

Public Procurement in Malaysia: Is There a Need for Reform? A Look at the Objectives of Public Procurement Principles with Particular Emphasis on Transparency and Accountability

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Introduction

What is public procurement and why the need for regulation? Public procurement is the process by which public authorities (governments) procure works, goods or services from companies. Since public procurement accounts for a substantial portion of taxpayers' money (approximately 12% of GDP and 29% of government expenditure in OECD member countries), governments are bound to ensure that it is carried out efficiently and with high standards of conduct in order to ensure quality of service delivery and to safeguard public interest. Public procurement remains the government activity that attracts most waste, fraud and corruption due to the size of the financial flows involved.¹

Annually, over 250,000 public authorities in the EU spend about 14% of GDP on the purchase of services, works and supplies. Public authorities are the principal purchasers in sectors such as energy, transport, waste management, social protection and the provision of health or education services.² Statistics provide that 15–20% of global GDP is taken up by public procurement and this is a substantial portion of the EU economy and the economies of many countries around the world.³ Under the World Trade Organization's Agreement

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1 See <http://www.oecd.org/gov/ethics/public-procurement.htm> (retrieved on November 18, 2016).

2 See https://ec.europa.eu/growth/single-market/public-procurement_en (retrieved on November 18, 2016).

3 See "Public Procurement", available at http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm (retrieved on February 25, 2016).

on Public Procurement (“GPA”), public procurement projects have been estimated at around 1.3 trillion Euros.

To ensure that there is a level playing field for all businesses across Europe, EU law sets out minimum harmonised public procurement rules that organise the way public authorities purchase goods, works and services. These are then transposed into national laws which need compliance with EU law.⁴

So now the question as to why there is such a focus on public procurement can be answered. Public procurement is the biggest spender in a developing economy. The very nature of procurement and the use of public funds in government procurement involves decision taking. Such decision taking would naturally be influenced by discretion. And discretion in turn may be influenced by bias. Such would then open the door to the risk of corruption. All levels of government departments engage in procurement. Important projects that encompass health, education and infrastructure have a significant impact on the economic development of a country. Developing nations with a challenged economy usually resort to boost economic growth by increased developmental projects. Sometimes, the projects do affect the provision of services to the needy members of the public. In this regard, Malaysia, especially Kuala Lumpur, has embarked on a multi-billion Ringgit⁵ transportation system, with the building of the Light Rail Transport and the Mass Rapid Transport (“MRT”). Public procurement reform and regulation may result in better general governance and accountability benefiting suppliers as well as procurers and ultimately the end user, the public.

1. Development of public procurement regulation in different jurisdictions⁶

Regulation of public procurement is by no means a new phenomenon. It has been introduced into various jurisdictions⁷ and may in fact be said to be reaching the “ripe old age” status in some countries. The countries that have public procurement laws or regulations number 25 in all.⁸ The list is as follows: Albania (Public Procurement Law 2006); Bosnia and Herzegovina (Public Procurement Law 2004); Bangladesh (Public Procurement Regulations 2003);

4 See https://ec.europa.eu/growth/single-market/public-procurement_en (retrieved on November 18, 2016).

5 The 52.2km Sungai Buloh-Serdang-Putrajaya Mass Rapid Transit (“MRT”) Line 2 is likely to cost over RM30 billion, taking into account the private land acquisition that is estimated to be between RM4 billion and RM5 billion: available at <http://www.themalaysianinsider.com/malaysia/article/mrt-says-line-2-to-cost-over-rm30-billion> (retrieved on February 20, 2016).

6 Xavier, Grace and Chew, Jason, “Regulation of Public Procurement: General Principles and Guidelines with a Brief Overview of Procurement Principles Governing the Construction Industry in Malaysia” (2012) 28 *Const LJ* Issue 5, pp 28–48.

7 http://www.oecd.org/document/30/0,3343,en_33638100_33693506_35029086_1_1_1_1,00.html (retrieved on August 13, 2016).

