rejection of its tender – the PFMA Regulations simply refer to 'the [failure] to perform' on a previous contract.<sup>29</sup> A contractor's tender could thus (again), if read literally, be rejected even if its failure to perform under a previous contract was not due to its own fault but as a result of, for example, *force majeure*.<sup>30</sup>

### 3.2.3 Submission

It is submitted that the rules that apply to national and provincial government for debarment on the ground of unsatisfactory contractual performance

25 Regulation 38(1)(g)(iii).

26 Section 217(1) of the Constitution

27 See also the United States Federal Acquisition Regulations (FAR), in particular FAR 9.496-2(b)(1)(i), which provides for debarment on the ground of 'willful failure to perform' under one or more contracts, '[a] history of failure to perform' or 'unsatisfactory performance of, one or more contracts'

28 Regulation 16A9.2(a)(iii) (emphasis added)

29 Regulation 16A9.2(a)(iii) (emphasis added).

30 The GCC (clause 1.12) defines *force majeure* as 'an event beyond the control of the [contractor] and not involving the [contractor's] fault or negligence and not foreseeable. Such events may include, but are not restricted to, acts of the [organ of state] in its sovereign capacity, wars or revolutions, fires, floods, epidemics, quarantine restrictions and freight embargoes'.

may, on a literal interpretation, unduly exclude certain contractors from participating in government procurement procedures and so defeat the principles of fairness, competitiveness and cost-effectiveness.<sup>31</sup> Rejecting a contractor's tender because of a mere '[failure] to perform'<sup>32</sup> on 'any previous contract'<sup>33</sup> may lead to unfair treatment and unduly limit competition. A contractor's tender should be rejected only if the failure to perform was 'willful'. The contractor must, as is the case at local government level, have 'willfully neglected, reneged on or failed to comply with' a government contract.<sup>34</sup> It is furthermore important for a time period to be attached to the non-performance or unsatisfactory performance by a contractor on a previous contract. Here, too, the time period may be similar to the period that applies to local government (i.e. the preceding five years)<sup>35</sup>

It is thus proposed that it is important for the wording of the PFMA Regulations, in particular Regulation 16A9.2(a)(iii), to be interpreted in accordance with the Constitution, particularly for present purposes the principles of fairness, competitiveness and cost-effectiveness in section 217(1) of the Constitution.<sup>36</sup> Section 6(2)(h) of Paja similarly requires reasonable administrative action on the part of state organs. Alternatively, Regulation 16A9.2(a)(iii) should be amended in such a way that it is more in tune with the wording of Regulation 38(1)(g)(iii) of the MFMA SCM Regulations. Doing so would to a large extent ensure that the rejection of a contractor's tender for non-performance or unsatisfactory performance under a previous contract complies with the principles of fairness, competitiveness and cost-effectiveness.<sup>37</sup>

### 3.3 Debarment on the ground of fraud or corruption

#### 3.3.1 General

The word 'corruption' has been afforded a number of dictionary meanings.<sup>38</sup> More relevant for present purposes, corruption has been described as –

31 Section 217(1) of the Constitution

32 Regulation 16A9.2(a)(iii) (emphasis added)

33 Regulation 16A9.2(a)(iii) (emphasis added)

34 Regulation 38(1)(g)(iii) of the MFMA SCM Regulations

35 Regulation 38(1)(g)(iii) of the MFMA SCM Regulations

36 See s 39(2) of the Constitution which provides that '[w]hen interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. In this regard, see s 33 of the Constitution which generally deals with 'just administrative action', i.e. administrative action that is, *inter alia*, lawful, reasonable and procedurally fair. As expounded upon below (par 4), the courts have held that the conduct of the government procurement process, the evaluation of tenders and the award of a tender to a successful tenderer are all forms of 'administrative action' within the meaning of s 33 of the Constitution (and Paja). Thus, tenderers are entitled to procurement procedures and decisions that are, *inter alia*, lawful, reasonable and procedurally fair. See further par 4 below on the debarment of contractors and the concept of 'administrative action'.

37 Section 217(1) of the Constitution

38 See e.g. Burton WC *Burton's legal thesaurus* 3 ed (1998) 131

the abuse of entrusted power for personal gain or for the benefit of a group to which one owes allegiance. It involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves or those close to them by the misuse of the public power entrusted to them. [The following elements must furthermore be present for corruption to take place, i.e.] a public official, discretionary power, a misuse of that public power by the public official and a benefit (whether in money or in kind) resulting to that official.<sup>39</sup>

In the government procurement context, corruption can take a number of forms. Corruption on the part of tenderers may take the form of, *inter alia*, collusion in the submission of tenders (also referred to as collusive tendering arrangements); influencing the work of evaluators; inciting breaks of confidentiality; the offering of bribes; over- and under-invoicing; influencing the choice of procurement method or technical standards; 'fronting', i.e. where black people are signed up as fictitious shareholders in essentially 'white' companies;<sup>40</sup> and/or inaccurate disclosures in the submission of tenders.<sup>41</sup> Corruption on the part of public officials, on the other hand, may take the form of, *inter alia*, the preparation of slanted tender specifications; the approval of inappropriate tenders; tampering with tenders; breaching confidentiality; the taking of bribes; the use of position to obtain a private benefit; and/or the lax administration of a contract after its conclusion.<sup>42</sup>

Whichever form corruption takes, corrupt practices are generally regarded as immoral and improper in terms of good procurement practice. It is extremely damaging to the procurement process because it reduces the confidence that honest contractors and the public at large have in the government. Corruption leads to the slackening of competition for government contracts and impacts negatively on the government's ability to obtain the best possible value for money. Corruption also impacts negatively on the attainment of other objectives in the procurement process, for example, policy promotion and the fair treatment of contractors.<sup>43</sup> It is, therefore, not strange for legislation to make provision for the debarment of contractors from government contract awards on the ground of corruption.

