Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong

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Abstract

Since South Africa's political transition in 1994, corruption has been a major feature of the country's politics. However, the complexity of post-apartheid South African politics has sometimes prevented allegations and suspicions of corruption from being adequately dealt with by the law. This article examines the legal framework used to combat public procurement corruption in South Africa. Using a comparative approach, the article also examines the legal framework of Hong Kong – with a view to identifying lessons that South Africa can learn therefrom. Such lessons include but are not limited to Hong Kong's specific laws dedicated to public procurement, its particular legislative and institutional features, its commendable constitutional commitment to eradicating corruption, and the fact that Hong Kong's rules pertaining to procurement processes are more consistent and are not hidden in several legislative prescripts. South Africa may also do well to learn from the successes of Hong Kong's iconic anti-corruption agency, the Independent Commission against Corruption (ICAC) – in attempting to model its own anti-corruption agency.

Keywords

Public procurement; corruption; legal framework; South Africa; Hong Kong.

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1 Introduction

Since South Africa's political transition in 1994, a major feature of the country's politics has been the centrality of issues around corruption in terms of public controversy. Although allegations and suspicions of corruption have plagued high-level government officials and politicians, the complexity of post-apartheid South African politics has at times prevented these allegations and suspicions from being dealt with by the independent hand of the law. Instead, they have been handled in politically expedient ways. Perhaps the point needs to be made in passing that corruption in South Africa is not confined to high-profile matters involving senior politicians or bureaucrats. Case law in this area tends to show that corruption pays a part in state procurement processes, whether or not senior political figures or bureaucrats are involved.

Corruption occurs in both the public and private sectors. However, the occurrence of corruption in the private sector has not enjoyed nearly as much attention as its occurrence in the public sector. This is because corruption in the public sector involves the resources and commodities that legally and rightfully belong to the public, and which are administered by public figures in trust, and on behalf of the public. Although it is widely accepted that public procurement is an area that is particularly susceptible to corruption, and while much has been written about corruption in general, not much has been written about corruption in the public procurement context specifically.

This article highlights the legal framework that is used to combat public procurement corruption in South Africa. It also examines the legal framework of Hong Kong with a view to identifying lessons that South Africa can learn therefrom. There are several reasons why Hong Kong is chosen as a comparator. Hong Kong, like South Africa, has in place a common law legal system. During its time as a British colony, Hong Kong was criticised as being one of the most corrupt places in the world,[1] but it no longer bears this stigma. The 2014 Transparency International

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1 Kwok Man-wai 2005 http://www.unafei.or.jp/english/pdf/PDF_rms/no69/16_P196-201.pdf.

Corruption Perception Index ranked Hong Kong 17th out of a total of 175 countries.[2] In comparison, South Africa was ranked 67th in the same index. It has been said that: "Hong Kong has transformed itself from a graft-plagued city into a place distinguished by its strong anti-corruption regime".[3] The success in reducing corruption so significantly in Hong Kong, is attributable to a number of factors, including support from the legislature. Indeed, there are a number of lessons that South Africa can learn from the Hong Kong experience.

Public procurement has been defined as "the process by which governments and regional and local public authorities or bodies governed by public law purchase products, services and public works".[4] Williams and Quinot define public procurement as the "purchasing by a government of the goods and services it requires to function and pursue public welfare".[5] Corruption in the public procurement system subverts the constitutional principles on which the system is based, and failure by government to control and prevent corruption in this sector amounts to government's failure to meet its constitutional mandate. Before we examine that constitutional framework, a brief understanding of the international dimension is necessary.

2 The international dimension

International law plays an important role in the South African legal system.[6] Since its constitutional recognition in South Africa, the courts have considered international law in most cases wherein international law is relevant. Perhaps the most well-known judgment which confirms the authority of international law in South Africa is *Hugh Glenister v President of the Republic of South Africa*[7] (hereafter *Hugh Glenister*), wherein the Constitutional Court pronounced as follows while referring to anti-corruption international conventions to which South Africa is a signatory:

> The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty of international law to create an anti-corruption unit that has the necessary independence. That duty exists not

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2 The Index ranks countries and territories on how corrupt their public sector is perceived to be. The lower the number the less corrupt the country is perceived to be, relative to other countries. See Transparency International 2014 https://www.transparency.org/cpi2014/results#myAnchor1.

3 Lam 2013 http://www.unafei.or.jp/english/pdf/RS_No83/No83_16VE_Lam.pdf.

4 Essig *et al Strategic Use of Public Procurement* 7.

5 Williams and Quinot 2007 *SALJ* 340.

6 See ss 39(1)(b), 232 and 233 of the *Constitution of the Republic of South Africa*, 1996.

7 *Hugh Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) (*Hugh Glenister*).

> only in the international sphere, and is enforceable not only there. Our constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.[8]

With regard to the eradication of corruption, South Africa is a signatory to several international or regional instruments including the *United Nations Convention Against Corruption* (UNCAC),[9] the *Convention Against Transnational Organised Crime*,[10] the *Southern African Development Community Protocol Against Corruption*,[11] the *Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*[12] and the *African Union (AU) Convention on Preventing and Combating Corruption*.[13] International anti-corruption instruments play a critical role in the fight against corruption. They enunciate principles and set universal and legally binding standards which signatory states undertake to be bound by. Such documents "foster both the domestic action and international co-operation needed to tackle the many facets of corruption".[14] Taking into account the role which international law plays in the South African legal system and the number of international anti-corruption instruments to which South Africa is party, it is clear that international law is relevant to any enquiry relating to whether a specific body of law contains sufficient anti-corruption mechanisms.

In the context of public procurement, the 2011 *UNCITRAL*[15] *Model Law on Public Procurement* (hereafter the *Model Law*) is the most relevant international instrument. It contains international best practices on public procurement procedures and principles in a national setting, seeks to harmonise public procurement processes across nations, and has been lauded by experts as being unique relative to other international public procurement texts.[16] For example, the *World Trade Organisation's Government Procurement Agreement*[17] tends to apply to international public procurement and international trade, while the *Model Law* provides procedures and principles which may be applied by nations in domestic

8 *Hugh Glenister* para 183.
9 *United Nations Convention against Corruption* (2003) (UNCAC).
10 *United Nations Convention against Transnational Organised Crime* (2000).
11 *Southern African Development Community Protocol against Corruption* (2003).
12 *Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1999).
13 *African Union Convention on Preventing and Combating Corruption* (2003).
14 OECD date unknown http://www.oecd.org/cleangovbiz/internationalconventions.htm.
15 United Nations Committee on International Trade Law.
16 Such as the *World Trade Organisation (WTO) Government Procurement Agreement*, the UNCAC, or the various European Union Directives on Public Procurement.
17 *WTO Government Procurement Agreement* (1994), as revised in 2011.

procurement. It is therefore helpful to those nations undertaking legal reform in public procurement.

