

## Introduction

This paper investigates the character and potential of sustainable public procurement (SPP) as a policy tool within the SA legal landscape. Following this brief introduction, it proceeds in four parts, including a conclusion. It first specifies the SPP concept in Part One, additionally exploring the manner in which the concept is often read in the South African context. Part Two then investigates the potential of sustainable public procurement as policy tool, exploring that potential from three dimensions: from a cross-cutting yet legal perspective of the SA public procurement system, from the perspective of theory and concepts (particularly in comparison with EU theory on horizontal policy in public procurement), and from a sectoral perspective of environmental and industrial policy. Part Three demonstrates some the propositions advanced earlier through a case study/overview of current SPP practices in Gauteng Province. Part Four concludes.

An Appendix provides a potential additional section to the Public Procurement Bill (PPB) currently before Parliament, a textual suggestion made in order to put sustainable public procurement onto a statutory basis within the public procurement regime in South Africa.

## Part One: “Sustainable” is the New “Green”; What Do We Mean When We Talk About Sustainable Public Procurement?

### *Global Sustainable Public Procurement*

Within the field of public procurement generally, the concept of sustainable procurement is often understood as synonymous with the environmentally-focused meaning of “green procurement”. But this understanding is changing and should and must change. Sustainable public procurement is distinct from -- more than, different than -- green procurement.

Sustainable Public Procurement is currently globally defined within the UN system as: “a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation but also to society and the economy whilst minimising the damage to the environment” (UNEP).<sup>1</sup>

The above definition pulls the sustainable development goals into public procurement. Understood in this sense, SPP is thus a public procurement policy that integrates three distinct components: the environmental but also a social component and an economic component. The social component is usually understood as economic empowerment of excluded or vulnerable persons. In South Africa, this obviously includes

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<sup>1</sup> UN Environmental Programme, “Second Edition: Sustainable Public Procurement: How to ‘Wake the Sleeping Giant,’” 2021, 15, <https://wedocs.unep.org/bitstream/handle/20.500.11822/37045/SPPWSG.pdf>.

the policy goals of Broad-Based Black Economic Empowerment. The economic component is usually understood as financial sustainability (achieving value-for-money, reducing barriers to entry for SMMEs, and promoting stable markets for goods, services, and infrastructures). The environmental component overlaps with and is constituted at core by green public procurement.

From a global perspective, the multidimensionality element inherent to SPP has often been neglected in its process of elaboration and diffusion. Moreover, SPP itself has become skewed in various global regions (Stoffel et al. 2019).

### *The Reception of Sustainable Public Procurement in South Africa*

Interestingly, the reception of SPP in South Africa has appeared to be somewhat although not entirely tone-deaf to the element of multidimensionality. This is perhaps further explained by a paradoxical local reading of the concept as focusing direct attention away from the strongest national element of SPP, the element of social procurement.

The reception of sustainable public procurement in South Africa has appeared to take one of two dominant forms. In one form, it seems to focus on a particular character of financial sustainability, one that focuses on sustainable supplier relationships and inclusive supply chains. This is perhaps not surprising given the relative lack of sustainability of a highly concentrated economy in an unequal society. In a second form, the term “sustainable” has simply been read as “green”. Local actors have understandably zeroed in on the environmental policy or “green” element as the most distinctive in the South African context.

### **Part Two: The Potential of Sustainable Public Procurement As A Policy Tool in SA**

The power of public procurement as a policy tool has long been both explicitly and implicitly acknowledged in South Africa, especially since the inauguration of constitutional democracy in 1994. Around 20% to 30% of South Africa’s GDP runs through public procurement (government contracting for goods, services, and infrastructure). Within this national economic number/picture, the particular contribution and share of infrastructure is being increasingly recognized as crucial.<sup>2</sup>

While a good start, it is not sufficient to note that public procurement is a large and significant share of the national economy. It is necessary to go beyond the mere fact and investigate the character of this policy linkage. Attention to the three dimensions of public procurement as a policy tool assists in investigating its specific potential: to SPP’s legal basis and scope, its theory and fit within the field public procurement, and to its use and placement within a particular policy sector and that sector’s dynamics within the economy.

### *The SPP Policy Tool Potential in South African Law*

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<sup>2</sup> Jonathan Klaaren and Ron Watermeyer, “Reforming Procurement Standards in Order to Effectively Deliver Public Infrastructure: Rethinking the Regulatory Environment in Post-Pandemic South Africa,” *South African Journal of Economic and Management Sciences* 25, no. 1 (September 27, 2022): 9, <https://doi.org/10.4102/sajems.v25i1.4465>.

Since the transition to constitution democracy, the public procurement system has been formally empowered and to some extent guided by the Constitutional s 217(1) factors including “preferential procurement” for a system that is: “fair, transparent, competitive, equitable, and cost-effective.” Preferential procurement is hard-wired into s 217(1), (2), and (3).

The current status of legislative development is a long story (dating arguably from both 1994 and from 2014) but certainly includes the 2020 gazetting a draft Public Procurement Bill and the 2022 drafting process in Nedlac and on a Public Procurement Bill to replace the current Preferential Procurement Policy Framework Act.<sup>3</sup> The results of the NEDLAC process in October 2022 are publicly available: <https://nedlac.org.za/nedlac-reports-and-research/>. After significant (but as yet unchronicled) intra-government and Cabinet consideration, a further revised Public Procurement Bill built on that of National Treasury was tabled in Parliament on 30 June 2023. The future of that Bill before the end of the current Parliament is uncertain, with elections for a new Parliament set to take place on or before August 2024. In any case, the Bill is currently open for comment, with the period for public comment ending on 11 September 2023 and public hearings currently scheduled for 12-13 September.

From a legal perspective, the direction forward ought to be to consolidate and finalize the reform of the public procurement system. Procurement reform is now also part of the Government response to the Zondo Commission and thus overlapping with important developments in the field of anti-corruption. Within the Nedlac process, the JSR expert group argued for the need to specify and (thereby) to implement the five Constitutional factors – transparency, efficiency, cost-effectiveness, equity, and value for money -- in comprehensive legislation/regulations as well as to clarify the mechanisms and the objectives of targeted procurement in the Bill.

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. This does not mean that they cannot be considered, as long as they are introduced in a proper manner.

Since the coming into force of the fourth-generation PPPFA regulations of January 2023, implementing s 2(1)(d) of that statute, there has been a loosening of authorized objectives within targeted or preferential procurement.<sup>4</sup> The third-generation 2017

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<sup>3</sup> Geo Quinot, “Expectations of the New Procurement Bill” (Special Interest Group on Public Procurement Law, Sandton, 2018); Jonathan Klaaren et al., “A Strategic Public Procurement Paradigm for South Africa: Reflections on the Development of the Public Procurement Bill” (Public Affairs Research Institute, July 10, 2023), <https://pari2.wpenenginepowered.com/wp-content/uploads/2023/07/PPP28-06MAINfinx-1.pdf>; Ryan Brunette, Jonathan Klaaren, and Patronella Nqaba, “Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa,” *Development Southern Africa* 36, no. 4 (July 4, 2019): 537–54, <https://doi.org/10.1080/0376835X.2019.1599712>.