### 3.3.2 Overview of legislation

The primary legislation that makes provision for the debarment of contractors on the ground of fraud or corruption is the Prevention and

39 Stapenhurst F and Langseth P 'The role of the public administration in fighting corruption' (1997) 10(5) *International Journal of Public Sector Management* 311-330, 313 (footnotes omitted). See also Nye JS 'Corruption and political development: A cost benefit analysis' (1967) 61 *American Political Science Review* 417, 419.

40 Also referred to as 'window dressing' or 'tokenism'.

41 See generally the Ministry of Finance and Public Works, Green Paper on Public Sector Procurement Reform in South Africa, *Government Gazette* No. 17928, 14 April 1997 - clause 4.1.1.

42 *Ibid*

43 On the use of government procurement as a policy tool in South Africa, see generally Bolton P 'The use of government procurement as an instrument of policy' (2004) 121(3) *SALJ* 619; Bolton P *The legal regulation of government procurement in South Africa* (unpublished LL.D thesis, University of the Western Cape, 2005) ch 6. See also ch 5 on the fair treatment of contractors who participate in government procurement procedures.



Combating of Corrupt Activities Act (Corruption Act),<sup>44</sup> which applies to all three levels of government. The Act makes provision for offences in respect of corrupt activities relating to contracts,<sup>45</sup> and offences in respect of corrupt activities relating to the procuring and withdrawal of tenders.<sup>46</sup> Section 28(1)(a), in particular, provides that a court, when convicting a person of an offence in respect of corrupt activities relating to contracts or corrupt activities relating to the procuring and withdrawal of tenders 'may', in addition to imposing any sentence contemplated in section 26, order that the particulars of the person, the conviction and sentence, and any other order of the court consequent thereon, be endorsed on the Register for Tender Defaulters. If the person convicted is an enterprise, the court may also order that –

- (i) the particulars of that enterprise,
  - (ii) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned,
  - (iii) the conviction, sentence and any other order of the court consequent thereupon,
- be endorsed on the Register<sup>47</sup>

The court may, furthermore, order the endorsement on the Register of –

- (i) any *other* enterprise owned or controlled by the person so convicted, or
- (ii) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over such other enterprise, and which –
  - (aa) enterprise, partner, manager, director or other person was involved in the offence concerned; or
  - (bb) partner, manager, director or other person knew or ought reasonably to have known or suspected that such other enterprise was involved in the offence concerned.<sup>48</sup>

An endorsement on the Register for Tender Defaulters also applies, unless the court directs otherwise, to every enterprise which will be established in the future and which will be wholly or partly controlled or owned by the convicted or endorsed person or enterprise.<sup>49</sup> The Registrar must also endorse the Register accordingly.<sup>50</sup> Chapter 6 of the Corruption Act makes provision for the establishment of the Register for Tender Defaulters, the designation of a Registrar, the powers, duties and functions of the Registrar, access to the Register by the public, and regulations pertaining to the

44 Act 12 of 2004

45 Section 12

46 Section 13

47 Section 28(1)(b)

48 Section 28(1)(c) (emphasis added)

49 Section 28(1)(d)

50 *Ibid.*

Register. The National Treasury may decide on the period of endorsement of offenders in the Register, but such period may not be less than five years or more than ten years.<sup>51</sup> During the period of endorsement, any offer tendered by the relevant party must be ignored or disqualified by the National Treasury, purchasing authority or government department concerned.<sup>52</sup>

The Regulations Regarding the Register for Tender Defaulters (as required by chapter 6 of the Corruption Act) have been promulgated.<sup>53</sup> Provision is made for the inclusion of the particulars in the Register not only of the actual person(s) or enterprise(s) convicted for fraud or corruption, but also the 'names of persons identified by the court of law to have been implicated by the conviction' as well as 'enterprises linked to the convicted enterprise'.<sup>54</sup> Notice of entry into the Register must be given to affected parties after such entry has been made (i.e. 'within 14 days after such entry').<sup>55</sup> The particulars of persons or enterprises entered into the Register 'must' furthermore be retained in the Register for 20 years,<sup>56</sup> this being the period of endorsement referred to in section 28(1)(a) of the Corruption Act, and the Register must be available for public access.<sup>57</sup>

51 Section 28(3)(a)(ii).

52 Section 28(3)(a)(iii). The Minister of Finance has also, in terms of s 13 of the State Tender Board Act 86 of 1968, amended Regulation 2 of the State Tender Board Regulations (published in *Government Gazette* No. 11328, 1 July 1988 as set out in the Schedule) by making provision for penalties for contracts concluded as a result of corruption. Specific provision is made for the debarment of contractors. Regulation 3(5)(a)(iv) provides, *inter alia*, that 'the Board may, in addition to any other legal remedies it may have, resolve that no offer from the person concerned should be considered during such period as the Board may stipulate'. Regulation 3(5)(b), however, provides that '[t]he Board may at any time vary or rescind any restriction'. The Preferential Procurement Regulations, Government Notice R725, *Government Gazette* No. 22549, 10 August 2001 (applicable to all three levels of government) also make provision for penalties for the fraudulent attainment of preferences and/or the non-attainment of specified goals in the performance of a contract. Regulation 15(2)(d) provides that an organ of state may 'restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years'. The Regulations are currently (25 January 2006) in the process of being redrafted – see the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000): Draft Preferential Procurement Regulations, *Government Gazette* No. 26863, 4 October 2004.