The *Model Law* also serves as a guide on various aspects of the open tendering process, including *inter alia* best practices pertaining to communication during a procurement process,[18] the participation of suppliers or contractors,[19] the qualification of suppliers and contractors, the minimum information to be disclosed in solicitation documentation and invitations to tender,[20] evaluation and award criteria,[21] rules pertaining to requests for information or clarifications sought by bidders,[22] rules regarding the acceptance of the successful bid,[23] rules regarding the manner in which records of procurement proceedings are to be maintained,[24] various methods of procurement,[25] the manner in which tenders are received, opened and evaluated,[26] and challenge proceedings.[27] A criticism of the *Model Law*, however, is that like most other public procurement texts, the focus is mainly on the selection and award stages of procurement. Notwithstanding this criticism, the *Model Law* has served as a benchmark for many countries, including South Africa, in reforming their public procurement regimes, as will be seen below.

3 The constitutional dimension

Section 217 of the *Constitution* provides the constitutional basis for public procurement in South Africa. Section 217(1) sets out five constitutional principles on which all procurement practices must be based: fairness, equity, transparency, competitiveness and cost-effectiveness. Subsection 217(2) recognises that public procurement may be used as a tool to promote social and policy objectives by promoting the development of previously disadvantaged groups, for example.[28] In order to fully appreciate the constitutional framework, it would be prudent to briefly highlight, now, each of the five principles enunciated in section 217(1).

18 Article 7 of the *Model Law*.
19 Article 8 of the *Model Law*.
20 Articles 10, 37 and 39 of the *Model Law*.
21 Article 11 of the *Model Law*.
22 Article 15 of the *Model Law*.
23 Article 22 of the *Model Law*.
24 Article 25 of the *Model Law*.
25 Article 27 of the *Model Law*.
26 Articles 40-43 of the *Model Law*.
27 Chapter VIII of the *Model Law*.
28 Bolton *Law of Government Procurement* 34.

Fairness, as an abstract concept, is difficult to define. According to Baxter "… as a bare concept, fairness has no meaning, but the meaning accorded to fairness in any given situation will be a conception of fairness".[29] It is trite law, however, that fairness is often defined in terms of procedural fairness and substantive fairness. *The Promotion of Administrative Justice Act*[30] (PAJA) sets out the elements of a procedurally fair administrative action.[31] These elements largely reflect the well-known principles of natural justice. While procedural fairness is concerned largely with procedural safeguards and adherence to rules, substantive fairness refers to the reasons for a decision. This means that the decision must be reasonable, taking into account the circumstances of the case.

Transactions entered into by virtue of public procurement result in contracts. However such contracts are not entirely akin to contracts within the private sector, wherein the contracting parties are bound and obligated only to one another, to the exclusion of non-contracting parties. A government is in a different position. As the custodian of public funds, government can be said to always have a fiduciary duty to the general public in all of its decisions, actions and/or conduct, including when it contracts for goods and services with the private sector. This fiduciary duty means that there must be fairness in the relationship between organs of state, fairness in relation to competing tenderers, and fairness to the general public. In this sense, fairness to the general public and fairness to competing bidders may entail more than just procedural fairness to prospective bidders, as it includes considerations about whether the decision or action in question is substantively fair in the light of the interests of the general public. Considering that government's procurement decisions have a significant impact not only on the contracting parties but also on the general public, and seeing that section 217(1) has allowed room for such an interpretation, it is submitted that fairness within the context of public procurement means both procedural and substantive fairness.

As far as the principle of equity is concerned, Bolton's view referring to the fair treatment of disparate groups in South Africa is instructive.[32] She states that:

> Equity is a measure that compares one group with another, for example black with white, rural with urban, rich with poor and women with men.

29 Baxter 1979 *SALJ* 633.
30 *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).
31 Section 3(2)(b)(a-e) of PAJA.
32 Bolton *Law of Government Procurement* 50-51.

> Instead of treating all groups exactly the same, groups who face different levels of resources and development should receive different treatment … Areas with the most vulnerable populations and worst facilities should receive more resources than more affluent areas. Thus, equity can be said to be aimed at improving the position of vulnerable groups in South Africa.[33]

De la Harpe avers that in interpreting equity as contained in section 217(1) of the *Constitution*, the general tone and purpose of section 217 and of the *Constitution* as a whole is relevant.[34] In that regard, he states that the utilisation of public procurement to address the legacies of Apartheid by the preferential treatment of previously disadvantaged South Africans may be equitable.[35] In the circumstances, it is submitted that equity, in terms of section 217(1) of the *Constitution*, can be said to be aimed specifically at addressing the inequalities and unfair discriminatory practices of the past.[36] During the apartheid era the procurement system in South Africa tended to favour "larger and better established entrepreneurs and did not create a favourable environment for small, medium and micro enterprises, in particular those owned and controlled by previously disadvantaged persons".[37] In transforming its public procurement system, the post-apartheid government aims to "realise the potential of public sector procurement as an instrument of policy in the socio-economic transformation process." This is clearly reflected in the *Constitution*, where provision is made in section 217(2)(a) and (b) for categories of preference in the allocation of contracts, and for the protection or advancement of persons disadvantaged by unfair discrimination. In this way, public procurement is used as a vehicle to effect socio-economic reform in South Africa.

The interpretation of the constitutional principle of transparency is critical in any evaluation of laws aimed at combating corruption in the public procurement sector, because transparency is universally recognised as being indispensable in the fight against corruption.[38] Apart from the context of section 217(1), the notion of transparency must also be interpreted in the light of the right to access to information, as contained in section 32 of the *Constitution*. It should also be seen in the context of section 33 of the *Constitution*, which affords every person whose rights have been adversely affected the right to be given written reasons for

33 Bolton *Law of Government Procurement* 50-51.
34 De La Harpe *Public Procurement Law* 281.
35 De La Harpe *Public Procurement Law* 281.
36 Bolton *Law of Government Procurement* 52.
37 *Green Paper on Public Sector Procurement Reform in South Africa* (1997) (Gen N 691 in GG 17928 of 14 April 1997).
38 OECD 2007 http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf.

administrative decisions. Finally, transparency must take into account the secret and clandestine nature of procurement corruption. A transparent procurement system, in addition to ensuring that procedures are open to scrutiny, should ensure that actual reasons and underlying principles in terms of which decisions are made are fair, lawful, rational, and free of any venal intent.