<sup>4</sup> In the Afribusiness case, the 2017 PPP Regulations were struck down by the Supreme Court of Appeal and, in the course of litigation in front of the Constitutional Court, were given life only until January 2023. The 2017 Regulations were found by the majority decision of the Constitutional Court to be wider than the powers given to the Minister of Finance in terms of the relevant empowering legislation. National Treasury has gone through a notice and comment process regarding replacement regulations and in early November published final text

regulations constrained procuring institutions, in that they had to apply all of the available preference points to B-BBEE contributor status level only. The fourth-generation regulations permit procuring institutions to decide, even on a tender-by-tender basis, how to allocate the available preference points, amongst a range of “specific goals”. These “specific goals” could be B-BBEE, but could also address socio-economic demands such as rural development, youth employment and the programmes of the Reconstruction and Development White Paper of 1994. That White Paper in part held out “a vision for the fundamental transformation of South Africa by ... creating a sustainable and environmentally friendly growth and development path.”<sup>5</sup> Further statutory routes authorizing the incorporation of environmental/green factors in tender adjudication via mechanisms other than preference are embedded within the current languages of “acceptable tender” (PPPFA s 1) and “other objective considerations” (PPPFA 2(1)(f)).

The point for present purposes is this: the obstacles to greater SPP adoption and use are not obstacles of hard law. If added in by an organ of state – such as the Gauteng Department of Agriculture, Rural Development, and the Environment (GDARDE), green procurement is authorized and legal. Indeed, as explored in the Appendix, the under-consideration legal framework has potential to mandate the consideration of environmental/green factors.

### *The SPP Policy Tool Potential in Theory*

The core norm in the field public procurement is usually stated along the general lines of the need for government to obtain goods, services, and infrastructure of good price and quality within an appropriate time and at the right place. But of course by necessity this core function is not all that the public procurement activities undertaken by the diverse and various entities of the state do. These indirect effects can be as important as those direct effects. Unsurprisingly, states (or parts thereof) enact formal policies within the public procurement system to govern those further non-core aspects of such activities.

Policies within the public procurement system beyond obtaining in an efficient and value-for-money manner effective goods, services, and infrastructure have often been termed in legal analysis both in the EU and in South Africa “horizontal policies”. They are also often known as secondary (in the EU) or collateral (in the US) policies. The objectives pursued through horizontal policies range from “environmental concerns to labour and equality, industrial development and economic growth, crime prevention and social concerns such as poverty alleviation and wealth distribution.”<sup>6</sup>

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for the Preferential Procurement Regulations (2022) intended to take effect 16 January 2023. The regulations struck down concerned specific mechanisms (such as pre-qualification) used for giving effect to what is usually termed preferential procurement, including local content, but did not include preference points system for open competitive tenders, which is still contained in the PP Regulations (2022).

<sup>5</sup> “GN 1954 OF 1994: Parliament of the Republic of South Africa, White Paper on Reconstruction and Development, Cape Town, 15 November 1994” (1994), [http://ocpo.treasury.gov.za/Resource\\_Centre/Legislation/governmentgazetteid16085%20-%20RDP.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/governmentgazetteid16085%20-%20RDP.pdf).

<sup>6</sup> Geo Quinot, “Promotion of Social Policy through Public Procurement in Africa,” in *Public Procurement Regulation in Africa*, ed. G. Quinot and Sue Arrowsmith (Cambridge University Press, 2013), 370.

The origin of this term is worth an exploration. Following Arrowsmith & Kunzlik, Quinot points out the term ‘horizontal’ may (that is to say should) be preferred to these others since it indicates no lesser status to such policies.<sup>7</sup> This reason resonates particularly in South Africa, with our attention to black empowerment.

An additional reason that Arrowsmith & Kunzlik prefer the horizontal terminology is that the horizontal terminology emphasizes that often there is little clear distinction between the objective pursued and the means of its pursuit.<sup>8</sup> The indirect and the direct often nearly completely overlap. This reason tracks the nearly-necessary nature of these horizontal policies.

In any case, in Arrowsmith and Kunzlik’s use, the horizontal term is an overarching title rather than a precise general classification.<sup>9</sup> Making a distinction between national contexts and the European one, Arrowsmith and Kunzlik argue for an EU principle of equality of horizontal policies, based ultimately on the rationale of an internal EU market with robust if regulated competition.<sup>10</sup> This allows them to argue, for instance, for the obligation on EU members states to consider the adoption of indirect procurement policies in the environmental sphere just as they do with indirect procurement policies relating to say local content or a particular population or class of firms, such as firms owned by women.

Before moving on from this exploration of the EU origins of this term and related theory, we should note one particular limitation on the equality of policies implied by the term “horizontal” – the limitation of national context. While an “internal market” point of view (i.e. a EU perspective) highlights the equivalence of horizontal policies as a matter of interpreting and applying EU soft and hard law to member states and their EU obligations, this equivalence among policies no longer applies once the EU member states have begun to implement indirect policies within their particular national contexts.

In each of those national contexts, factors of national constitutional competence as well as institutions, resources, and others play significant and potentially differentiating roles. We will take this further in the third section of this Part below. This limitation constitutes one significant part of the constraints on (or the dynamics to be taken into account) the translation of EU policies into African and African national contexts.<sup>11</sup>

As Quinot explains, horizontal policies foster at least two general legal problematics: the need for mechanisms for their implementation and the related but distinct concern, stemming from different objectives within the regulatory field, that “different rules aimed at achieving different objectives may be in conflict with each other.”<sup>12</sup> These two general problematics can very usefully be used to analyze the utility and efficacy of indirect policy tools in the field of public procurement.

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<sup>7</sup> Quinot, 370.

<sup>8</sup> Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009), 13.

<sup>9</sup> Arrowsmith and Kunzlik, 15.

<sup>10</sup> Arrowsmith and Kunzlik, 18.

<sup>11</sup> This is a general point worth taking further.

<sup>12</sup> Quinot, “Promotion of Social Policy through Public Procurement in Africa,” 371.

While (or because) the second of these perhaps conceals at least as much as it reveals, legal analysis has tended to focus upon the first. This is for instance the case in Geo's 2013 legal analysis where he clearly and precisely focuses upon value-for-money, efficiency, and clarity.<sup>13</sup>

In any case, the sharpening of focus in this and other legal analyses beyond a concern with the legitimacy of social objectives in public procurement to focus upon actual implementation mechanisms is a very welcome evolution in the field. This moves significantly forward from earlier more general and constitutional policy discussions and from ones framed nearly entirely through the redress of past (apartheid) inequalities.<sup>14</sup>

As Quinot argues, "[f]or the most part, the law does not play a significant role in decisions to use public procurement for horizontal policy purposes. Those policy decisions are mostly based on economic and policy rationales, not legal ones. ... The law does play a significant role in the context of horizontal policies in public procurement in the way that these policies are implemented."<sup>15</sup> While the legitimacy problem is never so easily put to one side, Quinot is certainly correct that it need not be at the centre of the analysis.

So, what is the theory behind the legal focus on the first problematic of mechanisms? One example of the focus on mechanisms in legal analysis within public procurement policy is Arrowsmith's identification of nine mechanisms through which to implement horizontal policies.<sup>16</sup> Three of Arrowsmith's nine mechanisms are prominent in South Africa's public procurement field through their employment in targeted social public procurement policy (termed "preferential public procurement" in SA).