53 Regulations Regarding the Register for Tender Defaulters, *Government Gazette* No. 27365, 11 March 2005.

54 Regulations 1(1)(g) and 1(1)(h). See also United States FAR 9.406-5, which provides for a similar scope for debarment.

55 Regulation 2.

56 Regulation 3.

57 Regulation 5. The International Labour Organisation (ILO) Labour Clauses (Public Contracts) Convention, 1949 (No. 94) also makes provision for the debarment of contractors. Article 5 I provides that '[a]dequate sanctions shall be applied, by the withholding of contracts or otherwise, for failure to observe and apply the provisions of labour clauses in public contracts'. See also Turpin C (*British government and the constitution: Text, cases and materials*) (1990) 60, 414, where the author points out that during 1975 and 1978 the British Government used its contracting power in support of counter-inflation policy on wages. All contractors who paid wages higher than those approved by the Government were blacklisted and denied the award of government contracts. Blacklisted firms could also not challenge the Government's actions in the courts because their legal rights had not been infringed – contractors were not regarded as having a right to be awarded government contracts.

The PFMA Regulations (applicable to national and provincial government) reiterate the provisions of the Corruption Act pertaining to debarment and provide that a tender may not be awarded to a contractor that is 'listed' (i.e. whose name is, as stated in the Corruption Act, 'endorsed') on the National Treasury's database as a company or person prohibited from doing business with the public sector.<sup>58</sup> An accounting officer or accounting authority must also 'reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for the *particular contract*'.<sup>59</sup> An accounting officer or authority 'may' furthermore '(a) disregard the bid of any bidder if that bidder, or any of its directors (i) have abused the institution's supply chain management system; [or] (ii) have committed fraud or any other improper conduct in relation to such system; [and] (b) must inform the relevant treasury of any action taken in terms of paragraph (a)'.<sup>60</sup>

The MFMA SCM Regulations (applicable to local government) further provide that an SCMP 'must disallow the listing of any prospective provider whose name appears on the National Treasury's database (i.e. in the Register for Tender Defaulters) as a person prohibited from doing business with the public sector'.<sup>61</sup> An SCMP must also enable an accounting officer to reject a recommendation for the award of a contract to a tenderer who 'has committed a corrupt or fraudulent act in competing for the *particular contract*'.<sup>62</sup> An accounting officer must furthermore be able to reject the tender of any tenderer if that tenderer, or any of its directors –

- (i) has abused the supply chain management system of the municipality or municipal entity or has committed any improper conduct in relation to such system,
- (ii) has been convicted for fraud or corruption during the past five years; or . . .

58 Regulation 16A9 1(c)

59 Regulation 16A9 1(c) (emphasis added).

60 Regulation 16A9 2 Regulation 3(5)(a) of the State Tender Board Act 86 of 1968. Amendment to Regulations of the State Tender Board Act in terms of s 13 also provides that if the Tender Board is of the opinion that a person '(iv) who has concluded an agreement referred to in section 4(1)(a) of the Act, has promised, offered or given a bribe, or has acted in respect thereof in a fraudulent manner or in bad faith or in any other improper manner, the Board may, in addition to any other legal remedies it may have, resolve that no offer from the person concerned should be considered during such period as the Board may stipulate'. See also par 47 of the State Tender Board General Conditions and Procedures (ST 36)

61 Regulation 14(1)(c) A contractor's name could arguably be removed from a list of accredited prospective providers also due to a failure to respond to tender invitations or a failure to maintain the prescribed standards or conditions laid down for inclusion on the particular list. See Turpin *C Government procurement and contracts* (1989) 240. The removal of a contractor from a list would, however, be appropriate only if there are many suppliers. Thus, the more suppliers there are of the goods or services needed by an organ of state, the easier it would be to obtain the goods or services at reasonable cost elsewhere – the removal of a specific contractor would therefore give rise to few difficulties (if any). On the other hand, the fewer suppliers there are of the goods or services needed by an organ of state, the more difficult it would be to obtain the goods or services at reasonable cost elsewhere – the removal of a specific contractor is therefore likely to give rise to more difficulties.

62 Regulation 38(1)(e) (emphasis added)

(iv) has been listed in the Register for Tender Defaulters in terms of section 29 of the [Corruption Act].<sup>63</sup>

The White Paper on Municipal Service Partnerships<sup>64</sup> similarly proposed (in 2000) that '[t]he proposal of any bidder that has engaged in a corrupt practice must automatically be rejected'. Also, '[a]ny contract awarded as a result of corrupt procurement processes must be declared void *ab initio*. In addition, a bidder that has engaged in a corrupt practice in a government procurement process should be barred (temporarily or permanently) from bidding in other government procurement processes'.<sup>65</sup>

### 3.3.3 Evaluation

Fraud and corruption defeats compliance with all the principles in section 217(1) of the Constitution.<sup>66</sup> In principle, therefore, the rules regarding the debarment of contractors on the basis of fraud or corruption are not improper if effect is to be given to section 217(1). The exclusion of contractors on the ground of fraud or corruption also enhances the integrity of the government procurement process – organs of state are prohibited from associating themselves with convicted contractors. Contractors involved in illegal activities are thus not supported, and there is support for government policies embodied in criminal legislation.<sup>67</sup> The existence of a Register for Tender Defaulters further alleviates the need for organs of state to spend time and effort reviewing the capability of debarred contractors – they can simply exclude debarred contractors from consideration which, in turn, leads to cost-savings.<sup>68</sup> Criticism can, however, be leveled against the legislation dealing with debarment on the ground of fraud or corruption, on a number of issues.