In understanding the contextual meaning and content of the constitutional principle of competitiveness, the *Competition Act*[39] is a useful starting point, because its preamble clearly recognises that the past apartheid and other discriminatory laws and practices resulted in excessive concentration of ownership and control within the national economy, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. As the largest buyer of goods and services in the country, government is uniquely placed to promote and advance competition in order to create a more robust economy from a commercial perspective, as well as an economy that fosters full and free participation by all who wish so to participate. Public procurement must therefore seek to achieve competitiveness in terms of this dual perspective.

The commercial nature of competition implies that a wide range of suppliers ought to be given an opportunity to bid for government work, and government ought to then select the contractor whose bid represents the best value-for-money option.[40] A procurement system that follows this approach will encourage the production and rendering of quality goods and services by commercial entities in the market, as competitors will understand that it is not only a low price which will secure them a public contract. In this way, public procurement advances competition, which results in an economy in which consumers benefit from superior quality goods and services.

With respect to redressing past apartheid and discriminatory laws and practices, competition will of necessity involve a structured system of preferential procurement. This is provided for within section 217(2) of the *Constitution*. With respect to public procurement, it is only through a system of preference that the ideals, as contained in the *Competition Act*, of creating an economy that is open to greater ownership by greater numbers of South Africans can be achieved. As such, public procurement in South Africa is subject to specific preferential procurement laws. It is

39 *Competition Act* 89 of 1998.
40 De La Harpe *Public Procurement Law* 287.

therefore submitted that in order to satisfy the principle of competiveness, each procurement decision must be balanced in order to reflect the commercial nature of competition and the achievement of the ideals outlined in the *Competition Act*.

Competition and cost-effectiveness are largely interconnected and interrelated, as both principles concern the attainment of value for money.[41] According to De la Harpe, a cost-effective action can be described as being effective or productive in relation to its costs.[42] Therefore, in the example used above, while the initial cost of not utilising a competitive system may be higher, the action itself may be more effective, in that the prevention of delay may prevent further and more costly damage in the longer term. However, the danger in public procurement lies in the abuse of such methods and the unjustified non-use of competitive methods in the guise of emergency situations which in reality ought to have been anticipated well in advance. This will constitute a negation of the principle of cost-effectiveness.

De la Harpe further asserts that a system is cost-effective when it is standardised with sufficient flexibility to attain best-value outcomes in respect of quality, timing and price, and demands the least resources to effectively manage and control the procurement processes.[43] In this respect, cost-effectiveness is interconnected with competition, in that the lowest tender might not always be the best option. A product with a longer lifespan or cheaper maintenance costs might be more cost-effective than its cheaper counterpart.

The principles of fairness, equity, transparency, competitiveness and cost-effectiveness, as set out here, must underpin all public procurement actions. Legislation governing public procurement and the implementation thereof must therefore promote these principles. The principles are the primary yardsticks against which all procurement processes and decisions must be tested. A public procurement system in South Africa, in order to pass constitutional muster, must reflect these five principles. While it may be difficult for any particular procurement decision to strictly reflect all five principles, the public procurement system, as a whole, must reflect the principles.

Due to the considerable judicial attention that the constitutional procurement principles have attracted, a discussion of such principles

41 Bolton *Law of Government Procurement* 40.
42 De La Harpe *Public Procurement Law* 289.
43 De La Harpe *Public Procurement Law* 290.

would be incomplete without reference to the relevant judicial jurisprudence. A discussion of the judicial approach to the interpretation of the constitutional procurement principles and the judicial approach to public tendering in South Africa is undertaken below. First, however, if meaningful legal reform has to be suggested, an evaluation of the domestic legislative framework is necessary.

4 The legislative framework

In South Africa, public procurement is extensively regulated.[44] No single piece of legislation is applicable to all aspects of public procurement, and the rules pertaining to public procurement are found in several laws. Prior to 1994 public procurement in South Africa was centralised. Soon after 1994 government introduced budgetary and financial reforms.[45] The first phase of reforms began with the introduction of a new intergovernmental system which required all three spheres of government to develop and adopt their own budgets.[46] This decentralised budgeting model also meant that heads of departments needed to have control over procurement expenditure, if each sphere of government and each department within government were to be held accountable for its own budget. New legislation was required. The *Public Finance Management Act* (PFMA),[47] for example, was adopted with the objective of modernising financial management and enhancing accountability. A basic principle of this modernised financial model is that managers must be given the flexibility to manage, within a framework that satisfies the constitutional requirements of transparency and accountability.[48] This is the context within which the PFMA was drafted. It regulates financial management and is applicable to national and provincial government departments. It sets out procedures for the efficient and effective management of all revenue, expenditure, assets and liabilities, and establishes the duties and responsibilities of government officials in charge of finances. Apart from section 38, which sets out the general responsibilities of accounting officers,[49] the PFMA does not contain any more provisions directly related to the processes of public procurement. It is therefore not a statute dedicated solely to procurement or to supply-chain management practices.

44 Bolton 2014 *PELJ* 2319.
45 National Treasury *Guide for Accounting Officers*.
46 National Treasury *Guide for Accounting Officers*.
47 *Public Finance Management Act* 1 of 1999 (PFMA).
48 This is reflected in Part 5 (ss 36-45 of the PFMA).
49 Section 36 of the PFMA defines an accounting officer as the head of a department or the chief executive officer of a constitutional institution.

Rather, it is an overarching statute regulating government finances at national and provincial level.

The other pertinent statute is the *Municipal Finance Management Act* (MFMA),[50] which is applicable to municipalities in the local sphere of government. The procurement provisions of the MFMA are similar to those of the PFMA, but contain more detail regarding the system.[51] While the MFMA is also not a statute dedicated solely to procurement, Chapter 11 is dedicated to supply-chain management. It provides the legal framework for the implementation of an integrated supply-chain management process in local government. Section 112 prescribes that municipalities must adopt a supply-chain management policy which is fair, equitable, transparent, competitive and cost-effective. This section also sets out certain minimum aspects which the supply-chain management policy must cover. In terms of section 115, the accounting officer is responsible for the implementation of the supply-chain management policy. The accounting officer must also take all reasonable steps to ensure that mechanisms are in place to minimise the likelihood of fraud, corruption, favouritism, and unfair and irregular practices. The MFMA also contains provision for contract administration after the tender award stage.[52] Section 168(1)(a) provides that the Minister of Finance may make regulations or guidelines applicable to municipalities regarding any matter that may be prescribed in terms of the Act. It is in terms of this section that the MFMA Regulations and Treasury prescripts pertaining to municipal supply-chain management are issued.

