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# USING PUBLIC PROCUREMENT AS A TOOL OF ECONOMIC AND SOCIAL DEVELOPMENT POLICY IN KENYA: LESSONS FROM THE UNITED STATES AND SOUTH AFRICA

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## ABSTRACT

*Regulators face many challenges relating to public procurement, arising from its nature, the multiple goals which it lends itself to as a policy tool and its impact on national development goals. The challenges, which often have a direct impact on development, usually revolve around: (i) interplay of economic and social policy objectives; (ii) abuse of discretion; and (iii) prevention of corruption, favouritism and other forms of malfeasance. This paper is a comparative study of how the United States and South African public procurement regulatory systems deal with these challenges, and the implications of those procurement regulatory systems for Kenya. The paper contends that compared to Kenya, the United States and South Africa have better, integrated and more effective regulatory responses to the problems of: (i) conflictual coexistence of economic and social policy objectives; (ii) discretion; and (iii) the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision-making. The paper also contends that the comparatively lax public procurement regulatory frameworks used in the US and South Africa, which give government bureaucrats broad discretionary powers in public procurement decision making, would not produce optimal results in Kenya. Discretionary powers can be abused to redirect financing for development through the procurement process towards private interests.*

**Key words:** Public procurement, economic objectives, social objectives, discretion, corruption, favouritism, malfeasance.

## 1. INTRODUCTION

Public procurement is an important economic activity subject to available revenue, which constitutes a significant portion of the gross domestic product in many countries.<sup>1</sup> Public Procurement is also a popular tool for promoting social, economic and political policies.<sup>2</sup> Specifically, many countries often use public procurement as a tool for (*inter alia*): environmental protection;<sup>3</sup> employment promotion (or promotion of fair employment practices);<sup>4</sup> protection or advancement of marginalised regions and

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<sup>1</sup> Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) 11. See also Arrowsmith S, Linarelli J and Wallace D, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 7, Louise Knight and others (Eds) *Public Procurement: International Cases and Commentary* (Routledge 2007) 19; Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007) 14; and Simon Lester and Bryan Mercurio, *World Trade Law, Text, Materials and Commentary* (Hart Publishing 2008) 665

<sup>2</sup> Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) *Journal of Public Procurement* 193, 195-196.

<sup>3</sup> Rolf H. Weber, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 *Public Procurement Law Review* 184.

<sup>4</sup> *ibid* 188. See also Arthur S Miller, 'Government Contracts and Social Control: A Preliminary Inquiry' (1955) 41 (1) *Virginia Law Review* 27, 33.

demographic groups;<sup>5</sup> combating corruption and other unethical practices;<sup>6</sup> enforcement of standards;<sup>7</sup> promoting strategic domestic industries or sectors of the economy<sup>8</sup> and isolation of foreign states.<sup>9</sup>

Public procurement policies and practices have a direct impact on a country's development<sup>10</sup> and tax policy, especially due to the revenue required to finance the multiple strategic goals that public procurement lends itself to as a policy tool and its size relative to the national economy.<sup>11</sup> Setting up an efficient regulatory procurement process therefore promotes a fair tax system. The use of public procurement as a policy tool, however, is complex and often controversial.<sup>12</sup> According to one view, the use of public procurement as a policy tool is inconsistent with the 'main' objective of public procurement regulation, which is to ensure that public agencies obtain goods, works and services on the best possible (economic) terms.<sup>13</sup> Closely related to this is the argument that the use of public procurement as a policy tool leads to misallocation of resources,<sup>14</sup> especially when a legally entrenched regime of (local/domestic) preferences and reservations favours economically inefficient producers or suppliers.<sup>15</sup> Both these aspects have broader implications on financing for development that seeks to systematically leverage through procurement a country's sustainable growth.

According to another view, the use of public procurement as a policy tool impedes the liberalisation of regional and international trade.<sup>16</sup> Moreover, according to yet another view, public procurement is a

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<sup>5</sup> The Constitution of Kenya, 2010 (hereinafter, the constitution), Article 227 (2).

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> Victor Mosoti, 'The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?' (2004) 25 (2) *University of Pennsylvania Journal of International Economic Law* 593, 595.

<sup>9</sup> Christopher McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 (1) *Journal of International Economic Law* 3, 5-7.

<sup>10</sup> Mosoti (n 8) 599-601.

<sup>11</sup> *ibid.*

<sup>12</sup> Weber (n 3) 185 and 200, Arrowsmith, Linarelli and Wallace (n 1) 11. See also Ron Watermeyer, 'The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects' (2000) 5 *Public Procurement Law Review* 226, 231.

<sup>13</sup> Joe Arnould, 'Secondary Policies in Public Procurement: The Innovations of the New Directives' (2004) 4 *Public Procurement Law Review* 187. See also Sue Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *Law Quarterly Review* 235, 284. According to this view, procurement regulation should mainly focus on economic considerations, any other policy objective is secondary or ancillary.

<sup>14</sup> Francis Ssenoga, 'Examining Discriminatory Procurement Practices in Developing Countries' (2006) 6 (3) *Journal of Public Procurement* 218, Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (2000) 23 (1) *World Economy* 57, 68. See also Simon J Evenette and Bernard M Hoekman 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules' (2002) *World Bank Policy Research Working Paper No. 3195* <<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3195>> accessed 20 November 2015.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

highly visible and politically sensitive activity among multiple stakeholders, representing diverse and often conflicting interests.<sup>17</sup> The multiplicity of stakeholders and their varied and conflicting interests make the use of public procurement as a policy tool highly amenable to controversy.<sup>18</sup> Further, the use of public procurement as a policy tool often falls into abuse, especially in countries characterised by endemic corruption, political patronage and other governance challenges, leading to financial mismanagement and abuse of the public finance system to promote an inequitable society.

Regulators face many challenges relating to public procurement, arising from its nature, the multiple goals which it lends itself to as a policy tool and its impact on national development. The challenges, which often have a direct impact on development, usually revolve around:

- (i) *interplay of economic and social policy objectives;*
- (ii) *abuse of discretion; and*
- (iii) *prevention of corruption, favouritism and other forms of malfeasance.*

We use the phrase ‘economic objectives’ as a generic term for all objectives of public procurement regulation that are based on the neoclassical economic idea of primacy of markets (or market forces) as the appropriate mechanism for allocating society’s scarce resources, and the phrase ‘social objectives’ as a generic term for all objectives of public procurement regulation that are not based on the neoclassical economic idea.

This paper is a comparative analysis of the United States (hereinafter, the US), South African and Kenyan public procurement regulatory systems. The paper contends that compared to Kenya, the United States and South Africa have better, integrated and more effective regulatory responses to the problems of: (i) conflictual coexistence of economic and social policy objectives; (ii) discretion; and (iii) the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision-making. The paper also contends that a lax or discretion-based approach to public procurement regulation would not produce optimal results in Kenya, and would have the overall effect of curtailing financing for development through the procurement process.

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<sup>17</sup> Arnould (n 13), Bolton (n 2), and Weber (n 3) 184. See also Christopher McCrudden and Stuart S Gross ‘WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study’ (2006) 17 (1) *European Journal of International Law* 151, 154.

<sup>18</sup> Trepte (n 1) 6.

The rationale for focusing on public procurement from a general financing for development perspective, and specifically the interplay of economic and social policy objectives and governance challenges, is threefold. First, commentators often disagree on the merits and demerits of market and social approaches to development. Secondly, public procurement is the medium through which governments deliver (inter alia) important infrastructural projects and social amenities, which are often seen as indicative or facilitative of development. Thirdly, corruption, favouritism and other forms of malfeasance (which are generally prevalent in public procurement decision making) tend to undermine development.

Three factors inspired the selection of the US and South Africa for comparative analysis. First, just like Kenya, the US and South Africa practise social procurement within the context of a predominantly market-oriented economy. Secondly, the interplay of social and economic dimensions of public procurement regulation is relevant to development discourse, in view of: (i) the direct correlation between public procurement and national development; and (ii) the different ideological and theoretical rationales, which are also inexorably linked to development discourse, that underlie economic and social objectives of public procurement respectively. Lastly, the regulatory frameworks for social procurement in all three countries are somewhat interrelated. The interrelation is twofold. First, Kenya extensively borrowed the text and structure of its public procurement laws from South Africa. Secondly, American experiences with social procurement inspired the design of South Africa's post-apartheid public procurement regulatory frameworks.

The paper is organized as follows. Sections 2 and 3 examine the interplay of economic and social objectives and the problem of discretion in the US and South African public procurement systems respectively. Section 4 sets out the conclusion.

## **2. INTERPLAY OF ECONOMIC OBJECTIVES, SOCIAL OBJECTIVES AND DISCRETION IN THE US FEDERAL PROCUREMENT SYSTEM**

### **2.1. Overview of the US Public Procurement Regulatory System**

The US regulates public procurement at both federal and state levels.<sup>19</sup> I focus on the US federal public procurement regulatory framework since state regulatory frameworks are too many and too disparate to

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<sup>19</sup> Nicholas S Vonortas, 'Innovation and Public Procurement in the United States,' in Charles Edquist and others (Eds), *Public Procurement for Innovation* (Edward Elgar Publishing 2015) 147, 150.

be coherently examined in a single study.

The principal regulatory framework for public procurement in the US is the Federal Acquisition Regulation (hereinafter, the FAR).<sup>20</sup> The Office of Federal Procurement Policy Reauthorization Act provides statutory anchorage for the FAR. Three institutions jointly issue and maintain the FAR.<sup>21</sup> These institutions are: the Secretary of Defence; the Administrator of General Services; and the Administrator of the National Aeronautics and Space Administration.