63 Regulation 38(1)(g) Article 15 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services, 1994 also provides that '[a] procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings'.

64 Department of Provincial and Local Government. White Paper on Municipal Service Partnerships, General Notice 1689 of 2000, *Government Gazette* Vol 418, no 21126, 26 April 2000 (clause 4.9).

65 *Ibid.* Clause 17 of the City of Cape Town, Contracts for Services: Special Conditions of Tender available at <http://www.capetown.gov.za/tenders/pdf/Special.pdf> (confirmed access: 25 January 2006) also provides the following: 'If Tenderers . . . or any person employed by them, are found to have either directly or indirectly offered, promised or given to any Councillor or person in the employ of the Council, any commission, gratuity, gift or other consideration, the Council shall have the right summarily and without recourse to law and without prejudice to any other legal remedy which it may have in regard to any loss and/or additional cost or expenses, to *disqualify* the Tender . . . without paying any compensation to the aforesaid Tenderer' (emphasis added).

66 See par 3.3.1 *supra*

67 See also Piselli E 'The scope for excluding providers who have committed criminal offences under the EU procurement directives' (2000) 6 *Public Procurement Law Review* 267–268.

68 On suspension and debarment as efficiency measures, see Kramer RE 'Awarding contracts to suspended and debarred firms: Are stricter rules necessary?' (2005) 34(5) *Public Contract Law Journal* 539, 550

**(a) The endorsement period of 20 years**

The Regulations Regarding the Register for Tender Defaulters may have undue consequences. The particulars of persons or enterprises entered into the Register must, in terms of the Regulations, remain in the Register for 20 years.<sup>69</sup> This is in conflict with section 28(3)(a)(ii) of the Corruption Act, which provides that once the Register has been endorsed in accordance with a court order,

the National Treasury must determine the period (*which may not be less than five years or more than 10 years*) for which the particulars of the convicted person or the enterprise must remain in the Register.<sup>70</sup>

Regulation 3 is clearly invalid because it is in direct conflict with section 28(3)(a)(ii) of the Corruption Act. It is submitted that the Regulation should be rephrased to state that the particulars of persons or enterprises must remain in the Register for a period of five years. This can be argued to be a reasonable period of time, and is also in line with the argument that the underlying policy of the debarment of contractors should not be the punishment of contractors (debarment is, in any event, in *addition* to any sentence a court may impose in terms of section 26 of the Corruption Act<sup>71</sup>) but rather the protection of the state against unscrupulous and unethical contractors. It is submitted that an endorsement period of 20 years is unreasonably long – it has as its primary aim the punishment of contractors and not the protection of the state against the risk of unethical contractors. Government procurement is business, and the debarment of a contractor should be viewed as a business decision. A debarment period of 20 years not only unduly punishes convicted contractors but also unduly limits competition and inhibits organs of state from obtaining goods and services at the best possible price.<sup>72</sup>

It is, furthermore, important for provision to be made for contractors to apply to the National Treasury for the reduction of the period or extent of debarment. Such application should, however, be accompanied by supporting documentation, for example, '(1) [n]ewly discovered material evidence; (2) [r]eversal of the conviction or civil judgment upon which the debarment was based; (3) [b]ona fide change in ownership or management; (4)

69 Regulation 3

70 Emphasis added. See also Regulation 1(1)(k) of the Regulations regarding the Register for Tender Defaulters which provides that the 'period of endorsement contemplated in section 28(3)(a)(ii) of the [Corruption] Act' must be entered in the Register for Tender Defaulters (emphasis added)

71 See s 28(1)(a) of the Corruption Act and par 3.3.2 *supra*

72 See United States FAR 9.406-4(a)(1), which provides that the period of debarment should generally not exceed three years. For violations of provisions contained in the Drug-Free Workplace Act of 1988, the period of debarment may not exceed five years (FAR 9.406-4(a)(1)(i)). Under European Community law, no time period is stipulated for the debarment of contractors. The period of debarment thus falls within the discretion of member states. See, in particular, Art 45 of the Public Sector Directive. See also Art 54 of the Unlives Directive. See further the unpublished draft paper of Williams S 'The mandatory exclusions for corruption in the new EC procurement directives' 16 on file with the author

[e]limination of other causes for which the debarment was imposed; or (5) [o]ther reasons the [National Treasury] deems appropriate'.<sup>73</sup>

Thus, even though debarment inevitably has a punitive function (it has adverse financial implications for a contractor and often detrimentally affects a contractor's reputation, sometimes to the extent that it is unable to obtain contracts from other sectors), the primary function of debarment should be to protect organs of state against unnecessary risk; the ultimate aim should be to protect the public purse.<sup>74</sup> A debarred contractor should furthermore, in principle, be allowed to continue performance under an existing contract. A contract with a debarred contractor should, as is provided for in the Corruption Act, be terminated only after the National Treasury has taken account of a number of factors, such factors generally being aimed at ensuring that termination does not result in undue loss being suffered by the government party.<sup>75</sup>

### (b) The court's discretion to order endorsement

The Corruption Act, by the use of the word 'may',<sup>76</sup> affords the courts discretion to order the blacklisting of convicted persons or enterprises.<sup>77</sup> In light of the serious nature and consequences of debarment,<sup>78</sup> this is to be commended.<sup>79</sup> The Act (and the Regulations Regarding the Register for Tender Defaulters) does not, however, offer guidance on the factors that a court should take account of when exercising the discretion to debar. It is submitted that the public interest should guide the courts in exercising their discretion. The primary aim of the decision to debar should not, as noted above, be the punishment of contractors, but rather the protection of the state against risk. A court should determine in each case whether the fraudulent or corrupt acts of a contractor warrant limiting competition to fewer potential contractors with whom the state may contract. As noted by Kramer,<sup>80</sup> the question to be asked is: 'Can we trust this contractor to provide what the government needs?' and not 'Is this contractor a bad contractor?' Thus,