Of more relevance is the *Preferential Procurement Policy Framework Act* (PPPFA), whose purpose is to give effect to section 217(3) of the *Constitution* by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the *Constitution.* The PPPFA therefore provides a framework for the recognition of socio-economic components and the setting and evaluation of an award criterion. It does this by introducing a preference point system to be utilised in the evaluation of tenders.[53] The PPPFA leaves it open to organs of state to decide what specific goals to award points for, but states that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.[54] The opinion has been

50 *Local Government: Municipal Finance Management Act* 56 of 2003 (MFMA).
51 Watermeyer "Regulating Public Procurement" 1, 3.
52 Section 116 of the MFMA.
53 Section 2(1) of the *Preferential Procurement Policy Framework Act* 5 of 2000 (PPPFA).
54 Section 2(1)(e) of the PPPFA.

expressed that the aim of the PPPFA is to enhance the participation of historically disadvantaged individuals and small, medium and micro-enterprises in the public-sector procurement system.[55] The PPPFA itself states that specific goals may include "contracting with persons, or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability and implementing the programmes of the Reconstruction and Development Programme".[56] The provisions of the PPPFA are applicable to all levels of government.

The *Local Government: Municipal Systems Act* (LGMSA)[57] provides that municipalities may procure the services of private persons to provide or perform a municipal service.[58] The LGMSA makes it incumbent on municipalities, when they procure such services, to employ a competitive bidding process which complies with the relevant provisions of the MFMA.[59] Sections 80, 81, 83 and 84 set out specific criteria to be met when a municipal service is provided through an external mechanism. With regard to the competitive bidding method, section 83(1)(d) requires that the selection process must make the municipality accountable to the local community regarding progress with selection and reasons for any decisions. These criteria are in addition to the criteria required to be met in terms of the MFMA and MFMA Regulations. The provisions of the LGMSA are therefore directly applicable to public procurement when the good or service procured is required to fulfil a municipal service.

The *Promotion of Administrative Justice Act* (PAJA)[60] is also relevant, because its provisions and administrative law in general apply to public-sector procurement. To a large extent, administrative law has been codified by PAJA, which sets the parameters within which correct administrative action must be taken. The provisions of PAJA impact on the public tender process and become particularly relevant when an aggrieved bidder opts to challenge a decision of an organ of state. If public-procurement legislation does not contain satisfactory appeal or review mechanisms, then the aggrieved bidder will have no option but to resort to the use of PAJA.

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55 Bolton *Law of Government Procurement* 45.

56 Section 2(1)(d) of the PPPFA.

57 *Local Government: Municipal Systems Act* 32 of 2000 (LGMSA).

58 Section 80(1)(b) of the LGMSA. A municipal service is defined in s 1 of the LGMSA as a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community, irrespective of whether such service is provided through an internal or external mechanism and irrespective of whether fees, charges or tariffs are levied in respect of such a service or not.

59 Section 83 (1)(a) of the LGMSA.

60 *Promotion of Administrative Justice Act* 3 of 2000.

Several regulations have also been promulgated in terms of some of the statutes referred to above. These include the PFMA Regulations,[61] the MFMA: Municipal Supply Chain Management Regulations,[62] and the Preferential Procurement Policy Framework Act Regulations.[63] In addition, a large number of Treasury prescripts apply to public procurement in South Africa, but discussion thereof is beyond the scope of this paper. Suffice it to say, they are issued in terms of section 76(c) of the PFMA or section 168 (1)(a) of the MFMA.

Finally, mention ought to be made of the *Prevention and Combating of Corrupt Activities Act* (PCCA),[64] which is the chief anti-corruption statute in South Africa, although it is not applicable to public procurement corruption only. As stated in chapter one, the PCCA provides a general offence of corruption,[65] and creates offences in respect of corrupt activities relating to specific persons,[66] offences in respect of parties in an employment relationship,[67] offences in respect of corrupt activities relating to specific matters,[68]and miscellaneous offences relating to a possible conflict of interest and other unacceptable conduct[69] – as well as "accessory to or after [an] offence", and "attempt, conspiracy and inducing another person to commit [an] offence".[70] While there are other sections in the PCCA which could be applicable to corruption in public procurement, section 13 is most relevant. It applies to corrupt activities relating to the procuring and withdrawal of tenders. Section 3 creates the general offence of corruption, whereas sections 24 and 25 create certain statutory presumptions and defences. Sections 29-33 apply to the register for tender defaulters. The

61 *Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities* (2005) (GG 27388 of 15 March 2005).

62 *Municipal Supply Chain Management Regulations* (2005) (Gen N 868 in GG 27636 of 30 May 2005).

63 *Preferential Procurement Regulations* (2011) (GN R502 in GG 34350 of 8 June 2011). The 2011 Regulations have replaced the *Preferential Procurement Regulations* (2001) (GN R725 in GG 22549 of 10 August 2001).

64 *Prevention and Combating of Corrupt Activities Act* 12 of 2004 (PCCA).

65 Section 3 of the PCCA.

66 Sections 4-9 of the PCCA create offences in respect of corrupt activities relating to public officers, foreign public officials, agents, members of the legislative authority, judicial officers and members of the prosecuting authority respectively.

67 Section 10 of the PCCA.

68 Sections 11-16 of the PCCA create offences relating to witnesses and evidential material during certain proceedings, offences relating to contracts, offences relating to the procuring and withdrawal of tenders, offences relating to auctions, offences relating to sporting events, and offences relating to gambling or games of chance.

69 Sections 17-19 of the PCCA.

70 Sections 20-21 of the PCCA.

PCCA also provides for the establishment of a national register of tender defaulters in the Office of the National Treasury.[71]

There is no doubt that South Africa has adopted a constitutional stance of committing itself to a procurement system that reflects the universal principles enunciated in the UNCAC. However, South Africa lacks in the formulation of a system which uniformly operationalises all such principles. A system which is an inconsistent system and where the rules are found in a plethora of different laws may promote ambiguities in conflicting provisions and the selective application of laws in order to disguise corrupt intentions. Moreover, the legislative framework is plagued by many laws and technical formalities, the abundance of which may create room for corruption. Furthermore, the legislative framework does not contain adequate or effective methods to detect acts of corruption, either prior to a tender award being made or after, and the provisions of the PCCA are insufficiently applicable to public procurement corruption.