8 As on October 19, 2010.

Bulgaria (Public Procurement Law 2003); Croatia (Public Procurement Law, 2007); Cyprus (Public Procurement Law 2003); Czech Republic (Act on Public Contracts 2006); Estonia (Public Procurement Law 2003); France (Code des marchés publics 2006); Germany (Gesetz gegen Wettbewerbsbeschränkungen 2007); Ghana (Public Procurement Act 2003); Hungary (Act CXXIX of 2003 on Public Procurement amended 2007); Kenya (Public Procurement and Disposal Act 2005); Kosovo under UNSCR 1244/99 (Public Procurement Law 2007); Latvia (Law on Procurement for State or Local Government Needs 2002); Lithuania (Law on Public Procurement No X-471 2005); Former Yugoslav Republic of Macedonia (Public Procurement Law 2007); Malta (Maltese Public Contracts Regulations 2004); Mauritius (Public Procurement Act 2006); Montenegro (Public Procurement Law 2006); Nigeria (Public Procurement Act 2007); Poland (Public Procurement Law 2004); Romania (Law regarding the award of the Public Procurement Contracts, Public Works Concession Contracts and Services Concession Contracts 2006); Scotland (The Public Contracts (Scotland) Regulation 2006); Serbia (Public Procurement Law 2004); Slovak Republic (Act on Public Procurement 2005); Slovenia (Public Procurement Act ZJN-2 2006); Turkey (Public Procurement Law 2002) and the United Kingdom (The Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006). Other countries not mentioned in the list above have also come up with legislation governing public procurement and certain countries have had major amendments to their existing Acts. Some of the said countries are the Philippines (Government Procurement Reform Act 2002); Pakistan (Public Procurement Regulatory Authority Ordinance 2002); Uganda (Public Procurement and Disposal of Public Assets Act No 1 of 2003); Venezuela (Public Procurement Act 2004); Zanzibar (The Public Procurement and Disposal of Public Assets Act 2005), Nepal (The Public Procurement Act, 2063 enacted in 2007); Zambia (Public Procurement Act (Commencement) Order 2008); Tanzania (The Public Procurement Act 2011); India (Public Procurement Bill 2012); Kenya (Public Procurement and Disposal Act 2015—old Act was in 2005); and Trinidad (Public Procurement and Disposal of Public Property Act, 2015).

It appears that many jurisdictions have enacted their regulations or amended them in the 21st century. The reasons could be manifold, including the increase of knowledge of the public in procurement issues and the spread of procurement principles and accountability due to the dissemination of the subject of procurement by various academic bodies and government agencies. Whatever the reasons may be, it is patent that the need for some form of regulation has become essential in Malaysia.

The need for procurement guidelines cannot be emphasised or reiterated more in developing countries. The economic progress in a region continues to be the stimulus needed to boost the economic development of a country. Hence development projects need to be carried out. But for the progress to be sustained, and for the country to become financially strong, the call for proper

governance less pervaded by waste, inefficiency, secrecy and corruption is needed. There has to be in place a more competent and accountable government administration. Such can be evidenced where public procurement focuses on value for money. Sadly, serious weaknesses have continually plagued developing nations, and this has caused the rise in reforms in the past 15 years.

2. Challenges faced

According to Jones⁹ the major obstacle in achieving effective public procurement in most countries in Southeast Asia is legislative inertia. Countries like Malaysia have various fragmented instruments governing public procurement, but such instruments are far from efficient as instead of creating greater transparency in the procurement process, they only serve to cause inconsistency and thus lead to lack of accountability in procurement procedures. In the Public Spend Matters Europe¹⁰ the author has listed out six challenges to public procurement regulation. He states the challenges as those with regard to difficulty in the implementation of new directives; austerity; social issues; value and innovation matters; the fight against corruption; and capability and competence.