[t]he determination whether to suspend or debar a contractor to protect the public interest is . . . a business decision that requires a weighing of the risks and benefits to the Government of contracting with an ethically questionable firm . . . The fact that a [court] has determined that, in general, the risks of doing business with a particular firm outweigh the benefits does not mean that specific circumstances cannot tip the balance.<sup>81</sup>

73 United States FAR 9.406-4(c). See also par 3.3.3(c) below on waivers during the period of debarment.

74 See further Kramer (fn 68 above) 539, 543-545; Zucker JS 'The Boeing suspension: Has increased consolidation tied the United States Department of Defense's hands' (2004) 5 *Public Procurement Law Review* 260 276, 260. See also United States FAR 9.402(b), which highlights the non-punitive nature of debarment

75 Section 28(1)(3)(i)(aa) of the Corruption Act. See also United States FAR 9.405-1.

76 See ss 28(1)(a)-28(1)(c)

77 See also United States FAR 9.402(a) which provides that debarment is a discretionary action.

78 See par 3.3.1 *supra*

79 See United States FAR 9.402(b).

80 Fn 68 above, 544.

81 *Ibid*, 545.

Possible mitigating factors that a court may take account of before ordering the endorsement of the particulars of an offender on the Register for Tender Defaulters include the following:

- (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.
- (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.
- (3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the [court].
- (4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.
- (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.
- (6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.
- (7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.
- (8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programmes.
- (9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.
- (10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programmes to prevent recurrence.<sup>82</sup>

A consideration of the above factors will ensure that an order for the endorsement of the particulars of a convicted offender on the Register for Tender Defaulters is in the public interest and that there is compliance with the principles of fairness, competitiveness and cost-effectiveness in section 217(1) of the Constitution. A contextual approach should thus be adopted by the courts when they are faced with debarment decisions.

**(c) The absence of waiver during the period of endorsement**

No provision is made for the waiver of the power of state organs to debar during the period of debarment (and this also applies to debarment on the ground of unsatisfactory performance under a previous contract).<sup>83</sup> In light of the argument made above (i.e. that debarment should not be aimed at punishing contractors but rather to protect the public purse), provision should be made for the possibility of waiver during the period of debarment.<sup>84</sup> Thus, provision could be made for waiver in exceptional circumstances

82 United States FAR 9.406-1(a). See also Zuckert (fn 74 above): 265–264.

83 See par 3.2 *supra*.

84 See, for example, the United States FAR, which makes provision for this. See, in particular, FAR 9.405(a).

when a (new) contract may be awarded to a contractor even though it has been debarred from government contract awards. It must be cautioned, however, that clear guidelines should be laid down in this regard. As is the position in the United States, there should be 'compelling reasons' before a contract may be awarded to a debarred contractor.<sup>85</sup> Examples of such 'compelling reasons' may include national defence, urgency, the unique capability of a debarred contractor, or circumstances where 'failure to contract with the debarred or suspended contractor would seriously harm [an organ of state's] programs and prevent accomplishment of mission requirements'.<sup>86</sup>

#### (d) The position regarding subcontractors

The Corruption Act and the Regulations Regarding the Register for Tender Defaulters do not expressly refer to the position regarding subcontractors in the procurement process. Should a main contractor, for example, be excluded if it proposes to make use of a debarred subcontractor? It is submitted that a main contractor should not be excluded from government contract awards on the basis that its proposed subcontractor's particulars are endorsed on the Register for Tender Defaulters. As noted by Shannon,<sup>87</sup>

[u]nless the subcontract requires government approval (some direct contact between the government and the affected concern), the party dealing with the government, rather than [sic] the agency itself, should be responsible for the business integrity of any excluded subcontracting party. Once the government has made a determination that an eligible firm is responsible and worthy of obtaining a government contract, no further concern about that firm's lower tier arrangements should remain. At that point, the [government] agency has no direct relationship with the tainted party, and arguably the government no longer needs the same level of protection that it does when privity exists between the agency and the excluded person or firm. If the tainted party plays an excessive role in the overall operation of the contract or program, however, the government should exercise its discretion to decline to enter into the prime contract.<sup>88</sup>

Thus, only if there will be direct contact between the government and the subcontractor, in the sense that the proposed subcontract is subject to government consent, or the debarred subcontractor plays a disproportionate role in the overall operation of the contract to be awarded, should the main contractor be denied the contract on the ground that it lacks the necessary ability to render performance under the contract.<sup>89</sup>

85 FAR 9.405(a)

86 Kramer (fn 68 above) 541-542 (footnotes omitted). See also Bednar (fn 17 above) 228, who notes that '[o]nce the wrongdoing has been revealed and the corporation is debarred, the likelihood of immediately repeated misconduct by the same corporation is remote. At that point, there simply are too many pressure points for responsible conduct for the corporation to ignore. For example, the debarred corporation will be struggling hard to prove that remedial and corrective action has been taken and the debarment should be lifted'.

87 Shannon BD 'Debarment and suspension revisited. Fewer eggs in the basket?' (1995) 44 *Catholic University Law Review* 363, 382

88 Footnotes omitted. See also United States FAR 9.405-2.

89 See also Williams (fn 72 above) 11-12 - referring to Case C-5/97 *Ballast Nedam Groep NV v Belgium* [1997] E.C.R. I-7549, par 13.