Although the FAR is unarguably the most important source of public procurement regulation in the US, many important aspects of US public procurement regulatory system are set out in other instruments. These include federal laws, presidential executive orders, and circulars and guidelines issued by (among others) the Office of Management and Budget and the General Services Administration.<sup>22</sup>

The FAR is an unusually long and complex legal instrument.<sup>23</sup> Many federal agencies, therefore, substitute or supplement it with their own simpler but substantially similar procurement rules.<sup>24</sup> Such deviations and supplements may implement agency-specific socioeconomic objectives.<sup>25</sup> In other words, and as explained below, the FAR gives contracting officers broad discretion to decide the specific social objectives of each agency and each procurement. The leeway for federal agencies to adopt rules that deviate from the FAR, however, is subject to certain authorization, notification and comment requirements.<sup>26</sup> The leeway for federal agencies to substitute or supplement the FAR with their own procurement regulations is also subject to the following important restrictions:<sup>27</sup>

- (a) Agency acquisition regulations shall not—*  
*(1) unnecessarily repeat, paraphrase or otherwise restate material contained in the FAR or higher-level agency acquisition regulations, or*  
*(2) except as required by law or as provided in subpart 1.4, conflict or be inconsistent with FAR content.*<sup>28</sup>

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<sup>20</sup> Ibid.

<sup>21</sup> Kristi D Caravella Robinson, 'US Federal Government Procurement: Organizational Structure, Process and Current Issues,' in Khi V Thai (Ed), *International Handbook of Public Procurement* (CRC Press 2009) 291, 304.

<sup>22</sup> Vonortas (n 19) 150-153.

<sup>23</sup> The FAR is available at <https://www.acquisition.gov/browsefar> (accessed 28 July 2018).

<sup>24</sup> Vonortas (n 19) 154-158. See also Martin J Golub and Sandra Lee Fenske, 'US Government Procurement: Opportunities and Obstacles for Foreign Contractors' (1986-1987) 20 *George Washington Journal of International Law and Economics* 567, 568.

<sup>25</sup> Robinson (n 21) 294.

<sup>26</sup> The FAR, § 1.402.

<sup>27</sup> Ibid §§ 1.304 (b) (1) and (2).

<sup>28</sup> Ibid.

Agency heads authorize deviations for individual contracts. Agency heads, in consultation with the Defence Acquisition Regulatory Council (for defence procurements) or the Civilian Agency Acquisition Council (for civilian procurements), authorize class or permanent deviations from the FAR.

## **2.2. Interplay of Economic and Social Objectives**

The regulatory framework for public procurement in the US, just like its Kenyan counterpart, permits the pursuit of both economic and social objectives<sup>29</sup> as broader goals within the financing for development framework. The US public procurement regulatory system, however, is predominantly economic in character. The economic orientation of the US public procurement regulatory system is evident in at least four aspects. First, the FAR's statement of guiding principles expressly mentions market principles but only covers social policies by implication.<sup>30</sup> Secondly, the FAR frequently imposes a market-oriented restriction on the pursuit of social objectives in federal procurement, by mandating the award of relevant contracts at 'a fair market price.'<sup>31</sup> Thirdly, virtually all the relevant laws and regulations require US federal agencies to firstly, adopt 'full and open competition' and secondly, use 'competitive procedures' in all their procurements.<sup>32</sup> Lastly, the FAR obliges the head of each federal agency to designate a senior official, other than the contracting officer or the procurement staff, as an independent 'advocate for competition.'<sup>33</sup> The role of the advocate for competition is to regularly review public procurement processes with a view to identifying barriers to competition and advising on their removal.<sup>34</sup>

The US has a long history of using public procurement as a tool of social policy.<sup>35</sup> Social procurement

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<sup>29</sup> The FAR, parts 1, 19 and 22 to 26.

<sup>30</sup> *Ibid* § 1.102:

(b) The Federal Acquisition System will—

(1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example—

(i) Maximizing the use of commercial products and services;

(ii) Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and

(iii) Promoting competition;

(2) Minimize administrative operating costs;

(3) Conduct business with integrity, fairness, and openness; and

(4) Fulfill public policy objectives.

<sup>31</sup> See e.g. the following sections of the FAR, namely: § 19.501 (g) on set-asides for small business, § 19.1305 (b) (2) on set-asides for the historically underutilized business zones and § 9.1405 (b) 2) on set-asides for service-disabled veteran owned small businesses. See also Jarrod D. Reece, 'Revisiting Class-Based Affirmative Action in Government Contracting' (2011) 88 *Washington University Law Review* 1309, 1336.

<sup>32</sup> Golub and Fenske (n 24) 570. See also the Competition in Contracting Act 1984; the FAR, § 6.101; the Armed Forces Act, § 2304; and the Public Contracts Act, § 3301.

<sup>33</sup> The FAR, §§ 6.501-6.502 and the Public Contracts Act, §1705.

<sup>34</sup> *Ibid*.

<sup>35</sup> Jarrod (n 31) 1309. See also Yihua Qiao, Khi V Thai and Glenn Cummings, 'State and Local Procurement Preferences: A Survey' (2009) 9 (3) & (4) *Journal of Public Procurement* 371.

in the US began by way of presidential executive orders rather than substantive legislative enactments. The earliest executive order was inspired by exigencies of the Second World War and, specifically, the need to secure the support of all racial groups in the defence of the US.<sup>36</sup> The war-time executive orders lacked enforcement mechanisms and, consequently, had little impact on integration of social objectives into federal procurement.<sup>37</sup> Eventually, social procurement gained momentum in the US as a form of ‘affirmative action’ following the civil rights movement riots of the 1960s.<sup>38</sup>

The social objectives of the US public procurement system mainly revolve around affirmative action programs. Generally, the relevant programs seek to promote equality and empowerment of economically and socially disadvantaged groups.<sup>39</sup> The target groups include: ethnic/racial minorities; women; small businesses; war veterans; persons living with disabilities and contractors from labour-surplus or historically underutilized business zones.<sup>40</sup> The US also uses federal procurement to promote: innovation, domestic industry, employment (in labour-surplus areas), fair employment practices, environmental protection and isolation of hostile foreign states.<sup>41</sup> These social objectives are set out in a highly fragmented regulatory framework, which includes: the FAR,<sup>42</sup> the Buy American Act,<sup>43</sup> the Competition in Contracting Act,<sup>44</sup> the Public Contracts Act,<sup>45</sup> the False Claims Act,<sup>46</sup> the Tucker Act,<sup>47</sup> the Administrative Procedures Act,<sup>48</sup> the Small Business Mobilisation Act<sup>49</sup> and the Small Business Act.<sup>50</sup>

Like Kenya, the US integrates social objectives into public procurement through schemes of preferences

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<sup>36</sup> William J Bogard, ‘Presumed Disadvantaged: Constitutional Incongruity in Federal Contract Procurement and Acquisition Regulations’ (2012) 115 Virginia Law Review 847, 852.

<sup>37</sup> P E Morris, ‘Legal Regulation of Contract Compliance: An Anglo-American Comparison’ (1990) 19 Anglo-American Law Review 87, 122.

<sup>38</sup> McCrudden, *Buying Social Justice* (n 1) 131. See also Christopher McCrudden, ‘Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study’ (2009) Acta Juridica 123, 124.

<sup>39</sup> See inter alia Christopher R Noon, ‘The Use of Racial Preferences in Public Procurement for Social Stability’ (2009) 38 (3) Public Contract Law Journal 611, Jarrod (n 31) and Vonortas (n 19).

<sup>40</sup> Ibid. See also McCrudden, *Buying Social Justice* (n 1) 167.

<sup>41</sup> Golub and Fenske (n 24) 594-595 and McCrudden, *Buying Social Justice* (n 1) 155. See also Linda Weiss and Elizabeth Thurbon, ‘The Business of Buying American: Public Procurement as a Trade Strategy in the US’ (2006) 13 (5) Review of International Political Economy 701.

<sup>42</sup> 48 C.F.R. 1.

<sup>43</sup> 41 U.S.C. 83.

<sup>44</sup> 41 U.S.C. 253.

<sup>45</sup> 41 U.S.C. 65.

<sup>46</sup> 31 U.S.C. §§ 3729–3733.

<sup>47</sup> 28 U.S.C. § 1491.

<sup>48</sup> 5 U.S.C. §§ 551-559.

<sup>49</sup> 50 U.S.C. §§ 1101-1112.

<sup>50</sup> 15 U.S.C. 14A.

and reservations.<sup>51</sup> The margins of preference for certain social objectives in the US are much higher than those applied in Kenya. The US applies, for instance, higher margins of preference in procurements that have the promotion of domestic industry or a favourable balance of payments as dominant social objectives.<sup>52</sup>

Social procurement in the US is intricately linked with the legacies of slavery, racial segregation, war and the civil rights movement.<sup>53</sup> The use of public procurement to promote equality in the US, for instance, first emerged during the second World War as a means for enlisting all citizens ‘regardless of race, creed, colour, or national origin’ to defend the country.<sup>54</sup> Similarly, the use of public procurement to promote small businesses first emerged when the US congress enacted the Small Business Mobilisation Act in 1942 as a means for securing defence supplies by all sectors of the economy.<sup>55</sup>

Most of the social objectives pursued in United States public procurement system have not generated much controversy. The use of set-asides (that is, reservations) to promote racial equality, however, has stirred significant legal and political controversies.<sup>56</sup> Due to political sensitivity and the contentious nature of race-based procurement preferences and reservations, the US government has traditionally anchored the relevant programs on presidential executive orders instead of substantive legislative enactments.<sup>57</sup> The most important executive orders in this regard are arguably those by Presidents John F. Kennedy and Lyndon Johnson in 1961 and 1967 respectively. President Kennedy’s executive order (No. 10925) required federal contractors to ‘take affirmative action’ to avoid discrimination of employees based on race, colour, creed or national origin. President Johnson’s executive order (No. 11246) established the ‘Philadelphia Plan,’ which obliged federal contractors, initially in Philadelphia and later in 55 other cities, to utilize minority employees as a precondition for award of federal public procurement contracts.<sup>58</sup>

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<sup>51</sup> McCrudden, *Buying Social Justice* (n 1) 167. See also Jarrod (n 31) 1333-1337. US laws generally use the phrase ‘set asides,’ rather than ‘reservations,’ to describe restriction of competition for certain government tenders to specified business or demographic groups.