This narrowing of the national policy mindset from nine to three is not surprising given the prominence of black empowerment as a leading political vector for the field of public procurement. Nonetheless, both as a matter of theory and as a matter of guiding effective implementation of SPP, it is worth holding open and exploring widely the variety of tools available in the first problematic of mechanisms.

Here, we may turn to South Africa's leading public procurement soft law expert practitioner, Ron Watermeyer. Watermeyer has also focused upon mechanisms, but, possibly due to the more systematic pull of the context in which he works, has maintained a conceptual focus wider than the specific range of mechanisms of most policy relevance to the objective of black economic empowerment.<sup>17</sup> In other words, Watermeyer has maintained within the South African and comparative discussion of horizontal procurement

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<sup>13</sup> Quinot, 377–80.

<sup>14</sup> Phoebe Bolton, *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, 2007), 251–52 ("The primary aim of this chapter is therefore to evaluate the way in which the South African government has made provision for the use of procurement as a means to address past imbalances.").

<sup>15</sup> Quinot, "Promotion of Social Policy through Public Procurement in Africa," 373–74.

<sup>16</sup> Arrowsmith and Kunzlik, *Social and Environmental Policies in EC Procurement Law*.

<sup>17</sup> Quinot, "Promotion of Social Policy through Public Procurement in Africa," 374–77; RB Watermeyer, "Facilitating Sustainable Development through Public and Donor Regimes: Tools and Techniques," *Public Procurement Law Review* 13 (2004): 30; Klaaren and Watermeyer, "Reforming Procurement Standards in Order to Effectively Deliver Public Infrastructure."

policies a conceptual space for indirect and supply-side mechanisms as well as those of reservations/set-asides and of preferencing/award criteria.

Watermeyer's two further boxes include three of Arrowsmith's nine mechanisms: (7) product/service specification, (8) design of specifications, contracting conditions and procurement processes to benefit particular contractors, and (9) general assistance. While these mechanisms have not been as prominent with black empowerment they may be of particular use in SPP implementation. These themes may traced specifically within Watermeyer's recent collaborative research on public infrastructure.<sup>18</sup>

### *A Sectoral Perspective on the SPP Policy Tool Potential*

As is often acknowledged, there is an increasing potential for the green (environmental) element of public procurement.

To some extent, this comes from trends that are cross-cutting to society, including the rise to prominence of what is now termed ESG: the incorporation of Environmental, Social, and Governance principles. ESG principles have been taken on board in various dimensions of private sector activities, including public procurement. SPP is obviously also aligned more generally with the green economy growth and development movement. To some extent, the wind behind the sails of SPP may also be identified within specific economic sectors, such as the energy sector. Drawing some degree of strength from a third distinct dimension, SPP appears to build on and thrive in bottom-up (or at least decentralized) policy contexts rather than in those geared to and populated with top-down approaches. It has certainly been the case in South Africa that greater progress has been made through provincial and municipal approaches to sustainable development than national ones in the past decade. An example of this is the Gauteng City Region Over-Arching Climate Change Response Strategy and Action Plan (March 2020). Likewise, at provincial level, the Western Cape Government has made some strides in developing sustainable public procurement policies. In SA, progress on green PP has been more bottom-up than top-down.

We can and should compare the power and the fit of public procurement in the environmental policy field with its power within distinct sectors of the economy. Here, one is looking to understand the linkage and flow between public procurement as a cross-cutting society-wide policy sector and its implementation within more specific economic sectors.

One example of such a linkage -- but arguably demonstrating that there is rarely a pure or simple "fit" of a specific sector with issues dealt with as part of a one-size-fits-all

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<sup>18</sup> Samuel Laryea and Ronald B Watermeyer, "Comparison of Two Infrastructure Project Implementation Models in a Developing Country," *Proceedings of the Institution of Civil Engineers - Management, Procurement and Law* 171, no. 1 (December 14, 2017): 3–17, <https://doi.org/10.1680/jmapl.16.00029>; Watermeyer, "Facilitating Sustainable Development through Public and Donor Regimes: Tools and Techniques"; Klaaren and Watermeyer, "Reforming Procurement Standards in Order to Effectively Deliver Public Infrastructure"; Ron Watermeyer and Sean Phillips, "Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy," Final Report (National Planning Commission, April 25, 2020), <https://www.nationalplanningcommission.org.za/assets/Documents/Public%20infrastructure%20delivery%20and%20construction%20sector%20dynamism%20in%20the%20South%20African%20economy.pdf>.

public procurement policy -- is the interface between the health sector and public procurement in SA. A 2017 working paper for the World Health Organisation and a 2020 (made public in 2023) report for the Rural Health Advocacy Project examines some of the current South African policy debates in the health sector and specifically around proposals (now including a tabled and passed 2023 Bill) for National Health Insurance.<sup>19</sup> As these papers make clear, the health sector is one where due to the economies of scale in producing especially drugs, there are powerful reasons for centralized public contracting. There are also factors within the sector likely to generate misalignment between public financial management in general and public health spending patterns, in particular with respect to revenue raising, pooling (cross-subsidization), and purchasing (provided payment).<sup>20</sup> Furthermore, the authority and scope of the power (if any) for transversal contracting at Treasury is a highly contested legal and policy issue. Understanding these features, the RHAP report called for (a) acceptance of the power for transversal contracts in the health sector but (b) not within national and provincial treasuries but rather within departments of health. This is an example of a sector-specific argument for partial resolution of a significant general issue in public procurement. At first glance, SPP in South Africa would support this call to decentralize authority for transversal contracts in health.

The health sector is just one example of the significance of the interface between particular economic sectors and the public procurement field. From a public procurement perspective, we should probably follow recent fiscal policy analysis<sup>21</sup> by grouping health together with another area of significant spending located at a provincial level: education. In another category, based on the primarily national constitutional competence for service delivery would be the equally significant sectors of service delivery of policing and security, social grants, energy, transport, and public infrastructure (including water).

It is also important to realize what policy field is not in the above list. By comparison with the significant economic spend in the sectors above, at least in South Africa, there is no existing institutional/regulatory arrangement or policy argument (apart from the growing but challenged just energy transition narrative and arguably the one in favour of public infrastructure) tending towards central procurement with environmental objectives. While national and provincial environment departments have such significant power, this is usually of a blocking or delaying character. It is not the proactive power associated with the specification and provision of significant social services.

This leads to a somewhat paradoxical insight for SPP policy advocacy. With regard to the relative power of the environmental policy field for public procurement, a focus of resources upon particular sectors – such as health, energy, transport, water, and infrastructure – may be most effective in advancing society-wide change in practices of

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<sup>19</sup> “Procurement and Audit Outcomes in Public Health” (Rural Health Advocacy Project, March 2020).

<sup>20</sup> Cheryl Cashin et al., *Aligning Public Financial Management and Health Financing: Sustaining Progress toward Universal Health Coverage*, Health Financing Working Paper;4, WHO/HIS/HGF/HFWorkingPaper/17.4 (Geneva: World Health Organization, 2017), <https://apps.who.int/iris/handle/10665/254680>.