**(e) Endorsement for conduct unrelated to public contracting**

The legislation regarding debarment on the ground of fraud or corruption makes provision only for conduct related to public contracting. Only if a contractor is convicted of an offence in relation to the government procurement process may a court order the endorsement of the particulars of the offender on the Register for Tender Defaulters.<sup>90</sup> It is submitted that thought should perhaps be given to the debarment of contractors also for conduct unrelated to public contracting. Debarment should be an option not only where a contractor has defrauded the government in the past, but also where there is evidence that a contractor committed offences in relation to, for example, non-public contracts. As noted by Shaw,<sup>91</sup> if a contractor is willing to defraud a non-government entity, it can be assumed that it will treat government entities similarly.

Thus, the application of debarment on the ground of fraud or corruption in relation to only government contracting can be said to be restrictive. It fails to take account of the fact that unethical conduct in relation to non-public contracts also impacts negatively on a contractor's responsibility in the performance of public contracts.<sup>92</sup> Conduct that could, for example, render a convicted contractor eligible for endorsement on the Register for Tender Defaulters may, as is the case in the United States, include acts such as bribery, the making of false statements, the receipt of stolen property, and offences indicating a lack of business integrity that directly and seriously affects the responsibility of a contractor.<sup>93</sup>

**(f) Endorsement of enterprises established in the future**

The Corruption Act and the Regulations Regarding the Register for Tender Defaulters should be commended for allowing the endorsement of the particulars on the Register for Tender Defaulters also of enterprises *linked* to the convicted enterprise and persons *implicated* by the conviction.<sup>94</sup> An endorsement on the Register further applies, unless the court directs otherwise, to every enterprise which *will be established in the future* and which will be wholly or partly controlled or owned by the convicted or endorsed person or enterprise.<sup>95</sup> The Registrar is further required to endorse the Register accordingly.<sup>96</sup>

90 Section 28(1)(a) of the Corruption Act – referring to ss 12 and 13 dealing with offences in respect of corrupt activities relating to contracts and corrupt activities relating to the procuring and withdrawal of tenders.

91 *Fn 17 above*, 232.

92 *Bednar (Fn 17 above)* 226–227.

93 United States FAR 9.406-2. See also FAR 9.406-2(c), which makes provision for debarment 'on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor'. See further *Bednar (Fn 17 above)* 226–227.

94 Sections 28(1)(b) and 28(1)(c) of the Corruption Act and Regulations 1(1)(g) and 1(1)(h) of the Regulations Regarding the Register for Tender Defaulters. See also United States FAR 9.406-5.

95 Section 28(1)(d) of the Corruption Act.

96 *Ibid.*

In practice, the enforcement of the above provisions may prove to be rather difficult. This will especially be the case with the endorsement of enterprises established in the future and which are owned or controlled by a convicted or endorsed person or enterprise. As a general rule, proper enforcement of the provisions will be possible only if the state is prepared and able to spend considerable amounts of money to investigate the ownership of enterprises wishing to do business with the state.<sup>97</sup> There is, furthermore, no indication of how far into the future the endorsement is intended to apply to a future enterprise which will be wholly or partly controlled or owned by the convicted or endorsed person or enterprise. It has been correctly suggested<sup>98</sup> that the endorsement of a future enterprise should take place only during the period of endorsement of the convicted or endorsed person or enterprise. It would be difficult to see the legal basis for the exclusion of a future enterprise beyond the endorsement period of the 'controlling' person or enterprise.

#### 4 DEBARMENT AND 'ADMINISTRATIVE ACTION'

The debarment of a contractor has the potential to inflict grave harm.<sup>99</sup> Many contractors are substantially dependent on the government for business. A contractor's whole business may be with the government; its equipment may have been modified entirely to meet the needs of the government. The business of a contractor may also fall in an area of government control, for example, road construction.<sup>100</sup> Where a contractor's debarment or exclusion from government contract awards is the result or consequence of a conviction for fraud or corruption in a court of law, there is generally no difficulty because the contractor will have been afforded an opportunity to be heard. The *audi alteram partem* rule would, in other words, have been complied with. Where, however, a decision is made to debar a contractor in the absence of a conviction for fraud or corruption, the debarment decision should not be taken lightly. The same applies to the decision to debar a contractor for the failure to render satisfactory contractual performance in the past.

97 In the United States, it is estimated that it costs approximately \$2 000 to investigate a 'typical applicant' for a government contract and approximately \$10 000 in more complex cases (Anechiarico F and Jacobs JB 'Purging corruption from public contracting: the "solutions" are now part of the problem' (1995) 40 *New York Law School Law Review* 143, 172 – referring to interviews conducted with Joseph DeLuca, Assistant Inspector General, New York City School Construction Authority, in New York, N.Y. on September 15, 1999 and November 18, 1991). See also Williams (fn 72 above) 12–15 who generally deals with the difficulties of excluding (debaring) 'related' persons or enterprises from government contract awards under European Community law.

98 Williams (fn 72 above) 20–21.

99 The debarment of a contractor can be equated with the remedies of dismissal and suspension in the labour law context. It is generally accepted that these remedies, particularly dismissal, are the ultimate form of workplace discipline. Various rules are therefore in place for the protection of employees. In this regard, see the Labour Relations Act 66 of 1995. See also Grogan J *Dismissal* (2002); Grogan J *Workplace law* 8 ed (2005) Part C; Du Toit *et al Labour relations law. A comprehensive guide* 4 ed (2003) ch VIII.

