

South Africa Airside Capacity Enhancement Study for Air Traffic Navigation Services

Task 4 Report: Institutional, Legal, Regulatory and Procurement Issues



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LIST OF ACRONYMS

ACSA	Airports Company South Africa
ATNS	Air Traffic Navigation Services
ATC.....	Air Traffic Control
B-BBEE.....	Broad-based Black Economic Empowerment
SACAA	South African Civil Aviation Authority
CAPEX.....	Capital Expenditure
CARCOM.....	Civil Aviation Regulations Committee
DTI	Department of Trade and Industry
DOT.....	Department of Transport
FALE.....	King Shaka International Airport
HDI.....	Human Development Index
ICAO	International Civil Aviation Organization
NASCOM.....	National Air Space Committee
NIPP	National Industrial Participation Programme
PPPF	Preferred Procurement Policy Framework
RDP	Reconstruction and Development Programme
RFB	Request for Bid
RFP.....	Request for Proposal
SARPS.....	Standards and Recommended Practices
SMME	Small, Medium, and Micro Enterprises
USOAP.....	Universal Safety Oversight Audit Programme

1 Introduction

The purpose of Task 4 is to identify South African laws, regulations and standards that could impact the implementation of airside capacity enhancements and determine how South Africa's procurement rules and regulations and the internal procurement processes of Airports Company South Africa (ACSA) and Air Traffic Navigation Services (ATNS) are likely to affect the implementation of this Study's recommendations. The approach to these two topics is outlined below.

1.1 Laws, Regulations and Standards

Task 4 provides an overview of regulations and standards that govern ATNS and ACSA operations. The overview will indicate which government regulators are responsible for oversight and approval, and whether the standards are local, national, or international.

Task 8, Implementation Plan, will address regulatory approvals that need to be obtained and operational standards adhered to for specific capacity enhancements.

1.2 Procurement

Although the study team reviewed ACSA and ATNS procurement processes as they are articulated in their internal policy guidelines, the focus of the analysis and commentary is on procurement of high-value, high-technology goods and services.

This Task will focus on the Preferred Procurement Policy Framework (PPPF) Act and the impact that this act has on procurement regulations governing broad-based black economic empowerment (B-BBEE) enterprises and its likely impact on the procurement process. These regulations took effect at year end 2012. During discussions with the study team, ATNS expressed concern that these new regulations may require ATNS to select a low-cost bidder that may not be capable of delivering the required high-technology systems. ACSA is concerned about the effect this regulation may have on procurement lead times. Both concerns will be addressed.

This Task will cover the following topics:

- International procurement best practices
- South African government procurement regulations as embodied in ACSA and ATNS procurement practices
- Review of three recent tenders by ACSA and ATNS
- Preferred Procurement Policy Framework Act
- Impact of PPPF Act on competitive bids
- Impact of PPPF Act on procurement timelines

2 Laws, Regulations, and Standards

This section is based on the study team’s understanding of South Africa’s Aviation Laws and Regulatory Framework. South Africa is a signatory to the Chicago Convention and therefore complies with the International Civil Aviation Organization (ICAO) Standards and Recommended Practices (SARPS).

South Africa’s civil aviation system is based on the Constitution of the Republic of South Africa (1996). The legal framework in place consists mainly of the following primary aviation legislation enacted by Parliament and by presidential assent:

- The *Aviation Act, No. 74 of 1962* (Aviation Act), last amended in 2002
- The *South African Civil Aviation Authority Act, No.40 of 1998, last amended in 2004*
- The *Civil Aviation Act No. 13 of 2009*;
- The *Air Services Licensing Act, No. 115 of 1990*, last amended 1998
- The *Air Traffic and Navigation Services Company Act, No. 45 of 1993*, last amended 1996
- The *Airports Company Act, No. 44 of 1993*, last amended in 2001
- The *South African Civil Aviation Authority Levies Act, No. 41 of 1998*
- The *International Air Services Act, No. 60 of 1993*, last amended in 1998
- The *Convention on International Interests in Mobile Equipment Act 4 of 2007*
- The *South African Weather Service Act, No. 8 of 2001*
- The *South African Maritime and Aeronautical Search and Rescue Act, No. 44 of 2002*
- The *South African Civil Aviation Offences Act, No. 10 of 1972*, last amended in 1981
- The *Convention on the International Recognition of Rights in Aircraft Act, No. 59 of 1993*

The Aviation Act gives the Minister of Transport responsibility for carrying out the provisions of this Act and of the *Convention on International Civil Aviation*. It also requires the Minister of Transport to appoint an employee of the South African Civil Aviation Authority (SACAA) as “Commissioner for Civil Aviation” (Commissioner), who may issue enforceable technical standards for civil aviation. The Commissioner may also designate one or more persons in the service of the SACAA to serve as inspectors or authorized officers. These inspectors and officers are provided with unlimited access to facilities, equipment and documentation for the purpose of monitoring compliance with any legislation administered by the SACAA.