In order to understand how the law has been used or could be better used to combat public procurement corruption in South Africa, it is important to reflect on the role the courts can and do play.

5 The role of the courts

One of the criticisms of the judiciary is that the courts fail to notice or address the role that corruption may have played in cases involving the appeal or review of public procurement decisions. In *Moseme Road Construction CC v King Civil Engineering Contractors*,[72] the Court observed that "… sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders".[73] Notwithstanding the real possibility that corruption may play a role in tender processes, courts tasked with the adjudication of tender appeals or reviews tend to overlook this aspect. In such instances, therefore, it is regrettable that the prevailing judicial approach is not *mero motu* to recognise possible corrupt intents which may have played a part in the entire process under review. This judicial reluctance is perhaps most clearly demonstrated in *Allpay Consolidated Investment Holdings v The*

71 Section 29 of the PCCA.

72 *Moseme Road Construction CC v King Civil Engineering Contractors* 2010 3 All SA 549 (SCA).

73 *Moseme Road Construction CC v King Civil Engineering Contractors* 2010 3 All SA 549 (SCA) para 1.

Chief Executive Officer of the South African Social Security Agency,[74] wherein the Supreme Court of Appeal (SCA) refused to admit into evidence the transcript of a conversation between two individuals which revealed allegations or suspicions of corruption.

It was noted earlier that the current legislative framework for public procurement is plagued by a plethora of law, thereby creating inconsistencies and/or ambiguities in the system. This was acknowledged in *Dr JS Moroka Municipality v Bertram (Pty) Ltd*,[75] wherein the Court stated that:

> The necessity to comply with the obligations imposed by section 217 of the Constitution relating to public procurement policies and procedures to be adopted by organs of state, including municipalities, has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of laws and requirements that have proved to be fertile ground for litigation with the law reports becoming littered with cases dealing with public tenders.[76]

The other consequence, of course, is that the courts experience difficulty in focusing on the most relevant laws applicable in a given situation. This was evidenced in cases like *South African National Roads Agency Limited v The Toll Collect Consortium*[77] and *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC.*[78] In the latter case, the court failed to refer to an applicable law by not recognising that the initial oral contract was in violation of section 76(b) of the LGMSA. It should also be noted that strict and rigid adherence to the technical conditions of tenders and the plethora or rules may promote corruption. Several court judgments have pronounced on this aspect of the public tendering process. In *Metro Projects CC v Klerksdorp Local Municipality*[79] the SCA was tasked with assessing whether non-adherence to the strict rules which disallowed a procuring entity to allow a tenderer to alter its offer after the close of the tender process was fair in the circumstances. In declining to hold that the process was fair, as the deviation was occasioned by subterfuge and deceit,[80] the court referred to the "ever-flexible duty to act fairly".[81] This flexible judicial approach is also seen in other cases. In *Chairperson:*

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74 *Allpay Consolidated Investment Holdings v The Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC).

75 *Dr JS Moroka Municipality v Bertram (Pty) Ltd* 2014 1 All SA 545 (SCA) para 8.

76 *Dr JS Moroka Municipality v Bertram (Pty) Ltd* 2014 1 All SA 545 (SCA) para 8.

77 *South African National Roads Agency Limited v The Toll Collect Consortium* 2013 6 SA 356 (SCA).

78 *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA).

79 *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 All SA 504 (SCA).

80 *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 All SA 504 (SCA) para 14.

81 *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 All SA 504 (SCA) para 11.

Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd, for example, the Court held that:

> … the definition of "acceptable tender" in the PPPFA must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective." In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values.[82]

Courts have also occasionally determined whether non-compliance with conditions pertaining to the submission of tax clearance certificates constitutes a justifiable ground for disqualification. In *VDZ Construction (Pty) Ltd v Makana Muncipality,*[83] where one of the conditions of the tender was the submission of an original valid Municipal Billing Clearance Certificate, the court held that the non-compliance of the applicant was one which was in mere form as opposed to substance, and therefore did not remove it from the definition of "acceptable tender" as defined in the PPPFA.

Other cases that have come before the courts include *Valozone 268 CC v Minister of Education,*[84] which dealt with the need to have legislative measures to ensure proper recordings of minutes of meetings; *Groenewald v M5 Developments (Cape) (Pty) Ltd*,[85] which held that section 62 of the LGMSA is applicable to decisions pertaining to the award of tenders and that an unsuccessful tenderer did have a right of appeal in terms of section 62 against such decisions; and *City of Cape Town v Reader*,[86] which held, *inter alia*, that in a tender appeal process unsuccessful tenderers and all parties to the tender approval process were entitled to appeal under section 62. Cases also include *RMR Commodity Enterprise cc t/a Krass Blankets v Chairman of the Bid Adjudication Committee,*[87] which illustrates how delays in the tender process may prejudice an innocent, unsuccessful tenderer, and *WJ Building and Civil Engineering Contractors CC v Umhlatuze Municipality*,[88] which illustrates the consequences of time delays encountered by an aggrieved tenderer in

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82 *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2005 4 All SA 487 (SCA) para 14.

83 *VDZ Construction (Pty) Ltd v Makana Municipality* (1834/2011) 2011 ZAECGHC 64 (3 November 2011).

84 *Valozone 268 CC v Minister of Education* (3285/14) 2014 ZAGPPHC 294 (26 May 2014).

85 *Groenewald v M5 Developments (Cape) (Pty) Ltd* 2010 5 SA 82 (SCA).

86 *City of Cape Town v Reader* 2009 1 SA 555 (SCA).

87 *RMR Commodity Enterprise CC t/a Krass Blankets v Chairman of the Bid Adjudication Committee* 2009 3 All SA 41 (SCA).

88 *WJ Building and Civil Engineering Contractors CC v Umhlatuze Municipality* 2013 5 SA 461 (KZD).

its request to a procuring entity for information pertaining to the reasons for its decision.