<sup>21</sup> Michael Sachs et al., “Austerity Without Consolidation: Fiscal Policy and Spending Choices in Budget 2023,” June 1, 2023, <https://hdl.handle.net/10539/35683>; Michael Sachs, Arabo Ewinyu, and Olwethu Shedi, “Public Services, Government Employment and the Budget” (SCIS, October 2022), <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/scis/documents/PEP-public-services-and-employment-report-2022.pdf>. Sachs, Ewinyu, and Shedi.

green public procurement. The linkage explored above between public procurement and specific sectors of the economy also means that developments in other sectors – such as the broadening of the concept of sustainability within the financial and fiscal spheres or the sparking of green building within that of commercial or public infrastructure – can have significant interactive effects.

This analysis and conclusion – and the tactics/strategy problematic it sets up – is of course familiar to those working in the field of industrial policy. It is one worth discussing for advocates of SPP in contemporary South Africa.

Before leaving this terrain, a further dynamic is important to highlight explicitly. This is the reverse of the above, the reverse of the potential for specific sectors to advance SPP. It is the potential of SPP to assist with the reform of the public procurement policy field itself. A call for SPP is a call for a better public procurement system in South Africa. The coincidence of the growing prominence of calls for SPP with calls for general attention to public procurement reform in SA is no happenschance. It reflects both an alignment in potential and the specific choices of leaders within this community of practice.

### **Part Three: Sustainable Public Procurement in Gauteng Province: An Emergent Practice**

Drawing on applied research, this Part overviews the status of recent engagement with sustainable public procurement by provincial departments and municipalities within Gauteng Province. It further aims to link the theory of SPP as a policy tool as canvassed in Part Two to some of the dynamics of SPP in Gauteng. As a distinct Part, it argues that sustainable public procurement is an emergent practice in Gauteng.

#### **Part Three(A): *Recent Engagement with Sustainable Public Procurement in Gauteng***

The Gauteng Province – and the Gauteng Department of Agriculture and Rural Development and Environment (GDARDE) in particular – have been engaging with the concept of sustainable public procurement and guidelines to promote such procurement for over a decade.<sup>22</sup> Sometimes this engagement has been across the economy, such as with province-wide policies and sometimes within a particular sector, such as guidelines within the construction sector or, arguably most developed, policies within the transport sector.

While the private sector in Gauteng is not the topic of this Part, it is interesting to ask whether and how SCM policy can contribute to ESG (environmental, social, and governance factors) and ESG targets/achievement. Some industry groups see the two fields as very closely associated.<sup>23</sup> Academic research, however, on the whole distinguishes between the private and the public sector in this interface, investigating for instance the degree to which green public procurement policies influence private ESG standards.<sup>24</sup>

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<sup>22</sup> Laura Turley, “Implementing Sustainable Public Procurement in South Africa: Where to Start,” 2014, 32, [https://www.iisd.org/system/files/publications/implementing\\_spp\\_south\\_africa.pdf](https://www.iisd.org/system/files/publications/implementing_spp_south_africa.pdf).

<sup>23</sup> “Procurement Body SPP Driving ESG Change,” January 22, 2022, <https://supplychaindigital.com/procurement/procurement-body-spp-driving-esg-change>.

<sup>24</sup> Nickolay Gantchev, Jim Goldman, and Shu Zhang, “The Role of G(overnment) in Corporate ESG Policies,” SSRN Scholarly Paper (Rochester, NY, November 18, 2022), <https://doi.org/10.2139/ssrn.4280531>.

### *Engagement with Sustainable Public Procurement across Gauteng Province*

Understandably, Gauteng-wide strategies with attention to environmental factors have always highlighted and touched upon certain significant economic sectors and upon the Province's continuing need for economic development.<sup>25</sup> Although the region's growth path has historically been tied to resource-intensive mining and industrial activities, official provincial strategies from as early as a decade ago -- the Developmental Green Economy Strategy (2010) and its successor the Green Strategic Programme (2011) -- began to envision and promise a more sustainable future. However, progress on their implementation has been weak as these green economy strategies faced severe conundrums in the South African context.

Province-wide attention to sustainable public procurement has occurred within general climate change or environmental strategies that GDARDE has led and championed. Leading up to March 2020, GDARDE developed and formulated the Gauteng City Region Over-Arching Climate Change Response Strategy and Action Plan (the 2020 Gauteng CC Response Strategy). This Plan is currently in effect and is being implemented by the Province.

The 2020 Gauteng CC Response Strategy has a relatively clear and focused understanding of sustainable public procurement. It understands green procurement as incorporating the lifecycle of assets approach to sustainability and recognized the significant impact that can be achieved by greening procurement of infrastructure in the Province, particularly describing the progress made by the Gauteng Department of Infrastructure Development (GDID) in greening both new and upgraded buildings.<sup>26</sup> Within this overall attention to infrastructure, focusing more explicitly on energy than on water efficiency, the 2020 Strategy observed "building developers and users could 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."<sup>27</sup>

Dating from at least 2015, one GPG initiative within this sector facilitated by the provincial entity the Gauteng Infrastructure Finance Agency (GIFA) on behalf of the Gauteng Department of Infrastructure Development, is the Kopanong Precinct (pictured below) a plan for the adaptive reuse of a large number of buildings in the historic heart of Johannesburg. This project is currently at the tendering phase.<sup>28</sup> Charged with finding funding for and bringing to financial close either through the PPP or traditional procurement route, the Gauteng Infrastructure Financing Agency (GIFA) has planned to do socio-economic

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<sup>25</sup> Graeme Götz and Alexis Schäffler, "Conundrums in Implementing a Green Economy in the Gauteng City-Region," *Current Opinion in Environmental Sustainability* 13 (April 1, 2015): 79–87, <https://doi.org/10.1016/j.cosust.2015.02.005>.

<sup>26</sup> 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>.

<sup>27</sup> Gauteng Department of Agricultural and Rural Development, sec. 6.5.

<sup>28</sup> "Projects – GIFA," accessed January 20, 2023, <https://gifa.co.za/projects/>.

impact assessment of the major infrastructure projects for which it was seeking alternative funding.<sup>29</sup> In 2020-2021, GIFA spent R3.7m on socio-economic and market studies.<sup>30</sup>



Viewing the construction sector as a significant one for sustainable public procurement, the 2020 Gauteng CC Response Strategy stated that “Bringing about change in the commercial and institutional building sector, especially with respect to public facilities, is primarily a matter of re-aligning existing procurement processes with more sustainable standards.” It suggested four specific ways in which the GPG could spark sustainability: (1) Developing policy (setting a more ambitious minimum compliance benchmark) for commercial buildings within the province. (2) By including energy efficiency as one of the award criteria when procuring different (than buildings) products or services. Energy efficiency of a product or service as an award criterion in procurement could stimulate companies to improve the energy efficiency of their (industrial) buildings. (3) Engaging with municipalities to set and impose more ambitious energy and water efficiency by-laws. (4) Provide more information and know-how to companies and open one of its successfully retrofitted buildings to the public to learn from.

Regulations introduced in this sector at national level in 2020 and in effect since December 2022 have required non-residential buildings in certain categories to obtain and display energy performance certificates increasing the awareness and transparency of the energy efficiency of these structures.<sup>31</sup> Beyond this, the extent to which these specific routes to sustainability suggested in the 2020 Strategy are implemented is a matter for further research.