Public entities such as the SACAA, ATNS and ACSA are also bound by *inter alia*:

- The Companies Act No. 71 of 2008
- The Public Finance Management Act No. 1 of 1999

2.1 South African Civil Aviation Regulatory Framework

The SACAA is an agency of the Department of Transport (DOT) and as a result, its activities are governed by a performance agreement signed between the Board of Directors and the Minister of Transport. Its mandate, defined more fully in the South African Civil Aviation Authority Act No. 40 of 1998, can be summarized as follows:

“The Authority is mandated with promoting, regulating, supporting, enforcing and continuously improving levels of safety and security throughout the civil aviation industry. The above is to be achieved by complying with the International Civil Aviation Authority (ICAO) Standards and Recommended Practices (SARPs) whilst considering the local context. This mandate relates to aviation safety and security oversight of airspace, airports, aircraft, operations and personnel.”

The SACAA is responsible for publishing and regulating the Civil Aviation Regulations and Technical Standards for the Civil Aviation Industry in South Africa. The SACAA is subject to audits by ICAO under its Universal Safety Oversight Audit Programme (USOAP), and the overall findings of the most recent published audit (from summer 2007)¹ are that the Civil Aviation Regulatory system in South Africa complies with International Standards. The system is mature and is managed as such with regular audits, interaction and consultation between all stakeholders. ATNS and the SACAA are active in ICAO forums and are at the forefront of implementing ICAO requirements on the Continent.

At a strategic level, SACAA, ATNS and ACSA align objectives through a formalized process. Airspace and Regulatory matters are managed by the SACAA through two forums viz, National Air Space Committee (NASCOM) and Civil Aviation Regulations Committee (CARCOM) where the entire aviation industry is represented in a consultative environment.

Both ACSA and ATNS are subject to economic regulation by a Regulator appointed by the Minister of Transport. This financial regulation will be discussed in more detail in Task 3.

2.2 International Civil Aviation Organization (ICAO)

Annexes to the ICAO Convention on Civil Aviation govern the regulations and standards ICAO member states must adopt to ensure safe international air travel. Although the initial impetus of the Convention was on safety, over time the focus has expanded to include the environment and some service standards. Capacity enhancements that will be recommended in this report may have to comply with inter alia:

- Annex 2 – Rules of the Air.
- Annex 11 – Air Traffic Services, including Air Traffic Control (ATC). Chapter 3 covers aircraft separation and transfer of control between different ATC authorities.
- Annex 14 – Aerodromes (Volumes 1 and 2). It includes standards for airport ground layout (runway separation, taxiways, safety areas, etc.) as well as airspace standards.
- Annex 16 – Environment specifically aircraft noise and emissions.
- Doc 4444 – Rules of the Air and Air Traffic Services.

Once the study team has recommended specific capacity enhancements and these have been agreed to with the client, specific detail regarding the process to be followed in compliance with ICAO SARPS and South African legislation will be provided.

¹ ICAO Universal Safety Oversight Audit Programme, FINAL REPORT ON THE SAFETY OVERSIGHT AUDIT OF THE CIVIL AVIATION SYSTEM OF THE REPUBLIC OF SOUTH AFRICA (5 to 16 July 2007).

3 International Procurement Best Practices

This report is based on the study team's understanding of procurement practices around the world and the unavoidable challenges created by incorporating multiple policy objectives in procurement regulations.

It is important to all stakeholders that ACSA and ATNS continue to excel in their core competencies. The excellence of these companies provides South Africa a competitive advantage in global commerce and tourism. Airside capacity expansion supports GDP growth and increased high-paying employment opportunities. It also supports regional growth which helps South Africa as well as its trading partners. The challenge for procurement regulations is to help both ACSA and ATNS be as cost efficient as possible while supporting the government's B-BBEE goals and facilitating technology transfer to South African companies and individuals.

3.1 Introduction

The study team reviewed ACSA and ATNS internal procurement guidelines and compared them to international best practices. The intention of this review is not to design optimal procurement procedures or to recommend changes in existing procedures. The purpose of the review is limited to determining if ACSA and ATNS internal procurement guidelines conformed to best practices.

The topics that will be reviewed as significant to procurement policies that conform to international best practices are: means of notifying interested bidders, transparency, fairness, clarity of specifications and requirements for meeting tender qualifications, bid evaluation and review, and the roles of technology transfer, local content, and workforce development. This list is not intended to be comprehensive but to provide the basis for the study team's observations regarding ACSA's and ATNS' internal procurement regulations.

3.2 Communications with Interested Bidders

Communications with interested parties is essential throughout the procurement process from initial requirements development through award and contract administration. Early communication through formal market surveys and informal discussions is necessary to determine what is available in the market place that will satisfy many if not all of the identified requirements. The extent and type of communication during this time will be dependent on the complexity of the requirements and the potential costs associated with them. This information as well as internal analysis will form the basis of the initial specifications. These initial specifications should be shared with the industry to solicit their comments. With this input the specifications can be finalized taking care that they meet all critical requirements while ensuring that they are not so stringent as to limit competition or result in giving an unfair competitive advantage to a single company.

Another opportunity to communicate with prospective bidders can be with a formal release of a draft Request for Proposal (RFP), again to allow for industry comment. This step accomplishes two main purposes, first to give the industry a better understanding of the requirements, potential schedules and other terms and conditions of the eventual contract.