100 Arrowsmith S *Government procurement and judicial review* (1988) 162.

In South Africa, the administrative law of judicial review applies to government procurement procedures and decisions, defining the scope of the government's powers, the way in which such powers should be exercised and the consequences that flow from an abuse of powers.<sup>101</sup> In short, organs of state must act within the confines of their common law, constitutional law and statutory powers; organs of state may not fetter the discretion afforded to them, and persons affected by administrative decisions must be given an opportunity to be heard. In South Africa, these rules are generally regulated by Paja (i.e. the national legislation which, with the exception of sections 4 and 10, came into force on 29 November 2000 to give effect to section 33 of the Constitution). Section 33 provides as follows:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons
3. National legislation must be enacted to give effect to these rights, and must -
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.<sup>102</sup>

In brief, Paja deals with general administrative law, as opposed to particular administrative law,<sup>103</sup> laying down rules and principles that apply to and bind all levels of government (national, provincial and local). It applies to organs of state when '(i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation'.<sup>104</sup> It further applies to 'a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering

101 On the law of judicial review in South Africa, see generally De Ville JR *Judicial review of administrative action in South Africa* (2003), Hoexter C *The new constitutional & administrative law* Vol 2 (2002), Currie I and Klaaren J *The Promotion of Administrative Justice Act benchmark* (2001); Wiechers M *Administrative law* (1985)

102 Until the national legislation referred to in s 33(3) was enacted, in other words Paja, the operation of s 33 was suspended and s 24 of the 1993 Constitution effectively remained in effect. Item 23(2)(b) of Schedule 6 of the 1996 Constitution provided that s 33(1) and s 33(2) had to read as follows for the interim period: *Every person has the right to (a) lawful administrative action where any of their rights or interests is affected or threatened; (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened, (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for such action have been made public, and (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened* (emphasis original)

103 See Baxter I. *Administrative law* (1984) 2, where the author defines particular administrative law as comprising 'the legislation governing, and legal principles and policies developed in respect of specific areas of administration' (emphasis original). These include, inter alia, government procurement procedures, liquor licensing and immigration.

104 Section 1(a) of Paja

provision, which adversely affects the rights of any person and which has a direct, external legal effect'.<sup>105</sup> Paja gives powers to the courts to scrutinise the lawfulness, reasonableness, procedural fairness and the right to written reasons for administrative action. It also provides for remedies that are available if these requirements are not complied with. It further provides for procedures and methods aimed at encouraging good decision making by organs of state, thereby aiming to reduce the need for judicial review.

The right to just administrative action is therefore of supreme importance in South African administrative law. Where previously the courts had an inherent or common-law power to review administrative action, the review power of the courts is today subject to the Constitution and Paja.<sup>106</sup> The precondition for recourse to judicial review under Paja, however, is 'administrative action';<sup>107</sup> only if the action or decision complained of amounts to 'administrative action' can recourse be had to judicial review.<sup>108</sup>

The courts have held that the conduct of the government procurement process, the evaluation of tenders and the award of a tender to a successful tenderer are all forms of 'administrative action' within the meaning of section 33 of the Constitution and Paja.<sup>109</sup> The decision to debar a contractor can similarly be said to amount to 'administrative action' – the decision would, in accordance with Paja, 'adversely [affect] the rights [of the contractor]' and have 'a direct, external legal effect'.<sup>110</sup> A debarment decision is accordingly subject to the requirements of lawfulness, reasonableness and procedural fairness,<sup>111</sup> and a contractor is entitled to reasons

105 Section 1(b) of Paja. For actions and decisions that are excluded from judicial review under Paja, see the definition of 'administrative action' in s 1 of Paja.

106 The common-law power of review was described by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, 115 as follows. 'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court'.

107 'Administrative action' is defined in s 1 of Paja. Currie and Klaaren (In 101 above) par 2 4 note that the definition, as laid down in Paja, is unnecessarily complicated. To simplify the definition, the writers list seven elements that make up the definition of 'administrative action'. According to them, '[a]dministrative action is: (1) a decision or a proposed decision; (2) of an administrative nature, (3) that is made in terms of an empowering provision; (4) that is not specifically excluded; (5) that is made by an organ of state or by a private person exercising public power; (6) that adversely affects rights and (7) that has a direct external legal effect'.

108 Hoxter (In 101 above) 91 refers to 'administrative action' as the 'gateway to judicial review'.

109 See, *inter alia*, *Umfolozu Transport (Edms) Bpk v Minister van Vervoer en andere* [1997] 2 All SA 548 (A) 552j–553a; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) 117G–H; *Nextcom (Pty) Ltd v Funde NO and others* 2000 (4) SA 491 (T) 504G–J; *Grnaker LTA Ltd and another v Tender Board (Mpumalanga) and others* [2002] 3 All SA 336 (I) par 32; *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) par 5.

110 Section 1(b).

111 Section 33(1) of the Constitution and ss 3 and 6 of Paja.

for a debarment decision.<sup>111</sup> A contractor who is dissatisfied with the decision made has *locus standi* to challenge the decision, by means of an application for judicial review.<sup>112</sup> A contractor is also entitled to have access to the necessary and relevant information from the organ of state to enable it to enforce its right to just administrative action.<sup>113</sup>

A contractor who has not been convicted in a court of law for fraud or corruption, or who has not been *implicated* or *linked* by a court to the convicted enterprise should, therefore, in principle receive adequate notice of an organ of state's intention to debar it,<sup>114</sup> it should be afforded information in relation to the proposed decision, it should be afforded an opportunity to present arguments and evidence in response to the allegations against it<sup>115</sup> and it should be informed that it has the right to approach a court of law for a review of the decision.<sup>116</sup> The same opportunities should be

112 Section 33(2) of the Constitution and s 5 of Paja. For detailed examination of the requirements of lawfulness, reasonableness, procedural fairness and the right to reasons for administrative action, see De Ville (fn 101 above) chs 3-6, Hoexter (fn 101 above) chs 3-6, Currie and Klaaren (fn 101 above) chs 3-5.