<sup>52</sup> Golub and Fenske (n 24) 581, discussing the application of a 50% price preference under the balance of payments program.

<sup>53</sup> Ibid 132-156. See also Christopher R Yukins, ‘The US Federal Procurement System: An Introduction’ (2017) George Washington Legal Studies Research Paper No. 2017-75 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3063559###](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063559###) > accessed 02 February 2019.

<sup>54</sup> Bogard (n 36) 852.

<sup>55</sup> Ibid. See the Small Business Mobilisation Act 50 U.S.C. §§ 1101-1112.

<sup>56</sup> Ibid. See also Vonortas (n 19), Jarrod (n 31), Noon (n 39) and McCrudden, ‘Social Policy Choices’ (n 38).

<sup>57</sup> McCrudden, *Buying Social Justice* (n 1) 139. For a historical account of the various executive orders, see Martin J Sweet, ‘Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation’ (2006) 33 (1) *Journal of Law and Society* 160.

<sup>58</sup> Ibid.

Controversies relating to race-based social procurement in the US revolve around two main issues, namely: reverse discrimination and economic justification for the enormous extra costs usually entailed in the relevant social programs. Critics have also claimed that race-based procurement preferences tend to produce anomalous or unintended results.<sup>59</sup> One common anomalous result is the tendency of race-based procurement preferences to benefit privileged and well-off individuals on account of merely belonging to an ethnic or racial minority group.<sup>60</sup> Due to these controversies, race-based procurement preferences in the US have often resulted in protracted litigation and remarkably long filibusters before the US Congress.<sup>61</sup>

United States courts generally disavow the use of federal procurement to promote racial equality and redress the effects of past racial discrimination. The prevailing case law on the issue may be summarised into four main propositions.<sup>62</sup> First, although the constitutional validity of a race-based public procurement preference may be suspect, such preferences are not per se unconstitutional. In other words, the social objective of promoting racial equality through federal procurement is not presumptively illegitimate.

Secondly, race-based preferences in federal procurement must, if challenged in the courts, be subjected to *strict scrutiny* (that is, the severest level of judicial examination of executive action).<sup>63</sup> The rationale for strict scrutiny is that racial classifications are ‘potentially harmful to the entire body politic’ and ‘too pernicious to permit any but the most exact connection between justification and classification.’<sup>64</sup>

Thirdly, federal agencies must have a ‘compelling interest’ as a precondition for adopting racial preferences in their public procurements.<sup>65</sup> The rationale for requiring a compelling interest as a precondition for use of racial preferences in federal procurement is that racial characteristics ‘seldom provide a relevant basis for disparate treatment.’<sup>66</sup>

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<sup>59</sup> Jarrod (n 31) 1322, McCrudden, *Buying Social Justice* (n 1) 169.

<sup>60</sup> *Ibid.*

<sup>61</sup> Jarrod (n 31) 1309, noting that some states in the US have taken the extreme step of banning race-based affirmative action programs by ballot. See also McCrudden, *Buying Social Justice* (n 1) 133-139 and 173 and Morris (n 37) 125.

<sup>62</sup> *City of Richmond v J A Croson* 488 U.S. 469 (1989), *Adarand Constructors v Pena* 515 U.S. 200 (1995) and *Rothe Development Corp. v Department of Defence* 545 F. 3d 1023 (2008).

<sup>63</sup> *Ibid.* Previously, American courts subjected race-based affirmative action procurement programmes to a deferential standard of review, namely intermediate scrutiny. For a judicial opinion applying the intermediate scrutiny standard of review, see *Fullilove v Klutznick* 448 U.S. 448 (1980).

<sup>64</sup> *Adarand Constructors v Pena* 515 U.S. 200 (1995).

<sup>65</sup> McCrudden, *Buying Social Justice* (n 1) 170-174.

<sup>66</sup> *Adarand Constructors v Pena* 515 U.S. 200 (1995) 236.

Generally, the prevailing judicial view in the US is that the only compelling interest that would justify racial preferences is the need to correct the perverse effects of past racial discrimination.

Lastly, racial preferences must be ‘narrowly tailored’ to serve the specific compelling interest underlying their adoption.<sup>67</sup> In sum, therefore, the US judiciary is generally hostile to race-based procurement preferences.<sup>68</sup>

The US government has generally used three broad strategies to surmount judicial restrictions on race-based federal procurement preferences.<sup>69</sup> The first entails looking for ‘loopholes’ in the relevant judgments.<sup>70</sup> This strategy enables the US government to maintain race-based procurement preferences while ‘technically’ complying with relevant judicial decisions.<sup>71</sup> The second strategy entails redesigning race-based federal procurement preferences to make them facially race-neutral.<sup>72</sup> Lastly, the US government adopts need-based criteria, as opposed to race, as the dominant consideration for participation in social procurement programs.<sup>73</sup>

The US public procurement regulatory system attempts to balance economic and social objectives in three broad ways. First, the FAR sets out ‘best value’ as a core objective of the US public procurement regulatory system.<sup>74</sup> According to section 1.102 of the FAR, ‘best value must be viewed from a broad perspective and is achieved by balancing the many competing interests.’<sup>75</sup> The requirement for a broad perspective, and the balancing of many competing interests, suggests an approach to public procurement that is not unduly encumbered by markets or economics.

Secondly, United States procurement laws permit abandonment of social objectives where the extra costs of their pursuit are unreasonable.<sup>76</sup> Generally, extra costs are deemed unreasonable where the lowest offer from a bidder belonging to a target group, say racial minorities, is higher than the best offer even after the application of the relevant margin of preference.<sup>77</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Sweet (n 57) 164.

<sup>69</sup> Jarrod (n 31) 1318-1319.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> The FAR § 1.102 (a).

<sup>75</sup> Ibid §§ 1.102-1.

<sup>76</sup> Golub and Fenske (n 24) 576-579.

<sup>77</sup> The FAR, § 25.105 (c).

Lastly, the FAR gives federal agencies discretion to make reasoned trade-offs between price and quality where the perceived benefits of a higher priced bid exceed the extra costs.<sup>78</sup> Price/quality trade-offs are subject to two qualifications. First, agencies must document the rationale for their decision whenever they make any such trade-offs. The documentation provides an avenue for holding agencies accountable for their exercise of discretion in public procurement decision-making. Secondly, federal agencies cannot capriciously ignore or make price merely a nominal factor in evaluation of bids.<sup>79</sup>

### **2.3. Discretion, Corruption, Favouritism and Other Forms of Malfeasance**

The US public procurement system has evolved through alternating epochs of deregulation and strict regulation, characterised by broad and highly circumscribed discretion respectively.<sup>80</sup> Two factors have led to this ‘swinging pendulum’ of procurement reform.<sup>81</sup> The first is knee-jerk congressional reaction to specific abuses and scandals and, specifically, legislators’ tendency to treat such abuses and scandals as symptoms of structural weaknesses in the regulatory framework.<sup>82</sup> The second is conflicting perceptions, among US legislators and policy makers, of the problem of discretion and the propensity of government bureaucrats to abuse it.<sup>83</sup>

The following excerpt aptly captures the conflicting perceptions on the problem of discretion that have shaped the evolution of public procurement regulation in the US:

*Historically, much of United States’ federal procurement law has been founded on a pessimistic view of the operation of government and the capabilities and honesty of government employees. The premise often seems to be that procurement officials should not be allowed to exercise significant discretion, because left to their own unguided discretion, members of the federal acquisition workforce will make undesirable decisions...A central problem engendered by this approach is that it is easier to write rigid rules to prohibit or command certain types of behaviour than it is to achieve subtler goals of the procurement system, such as obtaining “best value” for the expenditure of government funds or optimally advancing the mission of the agency. Accordingly, rigid attachment to rule-bound procurement systems has costs, even though it also serves the procurement system objectives of integrity, equity and efficiency. From time to time the costs of adherence to such rule-driven approaches will appear to be excessive, promoting a counter-reaction of deregulation.<sup>84</sup>*

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<sup>78</sup> Ibid § 15.101.

<sup>79</sup> *Serco Inc. v United States*, 81 Fed. Cl. 463, 491 (2008).

<sup>80</sup> Robinson (n 21) 295-296. See also Steven Kelman, ‘Remaking Federal Procurement’ (2001) John F. Kennedy School of Government Working Paper No. 3.

<sup>81</sup> Joshua I Schwartz, ‘Regulation and Deregulation in Public Procurement Law Reform in the United States’ in Gustavo Piga and Thai Khi V (Eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (2007 PrAcademics Press) 177.

<sup>82</sup> Ibid.

<sup>83</sup> William E Kovacic, ‘The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets’ (1998) 6 *Supreme Court Economic Review* 201, 205-210.

<sup>84</sup> Schwartz (n 81) 179-181.