Secondly, it also provides the purchaser another opportunity to ensure that their requirements are reasonable and are likely to generate meaningful competition.

Once the RFP has been finalized and issued for responses, a pre-bidders meeting is useful to provide an open forum for answering questions or, if in the judgment of the purchaser enough has changed such that further discussions would be helpful to potential bidders.

In the formal solicitation stage, controlled communications with bidders should continue to address questions and ambiguities that arise. Although this communication can be very helpful to both the purchaser and bidders, care must be taken to ensure that it does not result in an unfair advantage for any of the competitors.

After proposals are received and undergoing evaluation, the purchaser may want to continue communicating with bidders to clarify issues and provide opportunity to correct deficiencies and weaknesses. Again, care must be taken not to create an unfair advantage or result in the “leveling” of proposals as changes are made in response to the purchaser’s questions. How much communication takes place at this point in the process will be dependent on the complexity of the requirement and the prospect that this process will help the purchaser obtain a contract that meets the purchaser’s needs.

Once an award decision is made, an opportunity should be given to the unsuccessful bidders to be debriefed. The goal here should be to help the losing bidders learn what actions they should take to improve their chances of winning in the future.

3.3 Transparency

Transparency is an important part of ensuring that adequate competition exists and that the purchaser receives best value for its contractual expenditures. The processes and procedures that will be followed from requirement identification through bid evaluation, and contract award, must be open and known to all competitors. The goals of a particular procurement, how it will be evaluated, and any mandatory or pre-qualification requirements should be clearly stated and known before proposals are requested. All processes and procedures should be open to public scrutiny. There are elements of the process that are carried out “behind closed doors” such as the evaluation of bids and the analysis of cost proposals. However, the processes that are used during these “closed door” sessions should also be documented and publically available.

3.4 Fairness

The perception of fairness of the overall procurement process is critical to ensuring adequate competition. Perceptions of bias will reduce competition and result in higher prices. Fairness and the perception of fairness come into play in many aspects of a procurement, from requirements development through the evaluation/award process and continuing into debriefings and the adjudication of complaints or protests. When requirements are being identified, communication with industry, through market surveys, informal discussions and releasing draft specifications and solicitations for comment, enhances the perception of fairness especially if the industry sees changes to these documents based on their input. Bidders need to believe that the winning bid was selected on an unbiased evaluation of the bid documents because the cost of preparing a thoughtful bid is high and most companies are very selective.

The evaluation criteria articulated in the RFP are important to the perception of fairness. The criteria should be as detailed as possible while providing the opportunity for a bidder to add value.

Once an award decision is made, unsuccessful contractors should be afforded the opportunity to be debriefed. The debriefing should give the contractor enough information to gain an understanding where their proposal fell short and what changes they will need to be successful in future procurements.

Finally, if a bidder feels they were not treated fairly and files a complaint or protest, the complaint should be handled as fairly as the procurement process. This generally requires that the adjudication of complaints be independent of anyone involved in any portion of the procurement process from requirements development through award. It is helpful to have the complaint process be clearly articulated in the RFP documents.

3.5 Clarity of Specifications

Having clear and realistic specification requirements is the single most important aspect to ensure that the eventual products meet the purchaser's needs. In most cases, purchasing departments are moving more towards performance specifications and moving away from design specifications. As systems and services become more complex, it is increasingly useful to specify the desired outcomes (performance) required rather than specifying how products should be designed, manufactured, etc.

In order to ensure that requirements are achievable and understood, it is important to understand what is currently available in the market as well as knowledge of new and emerging developments in the industry. Early communications with the industry can help ensure that requirements can be met at a reasonable cost and within an acceptable timeframe. Communications can be accomplished through market surveys or informal discussions with companies. This process will add time to the planning phase of the procurement process. However, it will pay dividends in both cost and schedule during the contract execution phase.

Care must be taken to avoid requirements creep, because it is easy to add nice-to-have requirements as more is learned about emerging capabilities. Once an initial specification is developed, it can be released to industry for comment. Issuing a draft solicitation for comment is another option for clarifying complex proposals. Again, these steps add time to the planning phase of a procurement but pay for themselves many times over during the course of the contract.

3.6 Mandatory and Pre-Qualification Requirements

Mandatory and or pre-qualification requirements can be important and should be made explicit when they exist. However, attention must be paid to ensure that they do not severely limit competition or give an unfair advantage to an individual company. Some examples of pre-qualification requirements are: minimum B-BBEE score, software development certification levels, financial requirements, administrative requirements and acceptance of terms and conditions.

3.7 Bid Evaluation

There are numerous ways to evaluate proposals, with the optimal method depending on the complexity and uniqueness of the products or services to be acquired.

Using simplified processes for small, straight-forward procurements makes sense. In these cases, requesting a quote and then selecting the lowest bidder is the preferred method. For procurements that have slightly more complex technical requirements and where there are several providers, a two-step process is recommended. Proposals are initially evaluated to determine which ones meet the technical/functionality requirements, and once qualified the award is made to the lowest qualified bidder.