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<sup>29</sup> “Gauteng Infrastructure Financing Agency 2019-2024 Strategic Plan,” March 4, 2020, 9, 21, <https://gifa.co.za/wp-content/uploads/2021/11/GIFA-2019-2024-Strategic-Plan.pdf>.

<sup>30</sup> “Gauteng Infrastructure Financing Agency Annual Report 2020-21,” 105, accessed November 12, 2022, <https://gifa.co.za/wp-content/uploads/2021/11/GIFA-Annual-Report-2020-21.pdf>.

<sup>31</sup> Staff Writer, “The New Certificate Businesses in South Africa Need to Know about – or Risk Facing a R5 Million Fine and Jailtime,” accessed January 25, 2023, <https://businesstech.co.za/news/business/630469/the-new-certificate-businesses-in-south-africa-need-to-know-about-or-risk-facing-a-r5-million-fine-and-jail-time/>; “Regulations for the Mandatory Display and Submission of Energy Performance Certificates for Buildings” (2020), [https://www.gov.za/sites/default/files/gcis\\_document/202012/43972gon700.pdf](https://www.gov.za/sites/default/files/gcis_document/202012/43972gon700.pdf).

### *Engagement with SPP in the Construction Sector across Gauteng*

The specific focus on the construction sector within policies applying across all the economic sectors of the Province has been paralleled by policy within the construction sector within Gauteng itself. Applying within the construction sector, Gauteng has a current guideline in operation since 2016, the Draft Gauteng Sustainable Development Implementation Guideline.<sup>32</sup> In addition, Johannesburg has been selected by the Department of Science and Technology as one of South Africa's three hydrogen hubs. The Johannesburg hub will be driven in part by H2-based sectors switching from gray H2 and by public buildings and buses and future private building demand.<sup>33</sup> In 2020, the Gautrain Management Agency, which operates the Gautrain and the Gaibus, had "the ultimate intent of ending up with hydrogen fuel-cell-powered mobility options."<sup>34</sup>

### *Engagement with SPP in the Transport Sector across Gauteng*

The transport sector has seen considerable attention to sustainable public procurement. In 2021, the Gauteng Department of Roads and Transport published a GPG-wide strategic plan: Growing Gauteng Together Through Smart Mobility.<sup>35</sup> The plan indicates a desire to engage in sustainable procurement. In specific, the intention is to implement "... the Green Procurement Guidelines (GPG) for full Government fleet of land transportation. The DOT procurement guideline considers the following government fleet; public transport buses, waste trucks, light-duty vehicles, passenger cars, motorcycles, buses, construction vehicles and police vehicles." Another intention included in the vision document is to engage in "[i]nvestment and procurement of connected vehicles, electric vehicles and electric charging stations." As further indication of the strength of this intention, there is a current initiative to procure e-vehicles in Gauteng Province for the GPG fleet. The Gauteng Department of Transport is also understood to be preparing and developing an app about sharing trips within the province.

Another example in Gauteng's transport sector is the commitment the local municipality of Tshwane made in 2014 to have 40% of its bus fleet in e-vehicles by 2020.<sup>36</sup> The City of Ekurhuleni states that it "could begin by looking into sustainable procurement of electric vehicles for its own fleet, as well as looking into opportunities for private sector

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<sup>32</sup> GDARD, "Draft Gauteng Sustainable Development Implementation Guideline," 2016.

<sup>33</sup> Sara Karapetian, "South Africa Hydrogen Valley Final Report" (Department of Science and Technology, October 2021), [https://www.dst.gov.za/images/2021/Hydrogen\\_Valley\\_Feasibility\\_Study\\_Report\\_Final\\_Version.pdf](https://www.dst.gov.za/images/2021/Hydrogen_Valley_Feasibility_Study_Report_Final_Version.pdf).

<sup>34</sup> Irma Venter, "Gautrain to Complete Electric Bus Pilot Project by End-2021," accessed January 19, 2023, <https://www.engineeringnews.co.za/article/gautrain-to-complete-electric-bus-pilot-project-by-end-2021-2020-10-27>.

<sup>35</sup> Gauteng Department of Roads and Transport, "Growing Gauteng Together Through Smart Mobility 2030," 2021.

<sup>36</sup> City of Tshwane, "Sustainable Procurement Strategy," March 2017, <https://www.tshwane.gov.za/sites/Council/Office-Of-The-Executive-Mayor/Climate%20Action/006-Sustainable-Procurement-Strategy.pdf>.

investment and space rental to build charging points.”<sup>37</sup> Likewise, at the City of Johannesburg, a fleet electrification feasibility study has been completed in June 2022 for the City of Johannesburg’s vehicle fleet by a UK-funded outside consultancy.<sup>38</sup> While there has been some “re-thinking” about e-vehicles, this research has related to the provision of incentives for purchase and in any case has related to the private rather than the public sector.<sup>39</sup>

One underlying reason why transport in Gauteng is a sector with clear evidence of engagement with sustainable public procurement may be that transport is one of the sectors where there is a significant degree of relevant overlap or interaction between existing Gauteng provincial/local and relevant national policies in the field of sustainable public procurement. In particular, the national Department of Transport has begun to develop and is very close to finalization of a green procurement guideline for its vehicle fleet.<sup>40</sup> The focus is on e-vehicle procurement. This 2021 draft guideline conceives green procurement through the life-cycle approach to costing as a sub-set of value for money procurement. The draft guideline recommends that green vehicle procurement be done either through an extant national transversal contract or through competitive bids via the supply chain management process. This national line department policy is broadly supported by and aligned with industrial policy and developments in other provinces.<sup>41,42</sup>

### **Part Three(B): Gauteng: Public Procurement Implementation at Provincial Level**

The legal framework for public procurement in South Africa is explained more fully in the first full section of Part Two in this paper. This section of Part Three narrows the focus and presents an overview of the policy of public procurement in the governance of Gauteng Province, with attention to the dimensions of sustainable public procurement. As described more fully below, public procurement policy to be implemented by provincial departments and entities is governed through the instruments of a policy framework and a model policy. The SCM Framework and the Model Policy detailed below may be seen as soft law instruments guiding interpretation and implementation of the public procurement system across Gauteng.

#### *Governing Documents: GPG SCM Framework & the Model Policy 2017-2018*

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<sup>37</sup> “City of Ekurhuleni Green City Climate Action Plan Summary Report,” May 20, 2022, 23, <https://ekurhuleni.gov.za/wp-content/uploads/2022/05/CoE-GCAP-Summary-Report-E-Version-20-05-22.pdf>.

<sup>38</sup> “Sustainable Energy Africa - City of Johannesburg EV Readiness Support Programme: Phase 2,” accessed November 23, 2022, <https://www.sustainable.org.za/project.php?id=66>; Sustainable Energy Africa, “Electric Vehicle Procurement Options for Local Government,” June 2022.

<sup>39</sup> Ashley Nunes, Lucas Woodley, and Philip Rossetti, “Re-Thinking Procurement Incentives for Electric Vehicles to Achieve Net-Zero Emissions,” *Nature Sustainability* 5, no. 6 (June 2022): 527–32, <https://doi.org/10.1038/s41893-022-00862-3>.