There is no consensus, therefore, among US intelligentsia and policy makers on the correct approach to the problem of discretion and its correlation to public procurement corruption, favouritism and other forms of malfeasance. Generally, however, the regulatory framework for public procurement in the US gives government bureaucrats significant discretion in the choice of economic and social objectives:<sup>85</sup>

*The substantive [economic and social] policies, however, are mostly left to the discretion of the acquiring federal agency...Discretion is given to the individual agency to decide what they think should be a qualifying condition for a vendor...Each agency has a fair amount of discretion in setting its standards and procedures under the wide umbrella of process rules laid down by FAR...While procurement in the United States is subject to a mesh of regulations issued and administered by a wide range of actors, significant decision-making power is left to the procurement manager in each agency. The substantive policies are mostly left to the discretion of each acquiring federal agency...The independence of each bureau to come up with its procurement needs is based on the overall federal practice of giving maximum discretion to the end client or to the acquiring agency in laying down procurement rules fitting to the agency's overall mission...<sup>86</sup>*

American courts' approach to the problem of discretion is substantially similar to the approach taken by Kenyan and most common law courts. The dominant judicial view in the US is that contracting officers are 'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process, and that a disaffected tenderer who alleges wrongful exercise of discretion bears a heavy burden of proof.<sup>87</sup> United States courts, therefore, invariably uphold impugned federal procurement decisions where a contracting agency offers a coherent and reasonable explanation for its exercise of discretion.<sup>88</sup> The statutory foundation for this judicial approach lies in provisions of the FAR that permit contracting officers to 'exercise personal initiative and sound business judgment' and 'assume if a specific strategy, policy or procedure is in the best interest of the government.'<sup>89</sup> Moreover, United States courts, just like their Kenyan counterparts, uphold the exercise of discretion once a rational and coherent explanation is offered even where they (i.e. the courts) would have exercised it differently had they been trusted with the making of the impugned decision.<sup>90</sup>

The US has experienced a significant incidence of corruption, favouritism and other forms of malfeasance, arising arguably from the broad discretionary powers its regulatory framework for public procurement

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<sup>85</sup> Vonortas (n 19) 149-153.

<sup>86</sup> Ibid.

<sup>87</sup> *Impresa Construzioni Geom. Domenico Garufi v United States* 238 F.3d 1324, 1332 and *AgustaWestland North America v United States*, United States Court of Appeals for the Federal Circuit Appeal No. 2017-1082, 10.

<sup>88</sup> Ibid.

<sup>89</sup> The FAR, § 1.102 (4) (b).

<sup>90</sup> *Phoenix Management Inc. v The United States*, United States Court of Federal Claims Case No. 16-78, 5. See also *Myers Investigative and Security Services Inc. v United States* 47 Fed. Cl 605 (2000)

confers on government officials.<sup>91</sup> The incidence of governance challenges in the US procurement system is, generally, confined to defence procurement.<sup>92</sup> The Department of Defence, however, is by far the largest procurement entity in the US in terms of expenditure,<sup>93</sup> accounting for more than the combined procurement expenditure of all other federal agencies.<sup>94</sup> The prevalence of corruption, favouritism and other forms of malfeasance in defence procurement, therefore, is arguably generalisable to the entire US public procurement system. Indeed, a leading commentator has described the US federal procurement system as characterised by ‘the unholy trinity of waste, fraud and abuse...where contractors run roughshod over the public and hapless agencies.’<sup>95</sup> A more comprehensive study on the issue described the US federal defence procurement as one that is traditionally characterised by ‘fraud, incompetence, waste and abuse... [and] collaboration between corrupt corporate representatives and incompetent or similarly nefarious public servants.’<sup>96</sup> The US has also experienced abuses of social procurement programmes, including allowing ineligible contractors to participate in set-asides for economically and socially disadvantaged groups.<sup>97</sup>

The US has adopted a broad range of innovative, robust and mutually complementary mechanisms for dealing with the problems of discretion, corruption, favouritism and other forms of malfeasance in federal procurement.<sup>98</sup> As explained below, the mechanisms include: (i) legal rules that oblige (rather than merely empower) courts to set aside federal procurement decisions tainted by abuse of discretion; (ii) availability of alternative forums for bid protests; and (iii) reliance on both public and private enforcement of rules against corruption, favouritism and other forms of malfeasance. Further, and perhaps most importantly, the US regulatory framework for public procurement contains a regime of sanctions that ensures the costs of engaging in corruption, favouritism and other malfeasance exceed the potential benefits.

The Tucker Act obliges US courts to hold as unlawful, and set aside, federal procurement decisions

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<sup>91</sup> Robinson (n 21) 296. Discretion generally tends to create incentives for corruption, favouritism and other forms of malfeasance..

<sup>92</sup> William Sims Curry, *Government Abuse: Fraud, Waste and Incompetence in Awarding Contracts in the United States* (Routledge 2017) 1.

<sup>93</sup> Robinson (n 21) 292.

<sup>94</sup> Sims (n 92) 1 and 9. According to Sims, the total federal procurement expenditure for the financial year 2010 stood at US\$516,713,547,000.00, of which US\$331,221,413,000 (that is 64%) represented Department of Defence procurement expenditure.

<sup>95</sup> Kelman (n 80) 44.

<sup>96</sup> Sims (n 92) 1.

<sup>97</sup> *Ibid* 10.

<sup>98</sup> Yukins (n 53) 89-93

found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.<sup>99</sup> Specifically, US courts must determine whether a federal agency has ‘considered relevant factors and articulated a rational connection between the facts found and the choice made.’<sup>100</sup> The dominant judicial view, however, is that: (i) the Tucker Act espouses a deferential standard of review; and (ii) the courts should uphold impugned procurement decisions where a federal agency provides a coherent and reasonable explanation of its exercise of discretion.<sup>101</sup>

The False Claims Act imposes stiff monetary penalties (ranging between US\$5,000.00 and US\$10,000.00) and treble damages for public procurement fraud.<sup>102</sup> This law also permits private citizens and whistle blowers to sue fraudulent contractors on behalf of the state and get a share of damages, ranging from 10% to 30%, if the suit succeeds.<sup>103</sup> These suits, which are commonly known as ‘relator suits’ (or ‘*qui tam* suits’ in medieval parlance) greatly complement traditional law enforcement.

Relator suits are very effective in combating corruption and malfeasance in the US public procurement system. This is evidenced by the huge sums of money often recovered through them.<sup>104</sup> Three factors account for the effectiveness of relator suits in curbing the incidence of corruption, favouritism and other forms of malpractice in the US federal procurement system. First, relator suits are driven by a private profit motive, which typical public investigators, prosecutors and other law enforcement officers lack.<sup>105</sup> Secondly, the False Claims Act confers locus standi on a broad range of actors, including private citizens and employees of both government contractors and government agencies to file relator suits.<sup>106</sup> This ensures compliance with regulatory norms even where the demand and supply sides of public procurement corruption have a mutual incentive to frustrate investigation and prosecution. Lastly, the False Claims Act protects government officers who file or assist in the filing or prosecution of relator suits from reprisals such as dismissal, threats, suspension, harassment and discrimination.<sup>107</sup> These three factors may explain why the US public procurement system does not have endemic levels of public

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<sup>99</sup> The Tucker Act 28 U.S.C. §1491 (b) (1), as read with the Administrative Procedures Act 5 U.S.C. § 706 (2) (A). For insights on judicial review of federal procurement decisions in the US, see e.g. *Phoenix Management Inc. v The United States*, United States Court of Federal Claims Case No. 16-78.

<sup>100</sup> *Baltimore Gas & Electric Co. & Others v Natural Resources Defense Council* 462 U. S. 87, 105 (1983).

<sup>101</sup> *Phoenix Management Inc. v The United States*, United States Court of Federal Claims Case No. 16-78.

<sup>102</sup> The False Claims Act, §§ 3729 (a) (1) and 3730 (b) (1) and (2).

<sup>103</sup> *Ibid.* For a critical analysis of the Act, see Kovacic (n 83).

<sup>104</sup> See e.g. United States Department of Justice, ‘Justice Department Recovers Over \$4.7 Billion from False Claims Act Cases in Fiscal Year 2016: Third Highest Annual Recovery in FCA History’ <<https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016>>accessed 02 February 2019.

<sup>105</sup> Kovacic (n 83) 201.

<sup>106</sup> *Ibid* 212.

<sup>107</sup> *Ibid* 217.

procurement corruption and malfeasance in spite of formal grants of broad discretionary powers on government bureaucrats.

#### **2.4. Implication of the US Experience for Kenya**

There are many textual similarities, and contextual differences, between the US and Kenyan public procurement regulatory systems. The lessons that emerge from the comparative analysis of the two regulatory systems are set out below.

The US regulatory emphasis of ‘best value,’ and the pursuit of such value by ‘balancing the many competing interests,’ offers an integrated approach to the problem of conflictual coexistence of economic and social objectives in public procurement. This integrated approach is better than Kenya’s mechanical approach of promoting social objectives through set-asides and percentage price premiums (that is, margins of preference). The extra costs of social procurement under the Kenyan regulatory system generally tend to increase with every increase in the value of public procurement contracts. The US approach to potential conflicts between the two species of objectives is also superior to Kenya’s to the extent that it empowers contracting officers to: (i) make reasoned trade-offs between price and quality; (ii) forgo the pursuit of social objectives in cases where the extra costs are unreasonable; and (iii) insist on payment of ‘a fair market price’ to beneficiaries of social procurement.<sup>108</sup>

The US approach to public procurement regulation, which is characterised by formal grants of broad discretionary powers on government bureaucrats, is very different from Kenya’s highly prescriptive regulatory system. The US regulatory approach (of formal grants of broad discretionary powers) would hardly work in Kenya. Formal grant of broad discretionary powers on Kenyan government bureaucrats would only exacerbate the country’s problem of endemic corruption, favouritism and other forms of malfeasance.