In cases where the specifications are complex and/or the requirement is unique or pushes the state of the art, it may be desirable to use a process that allows for a dialogue between the buyer and the prospective contractor. This allows discussions to take place that address ambiguities and weaknesses in a proposal and also allows for the contract to be awarded on the basis of value instead of price, and for the buyer to determine the relationship between cost and functionality. The effectiveness of the method of evaluating bids relies on the marketplace's perception of the impartiality of the buyer and the clarity of the bid's specifications, but the specifications may include intentional vagueness and invite bidders to add value as they deem appropriate. The risk associated with this approach is that it calls for judgment on the part of the deciding officials. This in turn opens the door to possible questions about fairness. However, if handled properly the selection can be fair to all participants and the resulting decision will lead to the most cost-effective solution.

3.8 Life-Cycle Cost

Another item to consider when designing and evaluating proposals is lifecycle-cost analysis. It may be appropriate to analyze the total cost of ownership of a new system or product in lieu of just evaluating its initial purchase price. If the costs to operate and maintain the new equipment can be determined with a reasonable level of accuracy, then using life cycle costs as part of the evaluation decision could be appropriate. However, life-cycle analysis involves considerable uncertainties, making it very difficult to accurately forecast how much it will cost to operate and maintain a new system over its useful life. This is especially true if the purchaser has limited or no operational experience with the new technology.

3.9 Supplier Financing

When new technology or a capacity enhancement involves substantial cost, it is common practice for a buyer to require the supplier to include a financing proposal with the tender. This can provide substantial value to the purchaser because equipment manufacturers are generally located in countries that have export credit agencies whose purpose is to finance exports. These government-owned financing agencies are frequently able to provide lower financing costs and/or longer term financing than is available in the commercial market. These financing proposals deliver value that has no cost to the exporter.

3.10 Technology Transfer, Local Content, and Workforce Development

Aviation is widely recognized as a source of high-paying jobs, and the skills and technology associated with air traffic control and airport management are no exception. As a result, countries with a sizable domestic market are interested in promoting policies that help them acquire these capabilities. Such policies can cover training, personnel retention, research, mandated technology transfer, industrial policy, and international sales support.

Acquiring and retaining the necessary human talent is the most fundamental part of developing an indigenous technological capability. No high-technology industry can exist

without having a critical mass of human capital and each country has unique challenges to creating an environment where this is possible. In a “flat” world where human talent can migrate to countries where it finds the greatest opportunities, the challenge is universal. For example the United States loses talent to other countries that provide greater financial opportunity, greater research support, or greater tolerance for their particular beliefs, just as numerous countries lose their talent to the United States. The most obvious initial step is to foster policies that retain the intellectual capacity that already resides in a country and then educate additional talent and enable these centers of excellence to expand.

All high-technology industries depend on continual innovation and it is difficult for smaller countries and smaller companies to identify niche markets or niche capabilities for which they either have or can acquire and sustain a competitive advantage. Since much of the advanced technology involved in air traffic control and airport management are dominated by global defense companies in Europe and North America, the challenge is significant. Fortunately, rapid technological change benefits new competitors who are agile and have the human talent to recognize the needs of new markets and the potential for adapting new, low-cost technology to price-sensitive markets and markets that benefit from easier-to-maintain solutions.

Best practices are influenced by national priorities and countries recognize that advanced technology requires the presence of a critical mass of motivated human capital. As a result, policies may be required to facilitate the development of existing human talent and help that talent gain access to the resources they need to maintain and enhance their current capabilities. For example, Germany accomplished this goal by consolidating its aerospace companies during the 1980s into Deutsche Aerospace. Canada did the same with its aviation companies by consolidating most of them into Bombardier. Brazil has done a very effective job helping its primary aerospace manufacturer, Embraer even after it privatized the company. Brazil has also supported the development of its air traffic control capability by requiring that all sales of air traffic control technology to Brazil involve Atech, which is 50%- owned by Embraer.

A substantial part of the world mandates companies that sell imported products (particularly those related to defense) to governmental entities to make investments in the country (sometimes termed “offsets”) and use the content of that offset as a factor when selecting the winning bidder. Offsets frequently involve transfer of technology to industries that are particularly important to the purchasing country and those technologies may have nothing to do with equipment being purchased. This approach enables a country to use national policy as a factor in selecting winning bidders.

4 Procurement Findings

This section will provide the study team’s understanding of the South African government’s procurement policy goals, how these goals are embodied in ACSA and ATNS internal procurement procedures and policies, and a review of two recent tenders.

4.1 Government Objectives

The South African government leverages its procurement of goods and services to support national policies covering black empowerment and the development of independently-owned small businesses; stimulate broad regional economic development; support South African industrial development; facilitate technology transfer; and create new jobs, particularly those needing highly skilled workers. In addition, it aims to ensure that the government gets value for its money and its procurement is conducted according to global best practices that are recognized to be transparent and free of corruption.

4.2 ACSA and ATNS Procurement Regulations

While ACSA and ATNS operate as corporations that are financially sustainable as independent entities, they are majority state-owned and their procurement processes are governed by government procurement policies. As such, all of their purchases are made in accordance with the PPPF Act of 2001 and its 2011 amendment, which rules how bids are evaluated based on technical functionality, price, and a preference point system designed to support the broad economic growth of formerly disadvantaged people. This report will focus on 2011 amendment² because it provides the rules that specify how the B-BBEE score of companies now factors into the scoring of bids.