Terakawa Akira¹¹ on the other hand, has a different set of challenges: ensuring and improving the quality of public works; the role of construction industries in exhibiting local leadership; harmonising with international public procurement processes and contributing to the creation of a recycling society. In South Africa,¹² some of the problems faced are lack of proper knowledge, skills and capacity of the procurement personnel. In addition they also found that there is inadequate planning and the linking of demand to the budget. Issues of accountability, fraud and corruption are also prevalent. Further issues include inadequate monitoring and evaluation of projects and unethical behaviour. However the common thread is the fight against corruption and lack of legislative will to ensure compliance with established directives.

Sulaiman Mahbob emphasises that good governance and transparency are vital to propelling Malaysia's economy to a higher level. "Good governance plus transparency will definitely curb excesses such as possible corruption,

9 Jones, David S, "Public Procurement in Southeast Asia: Challenge and Reform", *Journal of Public Procurement* vol 7, issue 1, pp 3-33. Available at: <http://unpcdc.org/media/6112/public%20procurement%20in%20southeast%20asia%20-%20challenge%20and%20reform.pdf> (retrieved on March 7, 2016).

10 Available at <http://public.spendmatters.eu/2015/01/22/2015-challenges-for-public-procurement-austerity/> (retrieved on March 10, 2016).

11 "Challenges Facing Public Procurement and Perspectives of National Land Management": Available at <http://www.nilim.go.jp/english/annual/annual2011/2-1.pdf> (retrieved on March 10, 2016).

12 Ambe, Intaher M and Badenhorst-Weiss, Johanna A: "Procurement Challenges in the South African Public Sector". Available at file:///C:/Users/John/Downloads/63-117-1-SM.pdf (retrieved on March 10, 2016).

rent-seeking activities and patronage”.¹³ Mahbob calls for adequate checks and balances to maintain the integrity of Malaysia’s key institutions. Only then will corruption be addressed resulting in greater transparency and accountability, which in turn will ensure that developmental outcomes are just.

Further challenges are asymmetrical information, emanating from dysfunctional procedures, corruption in the allocation and monitoring of contracts and problems of enforcement which tend to be the major sources that hinder transparency and accountability; both of which are fundamental and indispensable aspects of an effective public procurement system. An ineffective system means increases in the costs of goods, construction works and services provided through procurement especially during a period of severe financial constraint. How then do we proceed towards making public procurement an exercise that will deliver and ensure value for money that is spent?

3. The UNCITRAL Model Law of 2011

A brief introduction

The UNCITRAL Model Law of Procurement (“the 2011 Model Law”) was adopted in July 2011. Its principles are aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed. The 2011 Model Law replaces the earlier law that was enacted in 1994, known as the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (“the 1994 Model Law”). The purpose of the 2011 Model Law was in line with the desire of the United Nations Commission on International Trade Law to ensure that new practices, particularly with respect to e-procurement, were incorporated as it reflected the growing trends. The fundamental tenets of the 1994 Model Law, however, remain unchanged.

This section will consider the salient provisions of the Model Law and its impact on procurement regulations that have been adopted in the particular nations. The main reason for the re-drafting of the UNCITRAL Model Law of 2011 appears to be to curtail fraud and corruption in the public procurement process.¹⁴ Nicholas stated that in order to be effective and in line with United

13 “Economist says Good Governance, Transparency Vital for Malaysia’s Economy”: The Star online, January 8th, 2014: available at <http://www.thestar.com.my/business/business-news/2014/01/08/economist-says-good-governance-transparency-vital-for-economy/> (retrieved on March 15, 2016).

14 Nicholas, Caroline, “Fraud and Corruption in Public Procurement” (2010): available at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2010-December-13-15/Presentations/Caroline_Nicholas_-_Public_Procurement_-_UNCITRAL.pdf (retrieved on February 2, 2016).

