

A Framework for Developing and Implementing Sustainable Public Procurement Policy in Gauteng
March 2023

A number of questions might inform how one could best consider, formulate, adopt, and implement sustainable public procurement guidelines in Gauteng Province. How optimally should Gauteng Provincial Government (GPG) operationalize green (sustainable) procurement in terms of the three types of regulatory approaches identified by the World Bank to operationalize green procurement: environmental criteria, environment standards such as ecolabels, and total cost of ownership accounting practices? How best can GPG advance sustainable public procurement guidelines within the current context of (a) a fragmented public procurement system in South Africa and (b) current initiatives of reform (including legislative reform)? How best can GPG take advantage of the variable policy movements towards sustainable public procurement in specific national sectors as well as more generally in sectors and across sectors at provincial and local levels? What lessons can the GPG learn from the extensive experience with sustainable public procurement at both local and provincial levels in the Western Cape? What emphasis should GPG policy makers give to the provincial and local government levels?

Overview Legal Discussion

At a national level, within South Africa's public procurement system, there is currently no explicit legal requirement for environmental sustainability factors to be considered when a local government or a provincial department engages in public procurement of goods or services or when procuring public infrastructure such as buildings or information technology systems.

There are likely requirements for consideration of these green procurement factors, including the constitutional right in the Bill of Rights (section 24) and the local government direction in section 152 as well as other public policy arguments (like those based on reasonableness or rationality). Section 152 (1) of the South African Constitution directs procurement for local government to be green as it states the need to "...ensure the provision of services to communities in a sustainable manner" and "...to promote social and economic development" as well as "...a safe and healthy environment".

The 2020 Gauteng Climate Change Response Strategy understands green procurement as incorporating the lifecycle approach to sustainability, recognized the significant impact that can be achieved by greening procurement of infrastructure in the Province, and described the progress in greening new and upgraded building by the Gauteng Department of Infrastructure Development (GDID).¹ Focusing more explicitly on energy than on water efficiency, the 2020 Strategy observed "building developers and users could

¹ Gauteng Department of Agricultural and Rural Development, "Gauteng City Region Over-Arching Climate Change Response Strategy and Action Plan (March 2020)," March 2020, sec. 6.5, 7.3.1, <https://amcham.co.za/wp-content/uploads/2020/12/Gauteng-City-Region-Over-arching-Climate-Change-Response-Strategy-and-Action-Plan-March-2020-Final.pdf>.

increase the energy efficiency performance criteria of their buildings or facilities to a higher standard through planning and design based on holistic life cycle assessment and costing.”²

Still, these legal and policy requirements are not – at least as currently recognized and developed within South Africa’s jurisprudence -- sufficient to address the current situation of climate change. Nor are court actions likely to solve these problems, at least on their own. An explicit policy marshalling the resources of the legislature and the executive as well as the public service is required. Furthermore, a provincial policy champion such as Provincial Treasury is needed to lead such a campaign, including the envisaged workshop later in 2023.

The adoption of an explicit policy consisting of guidelines will change the above legal situation for Gauteng Province public institutions. With an officially approved guidance document, public procurement activity in the province must consider the factors of environmental sustainability specified in the Gauteng Green Public Procurement Guidelines. If such factors are not considered, then the procurement is arguably susceptible to judicial review under PAJA for failing to consider relevant factors in making an administrative decision.

It may well make sense to phase in the adoption and implementation of the Gauteng Green Public Procurement Guidelines. For instance, the Guidelines could be adopted first by GDARDE and then by the rest of the provincial departments in GPG. Finally, as guided by Provincial Treasury, they should be adopted also by provincial entities.

In addition to the guidance and explicit effect of the Gauteng Green Public Procurement Guidelines, procuring institutions should consider and may choose to engage in one or more of the four strategic sustainable public procurement strategies outline in the second guideline of the Draft SPPGs document: SPP priority products, green standards, TCO accounting, and green indicators. As the debate between two distinct versions of the Public Procurement Bill in the recent 2022 NEDLAC policy process has articulated, the current public procurement system in South Africa is dominated by the supply chain management/administrative model, not a strategic procurement or contracting model.³

The Draft Gauteng Green Public Procurement Guidelines have been developed in terms of the mandate of the MEC for Social Development, Agriculture, Rural Development and Environment. Going forwards, the idea is for them to be endorsed by the Provincial Cabinet including the Office of the Premier and Provincial Treasury. This will necessitate the involvement of the MEC for Finance (Provincial Treasury) as well as the GP Executive Committee as well as the necessary technical committees.