4.3 National Industrial Participation Programme

In addition, when ACSA and ATNS purchase imported goods and services worth more than US\$10 million, the vendor must comply with South Africa’s National Industrial Participation Programme (NIPP)³.

This obligates vendors to participate in the South African economy, as per the stipulations in the operating guidelines, and in compliance with the evaluation criteria in an amount equal to at least 30% of the awarded contract value. The investment is intended to stimulate the development of long-term sustainable businesses in South Africa; as such the business plan presented to NIPP must be profitable for the vendor. NIPP arrangements can include direct investments, joint ventures, licensee production, technology transfers, sub-contracting, R&D collaboration, export promotion, supply partnerships with South African industry, and delivery of technical training.

ACSA and ATNS are required to coordinate with the Department of Trade and Industry (DTI) to ensure that bidders offering more than US\$10 million in imported goods are engaging with

² “Implementation Guide Preferential Procurement Regulations, 2011 Pertaining to the Preferential Procurement Policy Framework Act, Act No. 5 of 2000”, dated Dec 1, 2011, published by the National Treasury.

³ “The National Industrial Participation Programme (NIPP), Revised Guidelines 2008”, published by DTI.

DTI in the NIPP. The processes of tender evaluation by the purchaser and of NIPP proposal evaluation by the NIPP Secretariat will run in parallel; however, unless stated otherwise in the tender documentation, the winner will be based on tender scores unless the bids are relatively close.

4.4 ACSA Internal Procurement Process Review

ACSA's procurement is managed by its Procurement Services department which controls procurement for the entire company. The reviewed procurement guidelines⁴ cover the whole process from demand management, publication of appropriate bid materials, bid evaluation, through contracting and eventual disposal of assets. The process has been set up to comply with National Treasury supply chain management guidelines and includes internal approvals from different committees depending on acquisition value thresholds.

An ACSA business unit must initiate a procurement and that business unit is responsible for demand management and technical specifications. The guidelines state that specifications should be as open as possible to encourage competition and that if an outside consultant has been involved in drawing up the specifications, that vendor is ineligible to tender for the procurement. A signed Business Case must be approved before formal procurement is initiated.

The guidelines address different acquisition strategies, and state that the most appropriate method will be agreed upon between the procurement department and the business unit. The strategies range from a Request for Quote from suppliers registered on a preapproved list for less costly items below a certain threshold, to a Request for Bid (RFB) for procurement of straightforward items above a certain threshold, to full RFPs for complex and expensive capital acquisitions. In each case, the process is managed and bid evaluations are scored according to DTI guidelines. When evaluating pricing, the guidelines state that full life-cycle costs should be used rather than initial acquisition costs.

The guidelines address diverse issues such as conflict of interests, gifts, and management of proprietary information among others. These guidelines are generally consistent with international best practices.

4.5 ATNS Internal Procurement Process Review

ATNS guidelines⁵ are designed to comply with relevant regulations from DTI and DOT, and emphasize using their procurement to promote South African businesses, small, medium and micro enterprises (SMME), and job creation. Procurement services such as administration, bid analysis, supplier management and development of procurement strategy are provided through a centralized Procurement Office; provision is made for decentralized procurement using authorized buyers in regional locations.

The guidelines address demand management, acquisition management, disposal, and logistics. They spell out procedures to follow at different value thresholds, from petty cash through

⁴ ACSA Corporate Procurement Policy: P010P Issue 1, Issue date: 21st September 2009. This lays out ACSA's procurement procedures. Note these procedures are being updated but the amended document is not yet public.

⁵ ATNS Corporate Procurement Policy: dated 15 October 2010

multimillion rand capital expenditures that require increasing levels of review and authorization. Procurement up to R100,000 can be made using at least three quotes from their registered supplier database; amounts in excess of this require approval from central committees and a competitive bidding process.

The guidelines also address ATNS' obligations under the National Industrial Participation Programme. These guidelines are generally consistent with international best practices.

4.6 Review of Procurement Documentation

ACSA and ATNS both provided the study team with documentation from recent procurement bids. ACSA provided two documents: one was a RFB for a consulting firm that would evaluate passenger satisfaction with the service provided at King Shaka International Airport (FALE) ⁶; and the second was for companies to be added to ACSA's approved supplier database to supply perimeter fencing⁷. The ATNS RFP was for financial services, including bank loans to ATNS. None involved the purchase of capital equipment or technology that would be used in increasing capacity.

The ACSA procurement materials were clearly advertised on ACSA's web site. Bidders were required to make a modest payment for receipt of the RFB documentation. For the FALE RFB, there was a compulsory briefing session one week after the tender was available; bids were due four weeks after the briefing; scoring of the bids was specific and transparent; and the role of the PPPF Act was explicit.

The ATNS RFP⁸ was for a loan facility of R650 million for the company's capital expenditures. The tender was advertised on the ATNS web site. The bid was structured to encourage creative proposals by letting the bank decide on the form and scope of its proposal. The bid evaluation process stated the minimum functionality score necessary to continue scoring on price and B-BBEE.