Strong accountability mechanisms such as those found in the US may not necessarily provide an effective counterpoise against formal grants of broad discretionary powers in Kenya, due to differences in the pervasiveness of public procurement corruption, favouritism and other forms of malfeasance across the two countries. As explained, public procurement corruption in the US is generally confined to a single

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<sup>108</sup> See e.g. the FAR, §§ 15.101, 19.501 (g), 19.1305 (b) (2).

agency (that is the Department of Defence).<sup>109</sup> The perception that public procurement corruption and malfeasance in the US is generally confined to defence procurement, however, is arguably attributable to: (i) shadowy budgeting and financial reporting of military expenditure; and (ii) the sheer size of defence procurement relative to other federal procurements.<sup>110</sup> These two factors (that is, shadowy budgeting/reporting of military expenditure and the sheer size of defence procurement) may also have shifted regulatory and academic attention from the incidence of public corruption, favouritism and malfeasance in the procurements of other US federal agencies. Overall, however, the US regulatory approach to the problem discretion would not work in Kenya to the extent that the latter's public procurement system is generally characterised by a pervasive incidence of the so-called 'dirty trio' of corruption, tribalism and impunity in most agencies.<sup>111</sup>

Kelman, arguably the leading exponent of enhanced discretion in public procurement management in the US, acknowledges the superiority of a rule-based approach to a discretion-based approach in societies where corruption, favouritism and other forms of malfeasance are endemic:

*Obviously, if abuse is the common practice rather than the exception—the case, possibly, with procurement corruption in some times and places—then the argument that a rule generally produces better decisions than greater discretion, with only occasional anomalies, regains its force.*<sup>112</sup>

Although judicial approaches to the problem of abuse of discretion in Kenya and US are substantially similar, the US regulatory framework has a subtle but important distinction. The distinction lies in the fact US laws expressly oblige federal courts to hold as unlawful, and set aside, public procurement decisions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.<sup>113</sup> This approach is superior to Kenya's approach, which generally leaves the issue of remedies to the discretion of the Review Board and the courts even where a complainant proves abuse of discretion or breach of procurement laws.<sup>114</sup> Kenya could borrow a useful lesson, therefore, by amending the 2015 Procurement Act to oblige (rather than merely empower) the Review Board and the Courts to nullify

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<sup>109</sup> Sims (n 92) 3, noting that only an 'infinitesimal element of the primarily honest government workforce' engages in public procurement corruption, favouritism and other forms of malfeasance in the US.

<sup>110</sup> Anthony H Cordesman, 'America's Military Spending and the Uncertain Costs of Its Wars: The Need for Transparent Reporting' <<https://www.csis.org/analysis/americas-military-spending-and-uncertain-costs-its-wars-need-transparent-reporting>> accessed 26 May 2019.

<sup>111</sup> Njuguna Humphrey Kimani, 'The Influence of Political Patronage on the Operationalization of Public Procurement Law in Kenya' (Fifth International Public Procurement Conference, Seattle, 2012) 1592, 1608, <<http://www.ipppa.org/IPPC5/Proceedings/Part6/PAPER6-14.pdf>> accessed 13 January 2019).

<sup>112</sup> Kelman (n 80) 13.

<sup>113</sup> The Tucker Act, § 1491 (b) (1).

<sup>114</sup> The 2015 Procurement Act, ss 173 and 175, as read with the Fair Administrative Action Act, 2015 s 11 (2).

procurement decisions that are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. The Kenyan judiciary should also reconsider case law that gives courts a leeway to refuse to grant judicial review remedies (usually, in public interest) even where a complainant establishes a case for the grant of such remedies.<sup>115</sup>

The US approach of relying on both public and private-driven sanctions to address abuse of discretion, corruption, favouritism and other forms of malfeasance would be particularly useful if adopted in Kenya. Specifically, relator suits would boost the war against public procurement corruption and malfeasance if adopted in Kenya. The rationale for this is two-fold. First, relator suits would ensure the imposition of sanctions even where public officers and government contractors conspire to ensure impunity for nefarious conduct. Secondly, private suitors, driven by the rational profit motive of getting a share of punitive damages or stiff monetary penalties, would fight corruption, favouritism and other forms of malfeasance in public procurement more enthusiastically than public investigators and prosecutors. Public investigators and prosecutors, unlike private citizens who file relator suits, lack a private profit motive in pursuing delinquent contractors and government bureaucrats. In sum, relator suits would greatly complement the efforts of Kenyan public investigators, prosecutors and other law enforcement officers, who are generally underpaid, overworked and (consequently) demotivated.

The US bid protest mechanism compares better than its Kenyan counterpart in at least two ways. First, disaffected bidders in the US have three alternative forums for filing bid protests, namely: the procuring agency, the Government Accountability Office or the United States Court of Federal Claims.<sup>116</sup> The availability of alternative bid protest forums reduces the incentives for judicial impunity and unaccountability, by encouraging each forum to make decisions that are honest and legally sound. Specifically, availability of alternative bid protest forums not only gives viable options to disaffected bidders but also ensures that an incompetent or corrupt forum falls into disuse and disrepute. Secondly, the US bid protest mechanism facilitates a quicker resolution of disputes by allowing contracting agencies to take corrective action before conclusion of bid protest proceedings.<sup>117</sup>

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<sup>115</sup> Republic v Judicial Service Commission ex parte Pareno [2004] 1 KLR 203. See also *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, paras 114 and 194. The view that judicial review orders are discretionary has its roots in old English common law principles, and is arguably incompatible with the provisions of the 2010 Constitution.

<sup>116</sup> The FAR, § 33.101-33.106.

<sup>117</sup> Government Accountability Office, 'Bid Protests, Appropriations Law, & Other Legal Work' <<https://www.gao.gov/legal/bid-protests/faqs/>> accessed 07 May 2019.

### 3. INTERPLAY OF ECONOMIC OBJECTIVES, SOCIAL OBJECTIVES AND DISCRETION IN THE SOUTH AFRICAN PUBLIC PROCUREMENT SYSTEM

#### 3.1. Overview of South Africa's Public Procurement Regulatory System

The South African public procurement regulatory system is founded on five core objectives, which govern the behaviour of government bureaucrats and private sector suppliers.<sup>118</sup> The core objectives are: value for money; open and effective competition; ethics and fair dealing; accountability and reporting; and equity.<sup>119</sup> Relatedly, these values form the core of the financing for development narrative. The South African government sees these objectives as ‘the five pillars of procurement,’ because ‘if any one of them is broken the [public] procurement system falls down.’<sup>120</sup> These objectives are established and elaborated in multiple laws and regulations, including:<sup>121</sup> the Constitution of the Republic of South Africa,<sup>122</sup> the Broad-Based Black Economic Empowerment Act,<sup>123</sup> the Preferential Procurement Policy Framework Act,<sup>124</sup> the Preferential Procurement Regulations, 2017 and the General Procurement Guidelines.<sup>125</sup>

#### 3.2. Interplay of Economic and Social Objectives

For many years, South Africa practised apartheid, a system that entailed state-sanctioned racial discrimination and segregation in all spheres of life. Apartheid resulted in extreme social exclusion, characterised by a market-dominant white racial minority and an impoverished black racial majority.<sup>126</sup> The term ‘black people’ refers, for purposes of South African preferential public procurement laws, to Africans, coloureds and Indians who: (i) are citizens of South Africa by birth or decent or (ii) had become South African citizens by naturalisation on or before 27th April 1994.<sup>127</sup> The apartheid era was also characterised by a predominantly market-oriented approach to public procurement, which tended to: (i) favour large white-owned and well-established businesses and (ii) exclude black-owned and small,

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<sup>118</sup> Government of the Republic of South Africa, ‘General Procurement Guidelines’ <<http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf>> Accessed 26 July 2018.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Christian Helmrich, ‘Equality-Oriented Horizontal Policies in South African Public Procurement’ (2014) 1 African Public Procurement Law Journal 61, 71.

<sup>122</sup> The Constitution of South Africa, 1996.

<sup>123</sup> The Broad-Based Black Economic Empowerment Act, 2003.

<sup>124</sup> The Preferential Procurement Policy Framework Act, 2000.

<sup>125</sup> Government of the Republic of South Africa (n 117).

<sup>126</sup> McCrudden, ‘Social Policy Choices’ (n 38) 126-127. See also International Institute for Sustainable Development, *Implementing Sustainable Public Procurement in South Africa: Where to Start* (IISD Report, 2014) 7.

<sup>127</sup> The Broad-Based Black Economic Empowerment Act, ss 1 and 9.

medium and micro enterprises.<sup>128</sup>

Following the formal end of apartheid in 1994, South Africa adopted policies and laws aimed at: (i) promoting good governance; (ii) extensive economic redistribution and (iii) maintenance of a market-oriented economy.<sup>129</sup> The main post-apartheid policies in this regard were: (i) the Reconstruction and Development Programme (hereinafter; the RDP policy); (ii) the Black Economic Empowerment Policy (hereinafter; BEE policy); (iii) the Broad-Based Black Economic Empowerment Policy (hereinafter; B-BBEE policy); and (iv) the Green Paper on Public Sector Procurement Reform.<sup>130</sup>

The social objectives imbedded in South African public procurement laws are to be found mainly in the B-BBEE policy. The correction of social exclusion, and specifically the amelioration of the extreme inter-racial inequalities created by apartheid, therefore, is the core social objective of the South African public procurement system.<sup>131</sup> Other social objectives include: advancement of SMEs and historically disadvantaged individuals, promotion of women and physically handicapped people, job creation and promotion of local industry.<sup>132</sup>

The South African regulatory framework for public procurement seeks to correct the perverse effects of apartheid through preferential procurement and enterprise development for businesses owned by historically disadvantaged individuals (generally, black South Africans).<sup>133</sup> This objective is embedded in multiple South African laws, including: the Constitution of South Africa, 1996; the Preferential Procurement Policy Framework Act, 2000; the Broad-Based Black Economic Empowerment Act, 2003; the Employment Equity Act, 1998; the Promotion of Equality and Prevention of Unfair Discrimination Act, 2002; the Public Finance Management Act, 1999; the Local Government: Municipal Financial Management Act, 2003 and various subsidiary legislation.<sup>134</sup> Just like the US, and unlike Kenya,

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<sup>128</sup> Bolton (n 2).