113 See *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 (1) SA 701 (O); 703ff 704D/E.

114 Section 32(1)(a) of the Constitution and the Promotion of Access to Information Act 2 of 2000. On the right of access to information generally, see Currie and Klaaren J *The Promotion of Access to Information Act commentary* (2002). See also *Gonzales v Freeman* 334 F 2d 570 (D.C.Cir. 1964) 574. The court stressed that 'to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts' (emphasis original).

115 See *Transco Security, Inc. of Ohio v Freeman* 639 F 2d 318 (1981) 323. The court in this case held that '[t]he general notice which appellants received did not permit adequate preparation for participation in a meaningful way in any forthcoming hearing or equivalent proceeding. Appellants were suspended for, among other things, "billing irregularities". At the time this information was received, appellants had performed a number of contracts for the GSA over several years at various locations. Appellants were not told to which of these contracts the "billing irregularities" referred. Without further identifying information of at least the contract involved, and approximate date of misbillings, it would be at best onerous and at worst virtually impossible to effectively gather and present relevant information relating this general charge'. The court, in other words, held that insufficient information was made available to the contractors to enable them to make representations in response to their proposed debarment (suspension).

116 The court in *Victoria v Master Builders' Association of Victoria* (1994) 7 VAR 278 held that the drawing up of a 'blacklist' of contractors was harmful to those contractors' reputations. They accordingly had a legitimate interest in protecting their reputations or at least defending their reputations. Since they had not, *in casu*, been afforded an opportunity to do so, there was a failure to observe procedural fairness or natural justice. For further discussion on the case, see Robinson M and Harvey I 'Private law vs public law: issues in government liability' paper presented at 4th Annual Workshop BLEC Conference, 4 May 1995 in Melbourne and 11 May 1995 in Sydney on *Government Liability Issues in Public Law*, 29-34 available at <http://www.wentworthhambers.com.au/marobinson/priv.htm> (confirmed access: 25 January 2006); Seddon N *Government contracts: Federal, state and local* 3 ed (2004) par 8.12.

117 See United States FAR 9.406-3, which generally deals with the procedures for debarment. More or less similar entitlements are afforded to contractors who face debarment from government contract awards.

afforded to contractors who face debarment on the ground of unsatisfactory contractual performance in the past. Affording contractors the above-mentioned opportunities may, admittedly, give rise to costs in the form of time and resources and general disruption of an organ of state's administrative processes. Such costs can, however, be said to be a necessary expenditure to ensure compliance with the principles contained in section 217(1) of the Constitution, and also section 33 of the Constitution and Paja.

## 5 CONCLUSION

In light of, in particular, the principles of fairness, competitiveness and cost-effectiveness in section 217(1) of the Constitution, it is important, as far as possible, for organs of state to, attract the maximum number of contractors to participate in government procurement procedures. The relevant principles in section 217(1) will not be complied with if organs of state are able to exclude contractors from participation based on some of the current legislative provisions. It is important for legislation at national and provincial government level, for example, to allow the exclusion of contractors only for 'willful' non-performance or unsatisfactory performance under a previous government contract. As is the case at local government level, non-performance or unsatisfactory performance under a previous contract must also have occurred during the preceding five years.

The legislation dealing with debarment for fraud or corruption has a number of shortcomings. Most importantly, the Regulations Regarding the Register for Tender Defaulters makes provision for a debarment period of 20 years. This is unreasonably long and is in direct conflict with the Corruption Act.<sup>118</sup> Provision should be made for a debarment period of five years. This will be in line with the underlying policy of debarment (i.e. that debarment is not aimed at the punishment of contractors but at the protection of the state against unethical contractors). The blacklisting of convicted persons or enterprises on the Register for Tender Defaulters is, furthermore, within the discretion of the courts, but no guidance is provided on the factors that the courts should take account of when exercising such discretion. It is submitted that the public interest should guide the courts in exercising their discretion. Provision should also be made for the waiver of the power of organs of state to debar during the period of debarment. It is important, however, for clear guidelines to be provided in this regard. An organ of state should, for example, be able to award a contract to a debarred contractor only if, as is the case in the United States, there are 'compelling reasons' for doing so.

It is furthermore submitted that where a main contractor wants to make use of a debarred subcontractor, the main contractor should be denied the contract only if there will be direct contact between the state organ and the subcontractor, or if the debarred subcontractor will play a disproportionate role in the overall operation of the contract to be

<sup>118</sup> Section 28(3)(a)(ii).

awarded. In such instances, the contract can be denied on the ground that the main contractor lacks the necessary capacity to render performance under the contract. It is also important for thought to be given to the debarment of contractors for conduct unrelated to public contracting.

The decision to debar furthermore amounts to 'administrative action' within the meaning of section 33 of the Constitution and Paja. Thus, a contractor who has not been convicted in a court of law for fraud or corruption, or who has not been *implicated* or *linked* by a court to the convicted enterprise is entitled to a debarment decision that complies with the requirements of lawfulness, reasonableness and procedural fairness. It is also entitled to reasons for a debarment decision and has *locus standi* to challenge the decision by means of an application for judicial review.

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