⁶ ACSA RFB: KSIA 1/10/2012 MPU – King Shaka International Airport Aviation Airport Master Plan Update/Review.

⁷ ACSA RFB: Provision of Airport Perimeter Fencing , October 2012.

⁸ RFP: LOA1509/2012, Appointment of a Suitable Financier to Provide Loan Facility for ATNS Capital Investment, 28/09/2012.

5 Impact of Preferred Procurement Policy Framework Act on Competitive Bids

5.1 Overview of Preferred Procurement Policy Framework Act

In line with the South African government's policy of using its procurement of goods and services to further the economic development of the country, the PPPF Act mandates the scoring of tenders based first on technical functionality, and then on a combination of price and the B-BBEE status level of the offeror. This has the effect of improving the competitiveness of companies with higher B-BBEE contribution levels.

5.2 Role of B-BBEE

To help redress the historic inequalities that were present in South Africa, B-BBEE was introduced by the government to give previously disadvantaged citizens economic privileges and preferences previously not available to them.

B-BBEE contribution levels, measured from Level 1 (highest) to Level 8 (lowest), of South African enterprises are scored based on seven factors weighted by industry sector: equity ownership (20% weight on the generic scorecard), management (10%), employment equity (15%), skills development (15%), preferential procurement (20%), enterprise development (15%), and socio-economic development (5%).

The preferential procurement component of a company's B-BBEE score is based on the share of all goods and services (including payroll, capital purchases, and cost of materials) the company acquires from disadvantaged groups. To gain maximum preferential procurement points, an enterprise must source 70% of expenditures from B-BBEE compliant suppliers, 15% from SMMEs, and 20% from black- or female-owned suppliers. Under the PPPF Act, all tenders must include the offeror's B-BBEE rating certificate issued by approved agencies or auditors. However, imported goods that cannot be obtained from South African sources are excluded from this computation.

5.3 Bid Scoring

The PPPF Act of 2011 mandates that all tenders be scored first on the basis of the technical functionality of the proposal, as specified in the published procurement material, and then on price and the offeror's B-BBEE level. The final score of the tender is the sum of the three component scores, and the contract must be awarded to the tender scoring highest.

Functionality: The bid RFP must clearly state the functionality evaluation criteria, the weight of each criterion, applicable values, and the minimum qualifying score for being accepted as functional. All tenders that meet the qualifying functionality score are then scored on price and B-BBEE compliance level.

The relative weighting of price and B-BBEE depends on the Rand value of the contract. Smaller contracts are more heavily influenced by the B-BBEE score—contracts with a value

between R30,000 and R1 million use an 80-20 weighting; contracts above R1 million use 90-10 weighting.

Price: Between R30,000 and R1 million, the lowest qualifying bid is awarded the maximum price score of 80 with bids of higher prices scored proportionately less; for contracts above R1 million, the lowest price is awarded the maximum score of 90 with higher bids proportionately less.

B-BBEE: Between R30,000 and R1 million, the B-BBEE component is awarded a maximum score of 20; for contracts above R1 million, the maximum B-BBEE score is 10. The specifics are shown in Table 1.

Table 1: B-BBEE Scoring

B-BBEE Scoring		
Offeror B-BBEE Level	Contract Value	
	R30,000 to R1 million	> R1 million
1	20	10
2	18	9
3	16	8
4	12	5
5	8	4
6	6	3
7	4	2
8	2	1
Non-compliant	0	0

5.4 ATNS & ACSA B-BBEE Procurement Targets

ATNS sources much of its capital expenditures (CAPEX), particularly high-technology products, overseas from companies that are not B-BBEE compliant; however, ATNS has a policy⁹ of maximizing its remaining purchases from B-BBEE compliant companies. As reported in its 2012 annual report the share of ATNS’ 2011-2012 CAPEX from B-BBEE compliant companies was 15% compared with its target of 45%. On the other hand, the company exceeded its operating expense target of 65% B-BBEE compliance, achieving 66%. In addition, the company exceeded its target of sourcing 15% of total CAPEX from South African sources, achieving 33%.

ACSA’s 2012 annual report does not address B-BBEE procurement targets. It states that ACSA achieved Level 3 B-BBEE compliance during 2011-2012 compared with the target set by its board of Level 4.

⁹ ATNS 2011 Annual Report (p. 46) states, “in terms of real expenditures, about 80% is spent overseas. Yet ATNS strives to see to it that a major portion of the remaining 20% spend is used encouraging BBEE”.

5.5 Challenge

ACSA's, ATNS', and the South African Government's policies are aligned in their goal of developing human and technological capital that will enable South Africa to enhance its enviable record of excellence in airport management and air traffic control. The challenge for all three entities is to make sure that the procurement process is effective at transferring new technology to these two South African companies so that they can meet South Africa's needs and remain competitive internationally. ACSA's role in managing airports in India and Brazil demonstrates its impressive global reputation and ATNS' importance to Africa as a whole.