Nations Convention against Corruption (“UNCAC”) guidelines, the proposed amendments had to focus broadly on coming up with a coordinated anti-corruption action which in turn, focused on the promotion of integrity and accountability. In order to achieve these objectives, there had to be clear preventive measures and sanctions bordering on criminalisation to be imposed on the offenders. Other areas of focus would include asset recovery with the assistance of international cooperation, where such assets had been procured outside the national boundaries.

Under article 9¹⁵ of the UNCAC, goals and objectives of procurement system requirements are those based on transparency, competition and objective criteria employed in decision-making which would be the ideal mechanism for combating corruption.

The key provisions of the 2011 Model Law may be summed up as follows:¹⁶

- (1) Recognising the growth of e-procurement and rewriting the framework agreements to reflect the change in procurement procedures;

15 Article 9. Public procurement and management of public finances.

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, *inter alia*:
(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.
2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, *inter alia*:
(a) Procedures for the adoption of the national budget; 13 (b) Timely reporting on revenue and expenditure; (c) A system of accounting and auditing standards and related oversight; (d) Effective and efficient systems of risk management and internal control; and (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.
3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

16 See the UNCITRAL Model Law on Public Procurement (2011): available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html (retrieved on March 2, 2016).

- (2) Ensuring that value for money principle continues to be upheld;
- (3) It contains procedures to allow for different types of procurement;¹⁷
- (4) It ensures that the enacting State has still the freedom to pursue its domestic policy objectives, e.g. promoting economic development through the support of SMEs;¹⁸
- (5) It supports the harmonisation of international standards in public procurement;¹⁹ and
- (6) It aims to assist States in formulating a modern procurement law.

Subsequently, after the 2011 Model Law was adopted, the Guide to Enactment of the UNCITRAL Model Law (“the Guide”) was formulated and adopted on June 28, 2012. This Guide was necessary to provide the background and explanatory information on the policy considerations reflected in the 2011 Model Law. The Guide serves to explain both the objectives of the 2011 Model Law as well as to how the provisions are designed to achieve those objectives. The Guide will be an invaluable reference tool for policymakers and legislators, regulators and those providing guidance to users of a procurement system based on the Model Law. The Guide addresses policy issues and issues of implementation and use of the Model Law. User of the earlier 1994 Model Law will also benefit from the Guide as the Guide will help them to update their legislation to reflect the recent developments in the area of public procurement.

4. Public procurement in Malaysia—the guidelines and the various instruments

Malaysia is a member of the Asia-Pacific Economic Co-operation Forum (“APEC”), participating actively in the Government Procurement Experts’ Group (“GPEG”), and has adopted the APEC Non-Binding Principles on Government Procurement. In addition, Malaysia has signed the United Nations Convention Against Corruption (“UNCAC”). Although a member of the WTO, Malaysia is not a party to the GPA.

The prime objective of the Malaysian Government’s procurement is to support government programmes by obtaining value for money through

17 Different types of procurement would include standard procurement, urgent or emergency procurement, simple and low-value procurement, and large and complex projects. See the UNCITRAL Model Law on Public Procurement (2011): available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html (retrieved on March 2, 2016).

18 However, such leeway must still adhere to international commitments that bind the member states.

19 In this regard, the 2011 Model Law takes into consideration the relevant provisions of the WTO Agreement on Government Procurement, the European Union Directives, the UN Convention Against Corruption, the Procurement Guidelines and Consultant Guidelines of the World Bank and the equivalent document of other IFIs.

acquisition of works, supplies and services. To meet this objective close attention is given to price factors as well as non-price factors such as whole life cost, quality, quantity, timeliness, maintenance and warranty. The benefits or value from procurement should be commensurate with the costs involved and the best procurement should be well and thoroughly evaluated, reasoned and justified. In this context, the Malaysian Government procurement is based on the following policies, principles, objectives and procedures.

The Malaysian Government Procurement Policies, in general, provide support for the full achievement of the objectives and aspirations of the National Development Policy and Vision 2020, i.e. towards a developed nation status.