Additionally, depending on the precise terms of its approval, Part Two – the Green Public Procurement Guideline -- should be able to function as an approved policy in terms of the Public Finance Management Act (at provincial level) and the Municipal Finance

² Gauteng Department of Agricultural and Rural Development, sec. 6.5.

³ One version was drafted by National Treasury; the strategic procurement version was drafted by the NEDLAC JSR (Joint Strategic Resource). See <https://nedlac.org.za/nedlac-reports-and-research/>

Management Act (at local government level). While there is no need in this process to amend the PFMA to provide for the Gauteng Green Public Procurement Guidelines, it may be nonetheless wise to for the Gauteng Province – as it did with the objective of open tendering – to adopt the objective of placing the policy of sustainable public procurement explicitly into South Africa’s public financial management statutes and thus into South Africa’s public procurement system.

What Is Needed to be Done in Terms of the Immediate Project?

An accompanying document (the Draft Gauteng Green Public Procurement Guidelines) contains two draft policies. The first is a proposed Draft Gauteng Green Public Procurement Guideline: Towards Sustainable Public Procurement, which may also be known as the Gauteng Going Green Guideline (GGGG). This Guideline focuses primarily on articulating and mainstreaming questions and factors promoting environmental sustainability in public procurement. The idea is that this Gauteng Green Public Procurement Guideline will be required – in terms of this overall policy document once it is approved – to be considered by public procuring institutions in the province when undertaking four steps of public procurement. The ultimate aim is thus for it to have at least some degree of strength (within Gauteng Province) greater than a pure interpretive or guidance document. This would mean that the guideline should actually be used when public procurement professionals and operations personnel are planning and implementing a procurement. While this draft Gauteng Green Public Procurement Guideline does not encourage a tick-box approach to procurement, it is essentially a list of environmental questions to be asked and environmental factors to be considered during all procurement processes.

The second policy does not consist of a list of questions to implement green procurement but rather provides strategic guidance on how provincial and local procuring institutions can and should use strategic public procurement within current public procurement system to pursue sustainability objectives. It outlines several (four) options for what can be termed strategic sustainable public procurement (SSPP).

This second policy goes beyond the first policy instrument in two ways. First, strategic sustainable public procurement is more comprehensive in the factors it explicitly considers. It implements the globally accepted definition of sustainable public procurement by considering at the same time **environmental sustainability goals (such as reducing carbon footprint)** as well as pursuing **value-for-money** and **preferential procurement objectives**. It is fair to say that the factors other than green factors – in the Gauteng context, value for money and BBBEE – are taken into account implicitly/inherently since any Gauteng public procurement must take place within the national public procurement system, which entrenches and implements those two non-green factors of sustainable public procurement. What strategic sustainable public procurement does is to explicitly put all three components into dialogue or interaction with each other.

Second, the concept of SSPP goes beyond the draft Gauteng Green Public Procurement Guideline since it does not take the currently accepted implementation model in Gauteng Province of the current South African public procurement system for granted.

The Draft Gauteng Green Public Procurement Guideline does take the current mode of implementation for granted and effectively simply adds a Province-approved guidance document into the procurement process.

Strategic sustainable public procurement looks closely at the existing legal framework to identify flexibilities and spaces within the current public procurement system for *strategically* pursuing sustainability. To do so, by definition changes the current system of implementation to some extent, articulating and adding new and different strategic objectives.

Further Development of the Draft Gauteng Green Public Procurement Guidelines – Implementing Through Specific Guidelines

The first Guideline in the Draft Gauteng Green Public Procurement Guidelines document – the draft Gauteng Green Public Procurement Guideline -- is drafted as and intended to be used as a general guideline. General here means (a) in procurement processes concluding all types of contracts – goods, services, and infrastructures; (b) at all financial levels of procurement – from R30K to R500K, as well as from R500K to R5m, and from R5m upwards⁴; and (c) across all sectors including the (at least two) sectors that have seen significant pre-existing practice development and policy development from the viewpoint of green/sustainable public procurement – the construction sector and the transport sector.