<sup>40</sup> “Guideline for Procurement of Green Vehicles in the Public Sector (Draft: 26-10-2021),” October 26, 2021.

<sup>41</sup> Department of Trade, Industry, and Competition, “First Input Towards the Development of the Auto Green Paper on the Advancement of New Energy Vehicles in South Africa,” May 18, 2021, [http://www.thedtic.gov.za/wp-content/uploads/EV\\_Green\\_Paper.pdf](http://www.thedtic.gov.za/wp-content/uploads/EV_Green_Paper.pdf).

<sup>42</sup> Even further along than the national process, an initiative to implement electric vehicles is currently underway in the Western Cape. Western Cape Government, “A Strategy for the Implementation of Electric Vehicles,” January 2022, <https://www.westerncape.gov.za/tpw/files/atoms/files/GMT%20EV%20Strategy.pdf>.

Generally kept internal to Gauteng Provincial Government (in other words, there is no obligation or practice to publish these policies), there are currently two key regulatory/policy documents governing the implementation of the public procurement system in Gauteng province at provincial level.

The first is the Gauteng Provincial Government Supply Chain Management Framework 2017-2018.<sup>43</sup> The second is the Gauteng Provincial Government Supply Chain Management Model Policy 2017-2018.<sup>44</sup> The second document is a model for procurement policy at provincial entity level and is controlled by the policy contained in the first document, the Framework. The GPG SCM Framework was signed off on 30 March 2017. This was the day before the 2017 Preferential Procurement Policy Regulations came into effect. The GPG SCM Framework and the GPG SCM Model Policy are both aligned with the 2017 PPP Regulations, now superseded by the 2022 PPP regulations, as discussed in more detail above.

The Framework and the Model Policy are both documents slightly over 30 pages and are intended to be read and worked with by public procurement (SCM) officials within the Gauteng Province. They are thus not primarily directed at technical officials within line departments, even though those officials may be closely involved in formulating the specifications for particular tenders.

The Framework draws its own power primarily from the Public Finance Management Act (PFMA).<sup>45</sup> The Framework essentially boils down the rules about public procurement relevant to the Province from the Constitution, relevant national legislation and subordinate legislation, and instruction notes made under the PFMA by the Office of the Chief Procurement Officer (OCPO) at National Treasury. It then puts those rules into a 48-item Framework so that provincial procurement officials can go to the Framework first in order to understand the public procurement system.

In terms of its content, the Framework largely sticks within OCPO policy in interpreting and essentially codifying public procurement rules. This means that the Framework covers the procurement cycle over what can be thought of as the four steps of procurement. These four steps are sequential phases in the procurement process itself: first, planning a procurement; second, going to market with the procurement and interacting with potential suppliers about the procurement through a particular method (such as open competitive bidding); third, evaluating bids received and concluding a contract with a supplier; and fourth, overseeing and monitoring the supply of goods, services, or works procured.

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<sup>43</sup> Gauteng Provincial Treasury, "Gauteng Provincial Government Supply Chain Management Framework 2017-2018," March 30, 2017, [https://e-tenders.gauteng.gov.za/Publications/GPG%20SCM%20Framework%202017\\_18.pdf](https://e-tenders.gauteng.gov.za/Publications/GPG%20SCM%20Framework%202017_18.pdf).

<sup>44</sup> Gauteng Provincial Treasury, "Gauteng Provincial Government Supply Chain Management Model Policy 2017-2018," 2018 2017, <http://e-tenders.gauteng.gov.za/Publications/GPG%20SCM%20MODEL%20POLICY%202017%202018.pdf>.

<sup>45</sup> "Public Finance Management Act 1999," accessed March 7, 2016, [http://www.saflii.org/za/legis/consol\\_act/pfma1999206/](http://www.saflii.org/za/legis/consol_act/pfma1999206/).

The Model Policy is more focused on implementation than the Framework. Nonetheless, perhaps because it is intended to function closer to ground level, it does contain some elements that directly and, arguably, innovatively relate to the constitutional and legislative framework. The Model Policy specifies its own application, identifies socio-economic objectives, sets up a committee system, provides for the opening, closing and validity of bids, allows for deviations from normal procurement processes, treats compulsory subcontracting, and regulates disposal and letting of state assets as well as a number of other procurement features and topics.

### *The Gauteng Open Tender Process*

The substantive item where Gauteng province is arguably distinctive and innovative in national context in its policy choices and interpretations of the governing legal framework for the public procurement system is the Gauteng open tender process. Tenders that meet a certain threshold as determined by the Gauteng Provincial Treasury undergo this process in order to improve openness and transparency in procurement processes. This policy innovation is supported by provincial legislation enacted within the provincial legislative competence.

As reflected in the Model Policy, the Gauteng Open Tender process entails two items: probity audits and public adjudication of bids.<sup>46</sup> The first means that all open tender projects must be audited by independent qualified auditor prior to the approval of specifications, the terms of reference, and the adjudication of the tender. The second means that members of the public will be allowed to observe the adjudication process of all tenders.

### *Gauteng on Sustainability in Public Procurement*

So, where do these relevant Gauteng provincial legal instruments on public procurement policy stand in relation to sustainable public procurement?

In one section where it discusses five pillars of public procurement, the Model Policy follows closely the General Procurement Guidelines promulgated by National Treasury.<sup>47</sup> This is in interpreting the five guiding principles the Constitution lays down in section 217 for public procurement. The Model Policy takes the constitutional wording and turns them into five principles of procurement, referred to as pillars of procurement.<sup>48</sup> This is a welcome strategy of specifying Constitutional principles in aid of governance. Each of the five principles has a short paragraph elaboration under the following headings (four of which are slight elaborations on s 217(1)): value for money; open and effective competition; ethics and fair dealing; accountability and fair dealing; and equity.

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<sup>46</sup> Gauteng Provincial Treasury, "Gauteng Provincial Government Supply Chain Management Model Policy 2017-2018," 21.

<sup>47</sup> National Treasury, "General Procurement Guidelines," accessed November 11, 2022, <http://www.treasury.gov.za/legislation/pfma/supplychain/general%20procurement%20guidelines.pdf>.

<sup>48</sup> Gauteng Provincial Treasury, "Gauteng Provincial Government Supply Chain Management Model Policy 2017-2018," 10–11.

In the Gauteng Model Policy, the current paraphrasing for equity is: “The word “equity” in the context of this policy means the application and observance of government policies which are designed to advance persons or categories of persons disadvantaged by unfair discrimination. This pillar ensures that the *department/entity* is committed to economic growth by implementing measures to support industry generally, and especially to advance the development of SMMEs and black people.”<sup>49</sup> (item 10.5). This Gauteng guidance document borrows wording directly from the national General Procurement Guidelines.<sup>50</sup>

From a sustainable public procurement point of view, while it does adhere to the national model, the wording in the Gauteng Model Policy on the key concept of equity is arguably disappointing. It fails to appreciate the interrelation in a sustainability paradigm of finance, historical redress, and environmental health.<sup>51</sup>

### **Part Three(C): Sustainability Policy within Supply Chain Management (SCM) Policies of Local Municipalities in the Gauteng Province**

This section wraps up the overview of sustainability within public procurement in Gauteng by overviewing some secondary research and supplementing such with some primary research on sustainability criteria within SCM policies at local government level in Gauteng, covering the province’s three metropolitan municipalities as well as some of the smaller ones.