The challenge will be to find ways to use the strengthened B-BBEE rules to foster technology transfer in addition to encouraging local content. Since ACSA and ATNS are the only buyers in South Africa of their products, other than the government, public policy is served by ensuring that these two entities remain the repository of this specialized technology and work to ensure that procurement policies are implemented to achieve this goal.

5.6 Conclusion

It is unclear whether or not the updated PPPF Act will have a negative or positive impact on the number of bids from foreign companies for high-technology goods and services that cannot be sourced from South African companies.

The study team's understanding is that most non-South African companies that provide the most advanced technologies have not historically complied with the requirements of the PPPF Act and it is unclear how this act will affect that historic pattern. There are very few suppliers of these advanced technologies and the time and cost in establishing joint ventures with local companies to ensure B-BBEE is significant. The most positive impact is likely to be with companies that provide lesser technology products or services which see a larger market for their products in the region. The transparency of the PPPF Act should motivate more suppliers of these products to invest the time and effort required to submit qualifying bids.

The study team does not believe the scoring provided for in the PPPF Act should force buyers to select substandard technology. The PPPF Act's implementation regulations allow the buyer to write the RFB to include the required technical specifications, the specification's value in the scoring, and the minimum score the bidder must have to be considered. The B-BBEE weighting is only used to determine which of the technically qualified bidders deliver the best value, where the value includes the bidder's B-BBEE score. As a result, the study team does not believe that the PPPF Act will require either ATNS or ACSA to accept a bid from a supplier with high B-BBEE scores, but unacceptable technical qualifications.

6 Procurement Timeline

6.1 Procurement Components

The major components of the procurement process are outlined below with an indication of how long each could take. These time estimates are intended as guidelines as they will vary depending on the nature of the purchase and the complexity of the technological processes involved.

6.1.1 Informal Discussions

This step may not be considered part of the procurement process because it is usually a continuous part of interaction between a buyer, its vendors and its other stakeholders. ACSA and ATNS technical departments use meetings with suppliers, international counterparts, and consultants to keep informed of developments within their areas of expertise as a form of continuing education. While this process is usually informal, it is in fact crucial to ensure efficient procurement of appropriate technology. Buyers initiate informal discussions with technology providers to understand competing technologies, their costs, strengths, and weaknesses. The purpose of this step is to provide the buyer with a sufficient understanding of the current market to ensure that they are able to develop specifications that meet their needs and are cost effective.

6.1.2 Development of Final Specification

In this step the buyer uses its market knowledge to develop preliminary specifications to satisfy its needs, and these preliminary specifications are shared informally with interested technology providers. The purpose of this step is to provide suppliers an opportunity to give feedback on how the specifications could be amended to provide enhanced value. Depending on the complexity of the purchase, this could be expected to take a few months or substantially more depending on the level of feedback and the level of ACSA's and ATNS' market knowledge. While this is taking place, the internal procurement process will probably be initiated, although this timing depends on when the buyer receives appropriate internal approvals.

6.1.3 Write and Issue Formal Tender Documents

ACSA and ATNS procurement specialists have extensive experience in writing tender materials and bid documentation and much of this step will be driven by pre-existing document templates and check lists to maximize efficiency. Once technical specifications are accepted, production of tender documents should take around two months but may take a lot longer depending on the size of the contract and the level of internal authorization required.

6.1.4 Bid Evaluation

This step focuses on evaluating the bids and determining how each meets the specifications. This formal process follows predetermined analyses, so should be relatively straightforward. While some tenders preclude any contact between the buyer and seller, others encourage

dialog with the bidders to clarify ambiguity and adjust the bids. This process would take from two to four months depending on the complexity of the requirement.

6.1.5 Conversion of the Winning Bid to a Contract

This process usually takes a month or less since most issues are covered during the evaluation process. Although administration of NIPP is a parallel process to the tender and should not affect the tender contracting, the study team does not know how this works in practice.

6.2 Procurement Process Timeline Impact on Capacity Enhancement Triggers

Based on the process considered above, after preliminary specifications are published, the rest of the procurement process could take up to a year, assuming that the NIPP negotiations with DTI do not lengthen the process. Hence, procurement considerations should not lengthen the lead time for implementing major capacity enhancements such as runways or terminals, because it is assumed that these will require at least three to five years to implement. Thus, the study team believes that the procurement timeline is unlikely to delay the implementation of capacity enhancement if procurement is factored into each capacity enhancement timeline. This assumes that ATNS and ACSA procurement professionals are an integral part of the decision making process.

ATNS and ACSA are responsible for purchasing advanced technologies whose rapid change lengthens the procurement process unless the buyer is already familiar with the technology under consideration. The study team makes the assumption that both ACSA and ATNS will continue to attend international forums, utilize government sponsored trade programs, and meet with current and prospective suppliers on a regular basis to enable each company to understand their options.

The study team believes that the stakeholder engagement that is recommended in this Study is likely to shorten the procurement timeline because everyone, including suppliers, will understand ACSA's and ATNS' plans ahead of time.