However, each of these three dimensions just noted above – subject matter of procurement/contract, financial level, and industry sector – may provide compelling grounds for motivating for devising an additional more specific guideline (or guidelines) separate from the general one in the Draft Gauteng Green Public Procurement Guidelines document. Moreover, these dimensions may also be combined in devising an additional specific guideline. The Western Cape has more or less done the latter, combining two dimensions (arguably three), in devising its sustainable public procurement guide for procurement managers applicable to procurements of infrastructure of the value of R5m and above.⁵ Indeed, this distinction between general and specific guidelines may assist in explaining why this particular UJ/GDARD project has been sometimes termed the development of a guideline and sometimes termed as the development of guidelines.

The potential for developing additional separate and specific guidelines beyond the current draft Gauteng Green Public Procurement Guideline will have to be carefully discussed and strategized. Given the fragmented state of the public procurement system, there is a strong argument for such guidelines to provide for assistance to procurement

⁴ The division points of these three bands are not random but derive from, in the case of the R30K to R500K band, procurements subject to mandatory supplier rotation in at least some Gauteng Province departments, and, in the case of procurements of infrastructure of R5m and above, applicable to specific implementation guidance from the Western Cape.

⁵ “Sustainable Public Procurement Training and Implementation Manual: Implementing Total Cost of Ownership in the Procurement of Infrastructure and Asset Management,” November 2021, https://www.westerncape.gov.za/eadp/files/atoms/files/WCG%20Sustainable%20Public%20Procurement%20-%20Training%20and%20Implementation%20Manual_HOD%2026112021%20%28003%29.pdf.

procurement professionals. Furthermore, it may be most effective to develop such guidelines in relatively close collaboration with the relevant communities of practice of Gauteng Province public procurement officials and technical specialists.

The Draft Gauteng Green Public Procurement Guidelines document recommends in future project work to have four more specific guidelines in addition to the Draft Gauteng Green Public Procurement Guideline. While this document has not begun such drafting, one might draft guidelines such as the following:

Gauteng Green Procurement Guideline (Infrastructure Version)

(to be used for procurement of works/infrastructure above R5m)

Gauteng Green Procurement Guideline (Transport or Electric Vehicles Version)

(to be used in the transport sector for high-cost good of fleet vehicles)

Gauteng Green Procurement Guideline (New Buildings Version)

(to be used in the construction sector)

Gauteng Green Procurement Guideline (Black & Green SMME Suppliers)

(to be used for SMMES for goods and services between R30K and R500K)

Training and Implementation

Awareness workshops and training are necessary in order to successfully implement sustainable public procurement guidelines. Along these lines, the Western Cape concluded that one of the most effective policy instructions would be a 38-page training manual aimed mostly at local government officials, both those new to SPP and established SPP champions.⁶ This “Training and Implementation Manual” has been developed “with inputs from local government practitioners” and “as part of a broader and ongoing support framework.” It has a specific strategic focus on total cost of ownership accounting methodology. It thus aims to assist municipal officials to “learn about Total Cost of Ownership as a component of Sustainable Public Procurement, its value to long term municipal sustainability, and how it can be applied.”

The importance of training is backed up in the literature. As one 2020 review article put it: “[t]o develop an effective circular public procurement tender contract, the public authorities need to enhance capabilities by training technical, legal and financial skills.”⁷ The training of procurement professionals in the use of environmental criteria has been found to be crucial in magnifying opportunities.⁸

⁶ “Sustainable Public Procurement Training and Implementation Manual: Implementing Total Cost of Ownership in the Procurement of Infrastructure and Asset Management.”

⁷ Sönnich Dahl Sönnichsen and Jesper Clement, “Review of Green and Sustainable Public Procurement: Towards Circular Public Procurement,” *Journal of Cleaner Production* 245 (February 1, 2020): 18, <https://doi.org/10.1016/j.jclepro.2019.118901>.

⁸ Francesco Testa et al., “Drawbacks and Opportunities of Green Public Procurement: An Effective Tool for Sustainable Production,” *Journal of Cleaner Production*, Embedding Sustainability Dynamics in Supply Chain Relationship Management and Governance Structures, 112 (January 20, 2016): 1893–1900, <https://doi.org/10.1016/j.jclepro.2014.09.092>.