<sup>129</sup> McCrudden, *Buying Social Justice* (n 1) 75. See also Interher Marcus Ambe, 'Procurement Challenges in the South African Public Sector' (2012) *Journal of Transport and Supply Chain Management* 242, 245.

<sup>130</sup> Helmrich (n 120) 71.

<sup>131</sup> Phoebe Bolton, 'The Public Procurement System in South Africa: Main Characteristics' (2008) 37 (4) *Public Contract Law Journal* 781, 785.

<sup>132</sup> Government of the Republic of South Africa (n 117). See also McCrudden, 'Social Policy Choices' (n 38) 128-130. For a comprehensive list of specific social objectives of the South African public procurement regulatory system, see section 2 (1) of the Preferential Public Procurement Policy Framework Act 2000, as read with regulations 3 and 4 of the Preferential Procurement Regulations, 2017.

<sup>133</sup> McCrudden, *Buying Social Justice* (n 1) 75. See also International Labour Organisation, 'Targeted Procurement in the Republic of South Africa: An Independent Assessment' (2002) 19-32. Kenya borrowed (apparently 'copy-pasted') article 227 of the 2010 Constitution from section 217 of the South African Constitution.

<sup>134</sup> McCrudden, 'Social Policy Choices' (n 38) 131-141.

therefore, South Africa has a highly fragmented regulatory framework for public procurement, various facets of which are set out in different laws and regulations.<sup>135</sup>

The Preferential Procurement Policy Framework Act (hereinafter, the PPPFA) and the Broad-Based Black Economic Empowerment Act (hereinafter, the B-BBEEA) constitute the core statutory framework for social procurement in South Africa. The PPPFA gives every organ of state discretion to determine and implement its preferential procurement policy (and the specific social objectives of such policy) within defined parameters.<sup>136</sup> The B-BBEEA, on the other hand, establishes diverse but integrated strategies for the viable economic empowerment of black South Africans, with special focus on black women, workers, youth, people with disabilities and people living in rural areas.<sup>137</sup> In summary, the overall aim of the B-BBEEA is to reverse the legacy of apartheid by increasing the number of black people that manage, own and control the South African economy.<sup>138</sup>

The B-BBEEA permits the use of public procurement as a tool for encouraging private enterprises to adopt and comply with prescribed codes of good practice for reversing the legacy of apartheid, through socioeconomic empowerment of black South Africans.<sup>139</sup> Enterprises that comply with the prescribed codes of good practice also enjoy advantages in: (i) issuance of licenses, concessions or other business authorisations; (ii) sale of state-owned enterprises; and (iii) public-private partnerships.<sup>140</sup> Bidders seeking to benefit from preferential procurement must submit B-BBEE status level certificates.<sup>141</sup>

South African public agencies evaluate the B-BBEE status of tenderers using a seven-pillar score card. Each pillar of the score card has a relative weighting in terms of preference points for purposes of the dual scales established by the PPPFA (that is the 80/20 and the 90/10 scales).<sup>142</sup> The seven pillars of the score card, which are deemed indices of a tenderer's compliance with prescribed codes of good practice, are: (i) equity ownership; (ii) management; (iii) employment equity; (iv) skills development; (v) preferential

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<sup>135</sup> Gezani Phineas Mazibuko, 'Analysis of the Administration of Procurement Practices in the South African Public Sector' (PhD Thesis, University of Pretoria 2018) 112-113.

<sup>136</sup> The PPPFA, s 2 (1). See also the Preferential Procurement Regulations, 2017, reg 3.

<sup>137</sup> The B-BBEEA, ss 1 and 2.

<sup>138</sup> Intaher Marcus Ambe, 'Public Procurement Trends and Developments in South Africa' (2016) 3 (4) *Research Journal of Business and Management* 277, 284.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.* See also the Preferential Procurement Regulations, 2017, reg 6 (4). The B-BBEEA empowers the Minister for Finance to establish a B-BBEE Verification Professional Regulator, which is responsible for accrediting B-BBEE Verification Agencies. B-BBEE Verification Agencies are responsible for issuance of B-BBEE status level certificates.

<sup>142</sup> International Institute for Sustainable Development (n 125) 9.

procurement; (vi) enterprise development; and (vii) socioeconomic development of black people.<sup>143</sup> The number of preference points obtainable under dual scales established by the PPPFA (that is the 80/20 and the 90/10 scales) generally depends on a tenderer's B-BBEEA status level certification.<sup>144</sup>

South Africa extensively reviewed US experiences with social procurement before designing her own regulatory frameworks.<sup>145</sup> Two factors inspired the review, namely: (i) the two countries' shared history of racial segregation; and (ii) legal controversies that had bogged down race-based procurement preferences in the US.<sup>146</sup> The review shaped two important aspects of the South African regulatory framework for public procurement. First, South Africa opted to implement social objectives through a preference points system as opposed to set-asides.<sup>147</sup> Moreover, South African policy makers generally considered set-asides incompatible with the constitutional edict that requires public agencies to conduct public procurement in accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective.'<sup>148</sup> Secondly, South Africa opted to 'secure' the legal validity of social procurement by expressly providing for it in the text of the post-apartheid constitution.<sup>149</sup> The rationale for 'constitutionalisation' of social procurement was simple: the architects of post-apartheid South Africa considered public procurement a critical and indispensable tool for redressing past racial injustices, hence the need to safeguard it against judicial declarations of unconstitutionality.<sup>150</sup>

As stated, pre-apartheid South Africa followed a predominantly market-oriented approach to public procurement, with price being the overriding criterion for award of public procurement contracts. The redistributive policies of the post-apartheid era envisioned a public procurement regulatory framework that espoused both economic and social objectives. The current regulatory framework requires South African procurement officers to not only encourage 'effective competition through procurement methods suited to market circumstances' but also ensure that all public procurement complies with the social objectives set out in the PPPFA.<sup>151</sup> Further, just like Kenya, South African public procurement laws require mandatory integration of social objectives into all public procurements and consideration of both

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<sup>143</sup> Ibid.

<sup>144</sup> Ambe (n 136) 283.

<sup>145</sup> McCrudden, *Buying Social Justice* (n 1) 131.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> International Labour Organisation, '*Targeted Procurement in the Republic of South Africa: An Independent Assessment*' (2002) 28. The South African constitution does not, however, expressly prohibit the implementation of social procurement by way of set-asides.

<sup>149</sup> McCrudden, 'Social Policy Choices' (n 38) 131.

<sup>150</sup> Ibid.

<sup>151</sup> Government of the Republic of South Africa (n 117).

price and non-price factors in awarding public contracts.<sup>152</sup>

Unlike their Kenyan counterparts, South African courts emphasize an integrated approach to public procurement that avoids inflexible obsession with either economic or social objectives. In *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape*, for instance, the South African High Court censured a procurement decision that sought to promote social objectives at an unreasonable economic cost in the following terms:

*I do not believe that the Constitution intended to elevate [social objectives] to the one and only consideration to be applied by a Tender Board... [T]his court accepts without reservation that it was at all times and will always be incumbent upon a Tender Board to consider the [social objectives] of each and every tender... It is however of the greatest importance that it should be understood that that aspect does not override all other considerations such as fairness, competitiveness and the like... [T]he decision of the Tender Board to award a contract (the total value of which is in the vicinity of R300 to R400 million) to tenderers who have quoted in the vicinity of R200 million more for the same service purely on ideological considerations is untenable<sup>153</sup>*

South African courts have also held that it is not cost effective to award a tender to a bidder who merely ‘ticks the right boxes as regards price and preference, but is unable to get the job done properly— whether through lack of experience, adequate personnel or financial resources.’<sup>154</sup>

South Africa uses a preference points system of dual scales, based on the value of the contract and the Broad-based Black Economic Empowerment status of bidders, as the principal method for integrating social objectives into public procurement.<sup>155</sup> There are two graduated scales in this regard, namely the 80/20 scale and the 90/10 scale.<sup>156</sup> Under the 80/20 scale, tenderers get a maximum of 20 evaluation points, out of 100, for: (i) being a historically disadvantaged individual; (ii) subcontracting an historically disadvantaged individual; (iii) subcontracting an enterprise that is least 51% owned by historically disadvantaged individuals; and/or (iv) meeting any other specified social objectives in procurements valued between thirty thousand and fifty million South African Rand.<sup>157</sup> Under the 90/10 scale, tenderers get a maximum of 10 evaluation points, out of 100, for: (i) being a historically disadvantaged individual;

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<sup>152</sup> Helmrigh (n 120) 70.

<sup>153</sup> *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck).

<sup>154</sup> *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3.