*Tshwane.* Tshwane early on – 2005 – articulated an intention to develop a green procurement guideline.<sup>52</sup> As early as 2007, Tshwane was intending to select five priority products for green procurement inclusion.<sup>53</sup> However, more than a decade would elapse before a specific strategy would be adopted, the March 2017 Sustainable Procurement Strategy.<sup>54</sup> In 2013, the City’s Sustainability Unit was established.<sup>55</sup> Prior to the adoption of the 2017 Strategy, Tshwane worked with the Council for Scientific and Industrial Research

<sup>49</sup> Gauteng Provincial Treasury, sec. 10.5.

<sup>50</sup> National Treasury, “General Procurement Guidelines.”

<sup>51</sup> As part of the national/provincial feedback on this issue, it should be possible for Gauteng to revise this section of the Model Policy along the lines of the JSR version of the Public Procurement Bill which was developed in Nedlac. That Bill contains the following text in section 2A(1)(b):

“equitable public procurement by

- (i) ensuring that public procurement is sustainable and has the most positive environmental, social and economic impacts possible over its entire life cycle;
- (ii) ensuring the protection and advancement in public procurement of persons disadvantaged by unfair discrimination;
- (iii) stimulating economic growth by promoting(aa) local manufacturing; (bb) innovation; and (cc) investment;
- (iv) promoting the protection of the environment for the benefit of present and future generations; and
- (v) ensuring that the public procurement system is reasonable, fair and just”.

<sup>52</sup> Adelaide Owusu Agyepong and Godwell Nhamo, “Green Procurement in South Africa: Perspectives on Legislative Provisions in Metropolitan Municipalities,” *Environment, Development and Sustainability* 19, no. 6 (December 1, 2017): 2466, <https://doi.org/10.1007/s10668-016-9865-9>.

<sup>53</sup> Agyepong and Nhamo, 2466.

<sup>54</sup> City of Tshwane, “Sustainable Procurement Strategy.”

<sup>55</sup> Global Lead Cities Network on Sustainable Procurement, “Tshwane Sustainable Procurement Profile,” 2021, [https://glcn-on-sp.org/fileadmin/user\\_upload/Tshwane/Tshwane\\_\\_GLCN\\_city\\_profile\\_-\\_2021.pdf](https://glcn-on-sp.org/fileadmin/user_upload/Tshwane/Tshwane__GLCN_city_profile_-_2021.pdf).

(CSIR) to develop three policy instruments including a draft municipal by-law promoting sustainable development in the green buildings space.<sup>56</sup> The City of Tshwane's Sustainability Unit, in collaboration and with the support of South African Cities Network (SACN) led the process of developing the 2017 Strategy.

Tshwane's early start and success with institutionalization does not appear to have continued at the same pace. Tshwane's currently applicable Supply Chain Management Policy was approved in 2011 and published in 2016.<sup>57</sup> As stated by the Sustainability Unit, "[t]he city's Supply Chain Management Policy, published in 2016, explicitly spelled out the relevance of sustainability in public procurement, but lacked measurable requirements to inform practice." Tshwane attempted to bridge the gap with the adoption of Tshwane's Sustainable Procurement Strategy (SPS). The March 2017 SPS for Tshwane came along with a three-year action plan, contained in Annexure D.<sup>58</sup> The earliest item in that plan is dated as third quarter of 2016/2017. By 2019, Tshwane had agreed to lead the Global Lead Cities Network on Sustainable Procurement for three years (a network in which Cape Town is also a member).<sup>59</sup>

Tshwane's Sustainability Unit led the development of the City's 2021 Climate Action Plan with funding from inter alia GIZ. This Plan states that "[t]he City will also establish supporting working groups, such as the sustainable procurement team which will comprise legal, finance and procurement professionals. Its role will be to provide advisory services to each of the outcome groups in respect of how to incorporate sustainability into the development of bid specifications."<sup>60</sup> While it remains committed to the sustainable procurement concept, the 2021 Plan appears to indicate that the Strategy had fallen into some disuse, as it states: "[t]he City will revive the SPP Strategy and implement a supplier development programme, which will ensure that the strategy is institutionalised."<sup>61</sup> While further detailed case study research would be necessary to resolve the issue, the use of the term 'institutionalised' does not seem to have mandatory or legal force in this context.

*Johannesburg.* Johannesburg has a Climate Action Plan dated March 2021.<sup>62</sup> One specific sub-action item listed is: "Amend the City's procurement policy to include a

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<sup>56</sup> Agyepong and Nhamo, "Green Procurement in South Africa," 2467.

<sup>57</sup> Global Lead Cities Network on Sustainable Procurement, "Tshwane Sustainable Procurement Profile."

<sup>58</sup> City of Tshwane, "Sustainable Procurement Strategy."

<sup>59</sup> Department of Environmental Affairs and Development Planning (DEADP), "SmartProcurement Programme Sustainable Procurement Analysis Report" (Department of Environmental Affairs and Development Planning, January 31, 2019), 13, <https://www.westerncape.gov.za/eadp/files/atoms/files/DEADP%20SmartProcurement%20Analysis%20Report.pdf>.

<sup>60</sup> "City of Tshwane Climate Action Plan E-Version," 2021, 123, <https://www.tshwane.gov.za/sites/Council/Office-Of-The-Executive-Mayor/Climate%20Action/Tshwane%20Climate%20Action%20Plan%20e-version.pdf>.

<sup>61</sup> "City of Tshwane Climate Action Plan E-Version," 132.

<sup>62</sup> "City of Johannesburg - Climate Action Plan (CAP).Pdf," accessed November 11, 2022, [https://www.joburg.org.za/departments\\_/Documents/EISD/City%20of%20Johannesburg%20-%20Climate%20Action%20Plan%20%28CAP%29.pdf](https://www.joburg.org.za/departments_/Documents/EISD/City%20of%20Johannesburg%20-%20Climate%20Action%20Plan%20%28CAP%29.pdf).

minimum energy performance level for rental buildings, appliances and equipment.”<sup>63</sup> Another is: “Convert the municipal fleet to electric vehicles by 2040, and from 2030 ensure 100% of new vehicles procured by the City are EV.”<sup>64</sup> Furthermore, the Plan indicates an intention to “Work with the Department of Economic Development to develop a Green Procurement Policy to stimulate climate change project implementation.”<sup>65</sup>

In terms of procurement policy, Johannesburg appears to have incorporated at least a mention of green procurement into its current SCM policy, dated 22 August 2019. This policy gives as one of its socio-economic objectives the following: “Promoting resource efficiency and reducing the negative environmental impact of the daily operations of the City, through taking a green approach to procurement.”<sup>66</sup>

*Ekurhuleni.* Ekurhuleni last revised and adopted its SCM policy in 2017.<sup>67</sup> There is no specific reference to green procurement or sustainable procurement in this public procurement policy. There are four general references to sustainability, including noting that in section 2 of the Municipal Finance Management Act (MFMA), Act No 56 of 2003, the object of the Act is “to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards for, inter alia, supply chain management.”<sup>68</sup> Ekurhuleni does have a Green City Climate Action Plan (2022).<sup>69</sup> However, this Plan does not indicate an intention to develop any legal or policy instruments relating to sustainable public procurement.