A detailed discussion of all cases on public procurement corruption that have come before the South African courts is beyond the scope of this paper. Suffice it to say that the judicial position enunciated in the judgments highlighted above seems to stress that decisions to condone non-compliance with tender conditions should not be exercised in a mechanical and technical manner. Where decisions are taken to disqualify bids for their non-compliance with formal technical conditions which do not go to the heart of the process, then such decisions may very well serve to frustrate the constitutional principles entrenched in section 217(1) of the *Constitution*. Such flexible judicial reasoning is to be commended, as it values substance over form, and places the advancement of constitutional principles at the heart of the enquiry. That said, however, the case law supports the point made earlier, that public procurement in South Africa is subjected to too many laws, and that this results in uncertainties and ambiguities. There have also been instances where courts have failed to admit evidence in cases where the possibility of corruption was real. This judicial reluctance immediately thwarts any attempt to uncover corrupt acts. It is also evident that courts seem not to appreciate the nature of public procurement corruption in a manner which allows them to adequately come to the assistance of aggrieved bidders.

Against the foregoing discussion on the South African legislative framework and judicial approach, the legal framework of Hong Kong is now discussed, with a view to identifying lessons that South Africa might learn therefrom.

6 Lessons from Hong Kong

During the 1960s and 1970s Hong Kong went through rapid changes characterised by massive population increases and the expansion of its manufacturing industry. During that time of social and economic development the government focused on delivering basic services and maintaining social order, and was unable to meet the growing needs of the people. This provided fertile ground for corrupt activities.[89] Corruption in the public sector became a way of life and gained cultural acceptance, notably by the Chinese population.[90] However, today Hong Kong is applauded for its anti-corruption efforts, most especially the efforts of its

89 Unreported judgment of KwaZulu-Natal High Court, case number 4139/2013.
90 Lee 1981 *Asian Survey* 357-361.

anti-corruption agency, the Independent Commission Against Corruption (ICAC), whose establishment in February 1974 "marked the turning point in the British Colony's fight against corruption".[91] It must be stated, however, that comprehensive anti-corruption legislation is to be equally credited for the drastic reduction of corruption in Hong Kong. This is because "the concern with corruption led to the development of a number of legal norms and measures".[92]

The *Basic Law of Hong Kong*[93] is its constitutional document. As with the *Constitution* in South Africa, it is the supreme law in Hong Kong. A striking feature of the *Basic Law* is Article 57, which establishes the ICAC, which "shall function independently and be accountable to the Chief Executive". It must be pointed out that the South African *Constitution* does not contain any such provision relating directly to the eradication of corruption. Unlike the South African *Constitution*, however, the *Basic Law* does not contain any specific public procurement provisions. Chapter V of the *Basic Law* is dedicated to the economy, which includes public finances. Although sound financial management and good governance may be linked to public procurement,[94] the *Basic Law* does not constitutionalise public procurement principles, as does the South African *Constitution*.

6.1 Public procurement laws

Public procurement in Hong Kong is based on the following principles: public accountability, value for money, transparency, and open and fair competition.[95] Hong Kong appears to have in place a system of both decentralised and centralised public procurement. While individual government departments are authorised to procure goods and services on their own, in certain circumstances goods and services required by individual departments are procured by the Government Logistics Department or the Public Works Tender Board.[96] In certain situations, procurement awards are also made by a Central Tender Board.[97] The circumstances in which centralised or decentralised procurement is implemented are guided by the procurement legislation highlighted below.

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91 Quah 1994/95 *Crime Law Soc Change* 391.

92 Lee 1981 *Asian Survey* 355.

93 *Basic Law of Hong Kong Special Administrative Region of the People's Republic of China* (1990).

94 This is seen in ch 3, where a 9(2) of the UNCAC is discussed, and is shown to link public procurement to good governance.

95 Treasury Branch, Financial Services and the Treasury Bureau 2013 http://www.fstb.gov.hk/tb/en/guide-to-procurement.htm.

96 Audit Commission 2012 http://www.aud.gov.hk/pdf_e/e59ch08.pdf.

97 Audit Commission 2012 http://www.aud.gov.hk/pdf_e/e59ch08.pdf.

The *Public Finance Ordinance*[98] provides the legislative framework for the control and management of public finances. Its provisions are not applicable just to public procurement. In terms of this law, the Financial Secretary has a duty to prepare estimates of government revenue and expenditure, which are then submitted to the Legislative Council, which is empowered to authorise such expenditure against the general revenue.[99] In terms of section 5, the estimates' expenditure must classify expenditure under heads and subheads, which are to include a description of each head, the estimated total expenditure under each head, the provision sought in respect of each subhead, the establishment of posts (if any), and the limit (if any) to the commitments which may be entered into in respect of expenditure which is not annually recurrent. This legislative duty on the Financial Secretary enables the authorising body – the Legislative Council – to have a clear and detailed understanding of government expenditure which is to be authorised for a particular financial year. The estimates' expenditure required in terms of the *Public Finance Ordinance* may be referred to as the government procurement plan. In effect, therefore, the authorising body is favoured with a detailed procurement plan prior to the approval of the expenditure estimates.

In terms of section 12, a controlling officer must be appointed for each expenditure head and subhead, and each controlling officer is responsible for expenditure from a particular head or subhead. Furthermore, controlling officers are also, if required, accountable to the Financial Secretary for the performance of their duties as controlling officers.[100] The *Public Finance Ordinance* further entrenches the principle of accountability in section 15, which makes provision for controlling officers to be personally responsible for additional expenditure (ie not in line with annual estimates submitted by the Financial Secretary to the Legislative Council) incurred on an urgent basis, and where provisions of the Ordinance in respect of such expenditure were not followed. Thus the *Public Finance Ordinance* is not dedicated solely to public procurement, and its provisions create a sound legislative basis for accountable government expenditure.

Public procurement in Hong Kong is governed mainly by the Stores and Procurement Regulations (SPR).[101] Chapter Three regulates tender procedures for government procurement. These Regulations set out detailed procedures to be followed during a public tender process.

98 *Public Finance Ordinance* (1983).
99 Sections 5 and 7 of the *Public Finance Ordinance* (1983).
100 Sections 12(2) and 13 of the *Public Finance Ordinance* (1983).
101 *Stores and Procurement Regulations* (2016) (SPR).