<sup>155</sup> Helmrigh (n 120) 71-72. Regulation 9 of the Preferential Procurement Regulations, 2017 provides for subcontracting arrangements as an additional method for promoting social objectives. In summary, the regulation allows procuring entities to require successful tenderers to subcontract at least 30% of the contract value to small enterprises that are at least 51% owned by black people or black people who: (i) are youth; (ii) are women; (iii) with disabilities; (iv) living in rural or underdeveloped areas or townships; or (v) are military veterans.

<sup>156</sup> Helmrigh (n 120) 71-72.

<sup>157</sup> The PPPFA, s 2 (1) (b) (ii). See also the Preferential Procurement Regulations, 2017, reg 6.

(i) subcontracting an historically disadvantaged individual; (iii) subcontracting an enterprise that is least 51% owned by historically disadvantaged individuals; and/or (iv) meeting any other specified social objectives in procurements valued over fifty million South African Rand (that is, about US\$ 3,450,000.00).<sup>158</sup>

In summary, the dual scale preference point system works as follows. First, the lowest acceptable tender gets maximum points for price, which is 80 or 90 points depending on the applicable scale.<sup>159</sup> Secondly, all other acceptable tenders which are higher in price must score fewer points, that is fewer than 80 or 90 points depending on the applicable scale, on a pro rata basis in accordance with a prescribed formula. Thirdly, procuring entities must award the contract to the bidder who scores the highest combined points for price and preference unless objective criteria justify an award to another bidder.<sup>160</sup> Fourthly, procuring entities must specify the social objectives of each procurement, and the preference points attached to each social objective, in tender solicitation documents.<sup>161</sup> Lastly, procuring entities have a discretion to choose the specific social objectives of each procurement, and the distribution of the 10 or 20 preference points, so long as they allocate at least one preference point to the amelioration of the effects of apartheid.<sup>162</sup>

The distribution of preference points under the 80/20 scale must accord with the following table:<sup>163</sup>

B-BBEE Status Level of Contributor/Tenderer (as evidenced by Certificate)	Points
1	20
2	18
3	14
4	12
5	8
6	6
7	4
8	2
Non-Compliant Contributor/Tenderer	0

<sup>158</sup> The PPPFA, s 2 (1) (b) (i). See also the Preferential Procurement Regulations, 2017, reg 7, Bolton (n 129) 793 and Geo Quinot, ‘The Role of Quality in the Adjudication of Public Tenders’ (2014) 17 (3) Potchefstroom Electronic Law Journal 1110, 1116.

<sup>159</sup> The Preferential Procurement Policy Framework Act, s 2 (1) (b) (i) and (ii). The Act defines an acceptable tender as one which, ‘in all respects, complies with the specifications and conditions of tender as set out in the tender document.’

<sup>160</sup> The Preferential Procurement Policy Framework Act, s 2 (1) (f). See also Ambe (n 136) 283.

<sup>161</sup> The Preferential Procurement Policy Framework Act, s 2 (1) (e) as read with the Preferential Procurement Regulations, 2017, r 3. See also McCrudden ‘Social Policy Choices’ (n 38) 133.

<sup>162</sup> Intaher M Ambe and Johanna A Badenhorst-Weiss, ‘A Review of Procurement Practices in the South African Public Sector’ (Fifth International Public Procurement Conference, Seattle, August 2012) 448.

<sup>163</sup> The Preferential Procurement Regulations, 2017, reg 6 (2).

The distribution of preference points under the 90/10 scale, on the other hand, must accord with the following table:<sup>164</sup>

B-BBEE Status Level of Contributor/Tenderer (as evidenced by Certificate)	Points
1	10
2	9
3	6
4	5
5	4
6	3
7	2
8	1
Non-Compliant Contributor/Tenderer	0

Although the South African public procurement regulatory framework places great emphasis on social objectives, price is the dominant criterion for awarding public contracts.<sup>165</sup> The predominance of price is evident from two aspects of the South African public procurement regulatory framework. First, South Africa has capped social policy preference points at twenty percent of total tender evaluation points. The dual-scale preference point system awards most of tender evaluation points, which is 80% or 90%, based on price.<sup>166</sup> Secondly, the dual-scale system generally awards more social policy preference points in low-value procurements and fewer social policy preference points for high-value procurements.<sup>167</sup> The emphasis on social objectives, therefore, tends to decrease as the value of an envisioned public procurement contract increases.<sup>168</sup> South Africa's preference point system, therefore, is more inclined towards an economic rather than social approach to public procurement.<sup>169</sup>

The predominance of economic objectives over social objectives in South Africa, especially in situations where the pursuit of the latter entails enormous extra costs, can also be gleaned from the prevailing case law. In *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape*, for instance, the court held that social objectives could not trump the objective of value for money (read 'economic efficiency').<sup>170</sup> Accordingly, the court further held, the pursuit of social objectives could not justify extra costs where a tender is awarded to a bidder whose offer exceeds other qualified bidders by 200 million

<sup>164</sup> Ibid reg 7 (2).

<sup>165</sup> Bolton (n 2) 207-213.

<sup>166</sup> Bolton (n 129) 793.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Helmrich (n 120) 96.

<sup>170</sup> *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck).

rand (that is about US\$ 14 million).<sup>171</sup> The court's interrogation of the interplay between economic and social objectives, and specifically the justifiability of the extra cost of promoting social objectives, substantially differs from the mechanical approach in Kenya.<sup>172</sup>

The legal validity of social procurement in South Africa is generally accepted by most stakeholders, due perhaps to its anchorage in the constitution.<sup>173</sup> Indeed, and as explained, the constitutionalisation of social procurement in South Africa sought to avoid the legal challenges that had bogged down the use of public procurement as a tool for promoting racial equality in the US. Moreover, and as explained above, South African policy makers considered public procurement an indispensable tool for addressing the deep socioeconomic inequalities created by apartheid.

Although there has been little controversy on whether South African public agencies ought to use public procurement as a tool of social policy, some studies have questioned the effectiveness of social procurement in achieving the desired policy outcomes. There are three main criticisms. First, the South African regulatory framework for public procurement places undue emphasis on black economic empowerment, at the expense of other social objectives.<sup>174</sup> Secondly, critics argue that the results of social procurement are often 'not good enough,' or 'the [extra] costs are too high.'<sup>175</sup> Lastly, critics have argued that social procurement tends to benefit a small elite of well-established or privileged blacks instead of promoting intended structural changes such as social inclusion, alleviation of inequality and distributive justice.<sup>176</sup> This line of criticism has featured in an important South African judicial opinion:

*[T]he RDP factor [read 'social procurement'] was never intended to enrich already successful members of the previously disadvantaged society...when one talks about the RDP, the intention is to improve the lot of those people that have suffered from the consequences of the inequalities of the past and not the lot of those that have succeeded in being successful in spite of them. To regard as RDP the enrichment of a small black minority in place of a small white minority who benefited in the past, does not seem to me to be a proper application of the principle.<sup>177</sup>*

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<sup>171</sup> Ibid.

<sup>172</sup> See e.g. *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Public Procurement Administrative Review Board Application No. 28 of 2017 and *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority*, Public Procurement Administrative Review Board Application No. 7 of 2016.

<sup>173</sup> Helmrich (n 120) 74.

<sup>174</sup> A reading of the texts of the B-BBEEA and the PPPFA shows there is a considerable merit in this criticism. The study by the Institute for Sustainable Development (n 125), however concluded, that this criticism is 'limited to intellectual or theoretical exercises more than it is founded in empirical research.'

<sup>175</sup> Helmrich (n 120) 89.

<sup>176</sup> Ibid 93-96. See also Sweet (n 57) 166-170, Ambe (n 127) 253. and Luyando Martha Katiyatiya, 'Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry' (LLD Thesis, Stellenbosch University 2014).

<sup>177</sup> *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck) (Pickard JP).

In summary, South African public procurement laws address the problem of conflictual co-existence of economic and social objectives as follows. First, the dual scale preference point system establishes a clear, weighted, integrated and objective regulatory mechanism for prioritising the two species of objectives. Secondly, every social objective integrated into public procurement under the dual scale preference point system must be measurable, quantifiable and monitored for compliance.<sup>178</sup> Thirdly, procuring entities have a discretion to cancel, without prejudice to any other legal remedy, contracts awarded on account of false information furnished by a tenderer to secure preference.<sup>179</sup> Fourthly, the South African regulatory framework for public procurement forbids organs of state from awarding a contract to any tenderer under the dual scale preference point system if the price offered by that tenderer is ‘not market-related.’<sup>180</sup> Lastly, where functionality is part of the evaluation process and the top two or more tenderers score equal total points for price and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.<sup>181</sup> Functionality, however, is not a mandatory aspect of tender evaluation in South Africa. Where functionality is part of the evaluation process, tenders are first evaluated on functional requirements (based on objective and quantifiable criteria) before proceeding for price and preference evaluation in accordance with the applicable 80/20 or 90/10 scale.<sup>182</sup>

### **3.3. Discretion, Corruption, Favouritism and Other Forms of Malfeasance**

South African laws give public agencies significant discretion to integrate various socioeconomic objectives into public procurement. Moreover, South African public procurement laws emphasize decentralised decision making, managerial flexibility and achievement of goals more than compliance with set rules.<sup>183</sup> These aspects of the South African regulatory system for public procurement create an environment in which public procurement corruption, favouritism and other forms of malfeasance can easily thrive.<sup>184</sup>

South Africa has faced significant governance challenges relating to corruption, favouritism and other forms malfeasance, arguably attributable to the broad discretion its public procurement laws confer on government officers. Available literature suggests that these governance challenges are pervasive and

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<sup>178</sup> The Preferential Procurement Policy Framework Act, s 2 (2).

<sup>179</sup> *Ibid* s 2 (1) (g). See also the B-BBEEA, s 13A.