*Other Gauteng Municipalities.* Sedibeng District Municipality has an up-to-date and publicly available SCM policy document.<sup>70</sup> It mentions environmental considerations only once or twice, for instance: “Commitment to safety, health and the environment The SDM is committed to the health and safety of its personnel and its providers in the application of its SCM system. The SDM is committed to the preservation of the environment, minimised pollution and improved use of natural resources in the application of its SCM processes and more specifically in the design of the specifications/TORs for each requirement.”<sup>71</sup> Similar

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<sup>63</sup> “City of Johannesburg - Climate Action Plan,” March 2021, 69, [https://www.joburg.org.za/departments\\_/Documents/EISD/City%20of%20Johannesburg%20-%20Climate%20Action%20Plan%20%28CAP%29.pdf](https://www.joburg.org.za/departments_/Documents/EISD/City%20of%20Johannesburg%20-%20Climate%20Action%20Plan%20%28CAP%29.pdf).

<sup>64</sup> “City of Johannesburg - Climate Action Plan,” 74.

<sup>65</sup> “City of Johannesburg - Climate Action Plan,” 129.

<sup>66</sup> “Supply Chain Management Policy (City of Johannesburg),” August 22, 2019, sec. 2.4.2, [https://www.joburg.org.za/work\\_/Documents/2020%20Tenders%20and%20Quotations/June%202020/Final%20SCM%20Policy%20v5%2022%20August%202019.pdf](https://www.joburg.org.za/work_/Documents/2020%20Tenders%20and%20Quotations/June%202020/Final%20SCM%20Policy%20v5%2022%20August%202019.pdf).

<sup>67</sup> “City of Ekurhuleni Supply Chain Management Policy,” accessed November 11, 2022, <https://www.ekurhuleni.gov.za/wp-content/uploads/2022/07/Annexure-D23-Supply-Chain-Management-Policy-.pdf>.

<sup>68</sup> “City of Ekurhuleni Supply Chain Management Policy,” sec. 6.1.2.1.

<sup>69</sup> “City of Ekurhuleni Green City Action Plan Summary Report,” May 20, 2022, <https://ekurhuleni.gov.za/wp-content/uploads/2022/05/CoE-GCAP-Summary-Report-E-Version-20-05-22.pdf>.

<sup>70</sup> “Supply Chain Management Policy and Procedures (2021-22) Sedibeng District Municipality,” 2021, [http://www.sedibeng.gov.za/a\\_keydocs/2021-2022%20MFMA/Budget%20related%20policies%202021-2022/15.%20Supply%20Chain%20Management%20Policy%20and%20Procedures%20%20-%20\(2021-22\).pdf](http://www.sedibeng.gov.za/a_keydocs/2021-2022%20MFMA/Budget%20related%20policies%202021-2022/15.%20Supply%20Chain%20Management%20Policy%20and%20Procedures%20%20-%20(2021-22).pdf).

<sup>71</sup> “Supply Chain Management Policy and Procedures (2021-22) Sedibeng District Municipality,” sec. 1.12.

are the SCM policies of the Mogale City Local Municipality<sup>72</sup> and of the West Rand District Municipality (within which Mogale City is located).<sup>73</sup>

### **Conclusion: A Way Forward for Sustainable Public Procurement ... and for the Public Procurement System in South Africa**

With its experience in and demonstrated policy space for preferential procurement (the social component), SA is well placed to advance quickly in the field of sustainable procurement, including but not limited to green public procurement. It is highly possible to make a permanent paradigm shift towards green procurement and to work towards decoupling from a carbon-based economy in order to lead to a future with sustainable outcomes. Moving towards sustainable public procurement can assist with all three components in a systemic manner – e.g. improving efficacy of preferential procurement and system efficiency/efficacy w/in s 217 of the Constitution.

There can and should be a range of strategies to pursue sustainable public procurement. Five strategic methods for pursuing SPP within a specific jurisdiction such as a municipality or a province include: (1) A guideline identifying environmental factors explicitly within the procurement process; (2) identifying and inserting within the procurement process certain green priority products to be procured; (3) specifying certain standards to be performed by and certifications to be provided from suppliers as well as, in such cases, met by the public infrastructure procured in certain sectors (including transport and new buildings) and generally; (4) using life cycle costing (specifically total cost of ownership costing) in formulating procurement processes and specifications and in evaluating tenders; and (5) counting, indicating and measuring the “sustainability score” of the goods, services, and infrastructure procured in e.g. a province on an annual basis.

### **Appendix A**

The PPB as introduced into Parliament in June 2023 uses the term “sustainable” twice. The first time is in section 2(2) listing as one of the explicit purposes of the uniform norms and standards that the Act has as one of its objects to formulate for making consistent the procurement systems of organs of state. Here the terminology is “the uniform treasury norms and standards ... must ... promote a sustainable environment”. The second time is in section 17 on preferential procurement policy. Section 17 (2)(c)(vi) requires that, in addition to and within other constraints, a procuring institution instituting a preferential procurement policy must do so with a policy including measures “to advance a sustainable environment”. Ministerial regulations to implement this statutory provision are optional.

The following is a green procurement provision at the level of a statute modelled upon the authority provided in the now-repealed 2017 PPP regulations for local content provision. It could be considered a friendly amendment to the PPB. This provision is adapted from a

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<sup>72</sup> “Supply Chain Management Policy Mogale City Local Municipality (2022),” May 31, 2022, <https://www.mogalecity.gov.za/wp-content/uploads/Pdfs/Council%20Page/Key%20Documents/Policies/2022%20-%202023/Supply%20Chain%20Management%20Policy.pdf?t=1656427360>.

<sup>73</sup> “SCM Policy West Rand District Municipality,” 2021 2020, <http://www.wrdm.gov.za/wp-content/uploads/2020/03/04-SCM-Policy.pdf>.

provision originally formulated to align with the Joint Strategic Resource (JSR) version in NEDLAC of the Public Procurement Bill.

#### Section 20B. Green Production and Content

- (1) When procuring goods or services in terms of section 17(2)(b)(ii) 7 (iii), a procuring institution must determine whether such goods or services are in a designated category for green production and content as envisaged in this section.
- (2) The Department of Trade, Industry and Competition may, in consultation with the National Treasury-
  - a. designate a sector, sub-sector, industry, or category or categories of goods or services or a combination thereof in accordance with national development and industrial policies for green production and content, taking into account economic and other relevant factors; and
  - b. stipulate a minimum standard for green production and content of such goods or services.
- (3) The National Treasury must inform procuring institutions of any designation made in terms of this section.
- (4) A procuring institution must, in the case of procuring goods or services in a designated category, engage in targeted treatment using margins of preference and/or reservations (also known as set asides) in conjunction with a category or categories of goods or services meeting a minimum standard established by the Minister for Trade, Industry, and Competition for green production and content unless there are justifiable reasons for not doing so such as capacity to deliver the required goods and services within project timelines, technical considerations and availability of input materials and components