Financial Circulars such as Financial Circular Number 4/2013 contain information pertaining mainly to issues like the setting of price thresholds, which may be amended from time to time. In terms of Regulation 300, the tender procedures set out in Chapter Three of the SPR are to be followed for the procurement of stores and services which exceed $1.43 million, and for construction and engineering services which exceed $4 million.[102] In other words, procurement above these thresholds cannot be undertaken in terms of other methods such as requests for quotations. Individual departments are authorised to procure goods not exceeding their direct purchase authority – ranging from $500 000 to $1.43 million. However, with respect to the procurement of services, individual departments may make purchases irrespective of value in accordance with the SPR.[103] The Government Logistics Department purchases goods on behalf of departments which exceed $1.43 million, up to an amount of $10 million – unless such tenders fall within the ambit of other subsidiary tender boards such as the Public Works Tender Board. The Central Tender Board generally decides on the acceptance of tenders exceeding $10 million.[104] The provisions of the SPR are applicable to departments, subsidiary tender boards such as the Government Logistics Department, and the Central Tender Board. In this way, Hong Kong has elements of a centralised and a decentralised procurement system.

By being applicable to all departments and tender boards, the SPR presents a set of uniform procedures to be followed throughout government procurement in Hong Kong. The SPR also does not seem to allow for the formulation of independent procurement policies within different departments. Although the SPR makes provision for different tendering methods – such as selective tendering – where service providers on an approved list are invited to tender,[105] the normal procedure adopted is open tendering.[106] In terms of Regulation 316, open tendering involves a procedure wherein all interested service providers are free to submit tenders.

Regulation 340 provides for the publication of invitations to tender in the government gazette, on the internet, and in local or international newspapers. Regulation 340(e) sets out minimum information which ought to be contained in a tender advert, which includes the closing date of the tender, contact details to obtain relevant tender documents, and the fact

102 Refers to the Hong Kong dollar.
103 Audit Commission 2012 http://www.aud.gov.hk/pdf_e/e59ch08.pdf.
104 Audit Commission 2012 http://www.aud.gov.hk/pdf_e/e59ch08.pdf.
105 Regulation 320(a) of the SPR.
106 Regulation 315 of the SPR.

that late tenders will not be accepted. Regulation 340(f) also stipulates that in order to allow potential tenderers sufficient time to prepare and submit tenders, a minimum of three weeks is normally required before the closing date. The provision of sufficient time for tender preparation and submission may help reduce corrupt activities. In certain instances, corrupt officials may deliberately set an inappropriately short period before a tender closing date in order to ensure that only a few tenders are submitted, thereby reducing competition. These conditions pertaining to the advertisement of invitations to tender appear to be similar to the conditions set in terms of South African law.

Regulation 345 sets out the criteria and information to be included in tender documents.[107] As in terms of South African law, Hong Kong requires procuring entities to furnish potential tenderers the terms of the tender, the general and special conditions of contract, the tender specifications, the bills of quantities, and the price schedules. In this respect South African law also specifically requires procuring entities to disclose all of the evaluation criteria in the tender invitation.[108]

Hong Kong elected to establish an independent administrative authority dedicated to receiving and reviewing challenges by suppliers, called the Review Body on Bid Challenges. The Rules of Operation of the Review Body[109] set out clear time-frames within which complaints must be lodged, clear timeframes for subsequent responses from parties, and timeframes within which the Review Body is to render its decisions. In terms of clause 13 of the Rules of the Review Body, a supplier may request a "rapid interim measure". This means that the Review Body may order the suspension of the procurement process pending the finalisation of the review.[110] This model presents a solution for many of the challenges highlighted in the South African appeal and review system pertaining to public tenders. In the first instance, the Hong Kong model affords bidders certainty regarding the procedures to be followed and the timeframes to be adhered to. Furthermore, the independent body (rather than a court of law) provides a dedicated service which obviates the delays experienced in the normal court system. And the existence of the provision for interim

107 For example, see Tender Form Gf 231 Tender for Services of the SPR.

108 Regulation 4(3) of the *Preferential Procurement Regulations* (2011).

109 *Rules of Operation of the Review Body on Bid Challenges (*2014).

110 Article XVIII (1)(7)(a) of the *Rules of Operation of the Review Body on Bid Challenges (*2014) states that "the procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied".

measures for suspension of the procurement process ensures that reviews do not become mere academic exercises.

6.2 Anti-corruption laws

As far as anti-corruption legislation in general is concerned, the *Prevention of Bribery Ordinance* (POBO)[111] is the main statute in Hong Kong. Section 3 creates a general offence of soliciting or accepting an advantage without the general or special permission of the Chief Executive. "Advantage", as defined in section 1 of the POBO, includes almost any form of advantage or value, whether monetary or not. Section 4 creates a general offence of bribery in terms of which it is an offence for any person to offer an advantage to a public servant as an inducement in the performance of his/her duties. It is also an offence for a public servant to accept or solicit an advantage as an inducement to act in any official manner. The POBO in Hong Kong creates specific offences with respect to bribery. The provisions applicable to corruption in public procurement are contained in sections 5 and 6. The general offence of bribery in section 4 may also be applicable to government procurement. Section 5 relates to bribery for giving assistance with regard to contracts. The equivalent provision in the PCCA in South Africa is contained in section 12. As is the case in terms of the PCCA, the central elements for an offence in terms of section 5 of the POBO is the giving, acceptance or solicitation of an advantage and a concomitant act from the person so accepting or soliciting the advantage without lawful authority or reasonable excuse. Unlike section 12 of the PCCA, however, section 5 of the POBO seems to be confined to bribery in the public sector. Section 6 of the POBO relates to bribery for procuring the withdrawal of tenders. In terms of this section, any person who offers, accepts or solicits any advantage for the withdrawal of a tender or the refraining from making a tender without lawful authority or reasonable excuse shall be guilty of an offence. The South African equivalent of this section is found in section 13(1)(a)(iii) of the PCCA.

Unlike the PCCA in South Africa, the POBO creates an offence of unexplained wealth. Taking into account the nature of public procurement corruption, the creation of an illicit enrichment offence may be useful in assisting the prosecution. Section 10(1) of the POBO places the burden on the accused to offer a satisfactory explanation regarding his or her standard of living or wealth. This burden on the accused is a reasonable one, given that in such instances it may be only the accused who is in a

111 *Prevention of Bribery Ordinance* (Ch 201) Hong Kong Laws.

position to offer a legitimate explanation regarding his/her wealth or standard of living. Section 12A also provides for confiscation orders to be sought from the court in respect of property or resources under the control of a person convicted of an offence under section 10(1)(b).