<sup>180</sup> The Preferential Procurement Regulations, 2017, reg 6 (9) and 7 (9).

<sup>181</sup> *Ibid* reg 10 (2).

<sup>182</sup> *Ibid*. Only those tenders which achieve a threshold score for functionality proceed to price and preference evaluation.

<sup>183</sup> International Institute for Sustainable Development (n 125) 8.

<sup>184</sup> The incidence of public procurement corruption, favouritism and other forms of malfeasance is generally directly proportional to the amount of discretion that government bureaucrats enjoy under the applicable regulatory framework.

endemic.<sup>185</sup> One study compared the relationship between the South African public sector procurement system and corruption to Siamese twins, because ‘whenever one of the two is mentioned, the other one has to follow in the next line.’<sup>186</sup> Other studies have estimated that South Africa loses about 20% of its government budget to public procurement corruption and malfeasance every year.<sup>187</sup>

Commentators have variously attributed the incidence of corruption, favouritism and other forms malfeasance in the South African public procurement system to: poorly circumscribed discretion, impunity, decentralisation of the procurement system and non-compliance with the applicable policy and regulatory frameworks.<sup>188</sup> A common governance challenge revolves around fronting, a practice in which an essentially white-owned company, which is not entitled to benefit from the schemes of preferences and reservations, ‘rents-a-black’ for purposes of winning a public contract.<sup>189</sup> Political patronage has also been a serious problem, with politically connected and wealthy blacks benefitting from the schemes of preferences at the expense of the intended small and medium-sized black businesses.<sup>190</sup>

South Africa has more deterrent and effective sanctions against: (i) abuse of public procurement discretion and (ii) corruption, favouritism and other forms of malfeasance than Kenya. Specifically, persons convicted of public procurement corruption and malfeasance in South Africa are liable a wider and severer range of sanctions compared to their Kenyan counterparts. The Prevention and Combating of Corrupt Activities Act, for instance, provides for: (i) imprisonment for periods ranging from five years to life; (ii) a fine equal to five times the value of gratification involved in the offence; and (iii) endorsement on the register of tender defaulters and automatic debarment for a period ranging from five to ten years.<sup>191</sup> The Preferential Procurement Regulations, 2017 also impose stiff penalties on contractors who fraudulently claim entitlement to preferential treatment, including: (i) debarment for a period not exceeding ten years; (iii) damages; (iv) termination of the contract; and (iv) a financial penalty.<sup>192</sup> Similarly, the B-BBEEA imposes sanctions in the form of: (i) imprisonment for a period not

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<sup>185</sup> Ambe (n 136) 278. See also Ambe (n 127) 251-254.

<sup>186</sup> Pandelani Harry Munzhedzi, ‘South African Public Sector Procurement and Corruption: Inseparable Twins?’ (2016) 10 (1) *Journal of Transport and Supply Chain Management* 197.

<sup>187</sup> Ambe and Johanna (n 161) 438. See also Sope Williams and Geo Quinot, ‘Public Procurement and Corruption: The South African Response’ (2007) *South African Law Journal* 3398.

<sup>188</sup> *Ibid.*

<sup>189</sup> Helmrich (n 120) 72. See also Bolton (n 2) 212.

<sup>190</sup> Noon (n 39) 629-630.

<sup>191</sup> The Prevention and Combating of Corrupt Activities Act, 2004, ss 12, 13, 26 and 28.

<sup>192</sup> The Preferential Procurement Regulations, 2017, r 14. Regulation 15 (2) (c) of the Preferential Procurement Regulations, 2001 imposed penalties ‘more severe than the theoretical financial preference associated with the claim.’

exceeding ten years and (ii) fines of up to ten percent of an enterprise's annual turnover.<sup>193</sup>

The sanctions embodied in South African public procurement laws are carefully designed to ensure that the cost of engaging in corruption, fraud, favouritism or other forms of malfeasance exceed the presumptive benefits. This differs starkly from Kenya's standard fines (of Kenya Shillings four million (that is, about US\$ 40,000.00) for natural persons and Kenya Shillings ten million (that is, about US\$ 100,000.00) for corporate bodies irrespective of the value of the benefit gained by the offender) and debarment for a period of three to ten years.<sup>194</sup> Moreover, South Africa's debarment regime is more stringent than Kenya's to the extent that it applies not only to persons or companies involved in malfeasance but also persons involved in management of such companies and enterprises established by such persons or companies in the future.<sup>195</sup> Further, South Africa's sanctions for abuse of discretion, corruption, favouritism and other forms of malfeasance are designed in a way that gives jurisdiction to all judicial officers, irrespective of rank, to impose them. This ensures, for instance, that offenders do not get light penalties due to statutory limits on the pecuniary jurisdiction of magistrates.<sup>196</sup> In summary, therefore, the South African regime of incentives and disincentives for abuse of discretion, corruption, favouritism and other forms of malfeasance far more effective than, and superior to, its Kenyan counterpart.

### **3.4. Implication of the South African Experience for Kenya**

Although the relevant legal texts may appear similar, there are many important differences of context and practice between the South African and Kenyan public procurement regulatory systems. The two countries share, in varying degrees, challenges relating to discretion, interplay of economic and social objectives and the incidence of corruption, favouritism and other forms of malfeasance. The implications of these contextual similarities and differences between Kenya and South Africa are summarised below.

The South African preference points system is more likely to produce an optimal balance between economic and social objectives than Kenya's system of reservations and percentage price premiums. The two approaches can lead to vastly different outcomes in terms of the extra costs of social procurement. The South African approach mitigates the extra costs of social procurement by capping the preference points to twenty or ten depending on the value of the contract. Under the Kenyan approach the extra costs of social procurement tend to increase with increases in the value of the contract. In South Africa,

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<sup>193</sup> The Broad-Based Black Economic Empowerment Act, s 13O.

<sup>194</sup> The 2015 Procurement Act, ss 41 (4), 67 (5), 176 (2).

<sup>195</sup> The Prevention and Combating of Corrupt Activities Act, 2004, s 28 (1) (d).

<sup>196</sup> See e.g. the B-BBEEA, s 13O (6) and the Prevention and Combating of Corrupt Activities Act, 2004 s 26 (4).

however, the extra costs of social procurement tend to decrease with increases in the value of the contract. The perverse consequences of the Kenyan approach can be discerned from *Questa Care Limited v Kenya Medical Supplies Authority & Another*, *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority* and the other relevant cases.<sup>197</sup>

South African courts have adopted a better approach to the issue of interplay of economic and social objectives than their Kenyan counterparts. Specifically, South African courts' willingness to weigh social value against extra costs, which Kenyan courts appear loathe to, would pre-empt lopsided procurement decisions that disproportionately lean towards either markets or social policy.

South Africa's regime of sanctions against public procurement corruption, abuse of discretion, favouritism and other forms of malfeasance is stronger and more effective than its Kenyan counterpart, especially to the extent that it is carefully designed to ensure the costs of nefarious conduct exceed the presumptive benefits. Specifically, and as discussed in the preceding section, South Africa's regime of quintuple fines (or fines up to ten percent of an offending tenderer's annual turnover), (ii) endorsement on the register of tender defaulters and debarment for both offenders and persons/enterprises affiliated to them is more effective and deterrent than Kenya's regime of sanctions for corruption and various forms of malfeasance.

#### 4. CONCLUSION

Procurement is an important tool for financing for development. Moreover, public procurement lends itself to multiple policy goals, which have a direct impact on sustainable development. A high incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making, therefore, would create significant impediments to sustainable development and significantly erode the tax base due to the resulting poor financial management system. Further, a dogmatic approach to public procurement decision making, which inflexibly insists on commitment to markets or social policy, would also undermine sustainable development.

This paper has provided a comparative analysis of the regulatory frameworks for the use of public

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<sup>197</sup> See *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Public Procurement Administrative Review Board Application No. 28 of 2017 and *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority*, Public Procurement Administrative Review Board Application No. 7 of 2016.

procurement as a tool of socioeconomic development in Kenya, the United States and South Africa. The comparative analysis focused on the US and South African regulatory responses to challenges relating to, conflictual coexistence of economic and social objectives, abuse of discretion and the incidence of corruption, favouritism and other forms of malfeasance, and the implication of those regulatory systems for Kenya. The comparative analysis suggests that the US and South Africa have better, integrated and more effective regulatory responses to these challenges than Kenya. Kenya, therefore, can borrow useful regulatory lessons from the US and South Africa on resolution of these challenges that relatedly will impact its tax and financial system.

Specifically, Kenya can benefit from the US and South Africa by adopting:

- (i) an integrated approach to public procurement that is not unduly or inflexibly bound to market principles or social policy; and
- (ii) an effective regime of sanctions against abuse of discretion, corruption, favouritism and other forms of malfeasance.

Secondly, although Kenyan, American and South African public procurement laws espouse facially similar economic and social objectives, the respective underlying historical contexts are very different. Specifically, the dominant social objective of public procurement laws of the US and South Africa is to correct social exclusion and deep inequalities arising from the two countries' shared history of state-sanctioned racial segregation and discrimination, which is inapplicable to (post-colonial) Kenya.

Thirdly, each of the three countries has a significant incidence of public procurement corruption and other forms of malfeasance, arguably attributable to formal grants of discretionary powers on government bureaucrats. Lastly, the comparatively lax public procurement regulatory frameworks used in the US and South Africa would hardly produce optimal results in Kenya. Specifically, a lax or discretion-based approach to public procurement in Kenya would not work in view of the country's unusually high incidence of endemic corruption favouritism and other forms of malfeasance thereby stunting limiting financing for development.

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