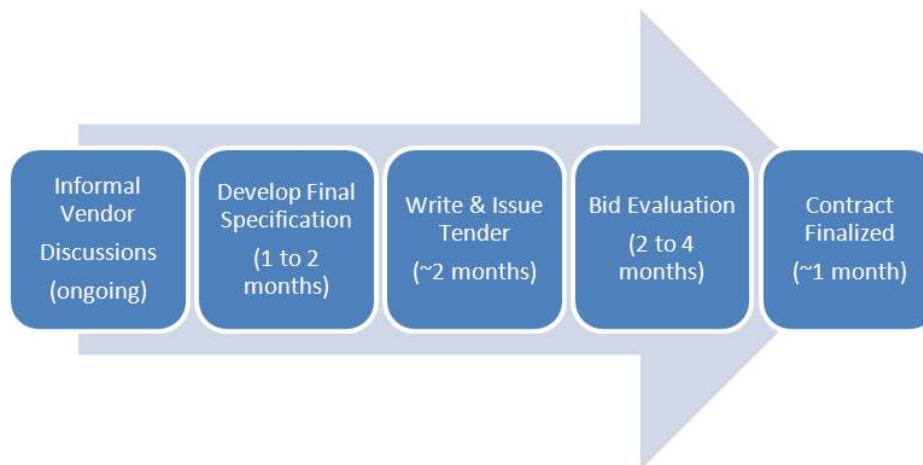


Figure 1: Procurement Process Timeline Summary

6.3 Impact of PPPF Act 2011 on Procurement Timeline

The study team has been asked to consider the impact of the implementation of the 2012 changes to the PPPF Act on ACSA and ATNS procurement timelines.

The major change in the bid evaluation process is that the PPPF Act provides very explicit weights to each level of B-BBEE. The new system mandates a bidder to submit its current B-BBEE Level Certificate in the tender documentation. Bid evaluations should be simplified by the changes since B-BBEE certificates (which will need to be verified during tender evaluation) replace other human development index (HDI) and reconstruction and development (RDP) criteria in the scoring of bids.

Based on an assumption that South African enterprises have had ample time to obtain B-BBEE Level certification from government-authorized entities, the study team does not expect the PPPF Act will have any impact on the procurement timeline of ACSA and ATNS.

7 Conclusions

The purpose of Task 4 is to identify South African laws, regulations, and standards that could impact the implementation of airside capacity enhancements and determine how South Africa's procurement rules and regulations and the internal procurement processes of ACSA and ATNS are likely to affect the implementation of this Study's recommendations.

7.1 Laws, regulations and standards

- South Africa's civil aviation system is based on Constitution of the Republic of South Africa (1996) and various Acts. The primary act, being the Aviation Act, which enables the DOT to appoint a Commissioner of Civil Aviation who may issue enforce technical standards for civil aviation.
- The SACAA is subject to audits by ICAO under its Universal Safety Oversight Audit Programme (USOAP), and the overall findings of the most recent published audit (from summer 2007)¹⁰ are that the Civil Aviation Regulatory system in South Africa complies with International Standards.
- Aviation Regulatory system in South Africa complies with International Standards. The system is mature and is managed as such with regular audits and interaction and consultation between all stakeholders.
- The study team has identified the necessary steps that ATNS and ACSA will need to take to comply with relevant institutional, legal, regulatory and standards requirements when implementing recommended capacity enhancements.
- Once the study team has recommended specific capacity enhancements and these have been agreed to with the client, specific detail regarding the process to be followed in compliance with ICAO SARPS and South African legislation will be provided in Task 8.

7.2 Procurement

- South Africa's procurement regulations are designed to achieve multiple policy objectives, including: meeting international best practices, fostering the growth of broad-based black economic empowerment, and the transfer of advanced technologies to South Africa.
- Many of the capacity enhancements being considered in the Study depend on ATNS and ACSA purchasing sophisticated, state-of-the-art products and services from companies outside South Africa. The study found that both companies employ very detailed internal procurement procedures that meet international best practices.
- The study team's reading of the implementation guideline of the 2011 PPPF Act revealed that the PPPF Act is more likely to help than impede the effectiveness of the procurement process. Procurement of state of the art technology is essential for ATNS and ACSA to maintain their world class status, and the PPPF Act supports this by allowing the purchaser to set technical specifications and specifying minimal acceptable technical scores for a bid to be considered. The qualifying bids will then be weighted on the basis of

¹⁰ ICAO Universal Safety Oversight Audit Programme, FINAL REPORT ON THE SAFETY OVERSIGHT AUDIT OF THE CIVIL AVIATION SYSTEM OF THE REPUBLIC OF SOUTH AFRICA (5 to 16 July 2007)

price and B-BBEE level. While this may require more careful development of technical specifications than in the past, the PPPF Act should not impede the acquisition of technology supplied by non-South African companies.

- It is possible that ACSA's concern that the PPPF Act will result in longer procurement lead times is correct, but once the new procedures are fully operational any extra time should be minimal and easily accommodated within the timeframe required to implement most capacity enhancements.
- The PPPF Act may result in fewer foreign company responses to RFPs because of the perceived time and expense required by a new bidder to enter the South African market. ATNS and ACSA should use their ongoing technical engagement with technology vendors as an opportunity to provide helpful guidelines on how to do business in South Africa.