The POBO also provides for the protection of informers in section 30A. This section provides that the names and addresses of persons who have given information to the Commissioner[112] with respect to any offence under the POBO will be protected. Section 30A(1)(b) provides that no witness shall be obliged to disclose the name or address of any informer or answer any question if the answer thereto could reveal the name or address of such an informer. Section 30A(1) also provides that the court shall be entitled to conceal from view or to obliterate any passage from any document or paper which has been tendered as evidence in order to protect the identity of an informer. It is submitted that such a provision may encourage persons to report acts of corruption. In terms of section 33A(1)(a-d) the court may of its own accord, if it is in the public interest to do so, order that a convicted person in a position of the director or manager of a public or private body, or a professional person, or a person who is a partner or manager in a private firm, may be prohibited from being so employed for a period not exceeding seven years. This prohibition relates to the conviction of any offence in Part II of the POBO, and is not confined to any particular offence. South Africa does not have a similar provision. Such a provision could be effective in discouraging the immediate re-entry of corrupt persons into the world of commercial activities.

The protection of informers in corruption cases is an important aspect of Hong Kong's anti-corruption legislation. Section 18 of the PCCA in South Africa creates an offence of unacceptable conduct relating to witnesses, in terms of which it is an offence for any person to intimidate, coerce or improperly influence a witness or use physical violence against a witness in order for such a witness *inter alia* to testify in a particular way, withhold testimony, or delay the testimony of such a witness. However, the PCCA does not offer any statutory protection to such witnesses, who may be informers and who may be subjected to intimidation for the disclosure of information relating to corruption offences. There are similarities between the provisions of the PCCA in South Africa and the POBO in Hong Kong. However, Hong Kong’s provisions relating to the possession of unexplained wealth, the protection of informers, and the prohibition of the

112 "Commissioner" refers to the Commissioner of ICAC.

employment of convicted persons may also be useful in the fight against corruption in South Africa.

The *Independent Commission Against Corruption Ordinance*[113] establishes Hong Kong's Independent Commission Against Corruption (ICAC) as envisaged by the *Basic Law*. The ICAC has been hailed as a powerful anti-corruption enforcement body, and as largely responsible for the reduction of corruption in Hong Kong.[114] The ICAC is an "anti-corruption agency independent of the police force and civil service".[115] In terms of section 5 of the *ICAC Ordinance*, the ICAC Commissioner is appointed by the Chief Executive Officer[116] and is accountable only to the Chief Executive Officer. The terms of office of the Commissioner and the Deputy Commissioner are determined by the Chief Executive Officer.[117] By contrast, South Africa does not have an independent agency dedicated to anti-corruption efforts.[118] While the work of the ICAC has been commended and applauded, the legislative framework within which it operates has helped to create an environment within which it can be effective.

7 Conclusion

The foregoing discussion shows why Hong Kong is globally acclaimed for its efforts in reducing public-sector corruption, and why it can provide valuable lessons for combating public procurement corruption in South Africa. Hong Kong has specific laws dedicated to public procurement. Its *Public Finance Ordinance* creates a sound legislative basis for accountable government expenditure, promotes effective demand planning, and creates layers of responsibility within the staff of government entities. With respect to tendering, Hong Kong adopts elements of a centralised and decentralised tendering system. Depending on the threshold of bids, individual departments or a Central Tender Board are responsible for awards of government contracts. Regardless of which entity is responsible for the procurement in question, Hong Kong has a

113 *Independent Commission Against Corruption Ordinance* 7 of 1974 (*ICAC Ordinance*).

114 In this respect, see Manion 2004 *China Review* 97.

115 Manion 2004 *China Review* 84.

116 The Chief Executive Officer is the administrative head of the Hong Kong Special Administrative Region.

117 Sections 5 and 6 of the *ICAC Ordinance*.

118 In this regard, refer to the judgment in *Hugh Glenister*, wherein the Constitutional Court held that the Directorate of Priority Crimes located within the South African Police Service did not constitute an independent body as envisaged in international law.

uniform set of laws applicable to all procuring entities. In keeping with international procurement principles, the Territory provides for a system of public tendering and a committee system responsible for the evaluation and adjudication of bids. The challenge system adopted by Hong Kong conforms to international best practice, particularly the provisions of the WTO GPA, and ensures that the review process affords aggrieved bidders an effective recourse mechanism.

In the specific context of public-procurement corruption, while Hong Kong appears to follow similar tendering procedures to those of South Africa, there are significant lessons to be learned which may help make the South African procurement system less susceptible to corruption. Firstly, Hong Kong's constitutional commitment to eradicating corruption is most commendable. Rules pertaining to procurement processes are more consistent and are not hidden in a number of legislative prescripts. The SPRs are applicable to all government entities. The *Public Finance Ordinance* creates a system which encourages effective demand planning and demand management, and allows for more effective monitoring of government expenditure against pre-planned procurement requirements. The creation of layers of accountability among government officials, as opposed to accountability resting with the head of a department, ensures that a greater number of officials have an interest in ensuring and maintaining integrity in the tender process. Finally, Hong Kong has a domestic review system which presents a solution to most of the significant review and appeal challenges highlighted in respect of the South African system. The existence of an independent administrative body obviates the delays occasioned by judicial review. The Rules of the Review Body present clear timeframes and procedures to be followed in a review. The provision for rapid interim measures ensures that procurement reviews do not become mere academic exercises in instances where impugned procurement decisions are allowed to be executed prior to the finalisation of a review or appeal.

In respect of Hong Kong's anti-corruption legislation, in general the provisions of the POBO relating to the possession of unexplained wealth, as well as those relating to the protection of informers, may provide some lessons for South Africa. The prohibition of the further employment of convicted persons has merit in ensuring that convicted persons do not immediately re-enter the commercial sphere. Hong Kong's anti-corruption agency, the ICAC, has been hailed as an iconic corruption fighting body. From a legislative perspective, South Africa may do well to learn from Hong Kong's ICAC in attempting to model its own anti-corruption agency.

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List of Abbreviations

AU	Africa Union
Crime Law Soc Change	Crime, Law, and Social Change
GPA	Government Procurement Agreement
ICAC	Independent Commission against Corruption
LGMSA	Local Government: Municipal Systems Act
MFMA	Local Government: Municipal Finance Management Act
OECD	Organisation for Economic Co-operation and Development
PAJA	Promotion of Administrative Justice Act
PCCA	Prevention and Combating of Corrupt Activities Act
PELJ	Potchefstroom Electronic Law Journal
PFMA	Public Finance Management Act
POBO	Prevention of Bribery Ordinance
PPPFA	Preferential Procurement Policy Framework Act
SALJ	South African Law Journal
SPR	Stores and Procurement Regulations
UN	United Nations

UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Committee on International Trade Law
WTO	World Trade Organisation