The principal policies are as follows:

- (a) To stimulate the growth of local industries through the maximum utilisation of local materials and resources;
- (b) To encourage and support the evolvement of Bumiputera (indigenous) entrepreneurs in line with the nation's aspirations to create a Bumiputera Commercial and Industrial Community;
- (c) To increase and enhance the capabilities of local institutions and industries via transfer of technology and expertise;
- (d) To stimulate and promote service oriented local industries such as freight and insurance; and
- (e) To accelerate economic growth whereby Government procurement is used as a tool to achieve socio-economic and development objectives.

Government Procurement Efforts are being implemented to improve transparency in government procurement. Malaysia is implementing an electronic procurement ("eP") system in government agencies. The Treasury Instruction Letter on June 28, 2013 stipulates that Cost Responsibility Centres of government agencies are required to ensure that at least 75% of their annual allocation of procurement is conducted online through the eP system. Malaysia still uses preferences in government procurement processes to benefit locally owned businesses. Generally, international tenders are invited only when local providers of goods and services are not available.²⁰

The legal framework for public procurement in Malaysia is governed by several statutes and government instruments, namely the Financial Procedure Act 1957, the Government Contract Act 1949, Treasury Instructions and Treasury Circular letters. These documents are used whenever the government enters

20 Available at http://www.apec.org/~media/Files/AboutUs/AchievementsBenefits/2014_BG_Reports/Malaysia%20-%20Bogor%20Goals%20Progress%20Report%20Oct2014.pdf (retrieved on April 3, 2016).

into a procurement exercise. The Procurement Division of the Malaysian Government sets out the rules governing procurement in government projects. The department is headed by the Minister of Finance (at the Federal level) and by the Chief Ministers for the various state procurement boards.²¹ A brief exposition of the instruments follows:

Financial Procedure Act 1957

This Act permits authority and management of public finance in Malaysia. It highlights financial and accounting procedures including collection, custody, and payment of federal and of states' moneys; supplies, custody and disposal of public properties owned by state and federal governments. The Act was amended in 1972, to authorise the Minister of Finance to manage, supervise, control and direct all federal financial matters.

Government Contract Act 1949 (revised 1973)

This Act authorises the ministers to sign contracts and delegates authority to the respective officers to sign contracts on behalf of the government. It was revised in 1973 to complement the original Act enacted in 1949. One of the major amendments was to make it mandatory to get the authorisation form filled-up and signed by the respective heads of ministries or heads of states.

Treasury Instructions ("TIs")

TIs provide details of financial and accounting procedures including procurement. Treasury instructions are issued to government agencies from time to time on any new changes to the procedures. To date there are 25 TIs issued to government agencies. It ranges from Estimated Revenue to Breakdown of Main Expenditure.

Treasury Circular Letters ("TCLs")

This official letter is issued by the Treasury Department to communicate, upgrade, explain, and amend the existing and new regulations or procedures regularly from time to time with the intention to make the public and the interest groups aware of any changes made. To date Treasury Malaysia has issued 24 new TCLs and reviews the tender board to ensure greater transparency in procurement transactions.

Federal Central Contract Circulars ("FCCCs")

This circular is issued with the intention to make it known to the public about the presence of central public procurement contract. It provides the following

21 Country Reports, ADB Report, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific: Curbing Corruption in Public Procurement in Asia and the Pacific: available at <http://www.adb.org/Documents/Books/Public-Procurement-Asia-Pacific/mal.pdf> (retrieved on November 1, 2011).

details including name, price, supplier, supply coverage, specification, mode and timeframe of the delivery.

These instruments apply to procurement by all federal and state governments and semi-governmental agencies but not state-owned enterprises. All of these identified the types of procurement and the processes involved as the MOF's function was primarily in the areas of controlling, enforcement, supervision, reconciliation, usage, distribution and storage of procurement for government departments. Examples of the information exhibited included; the range of purchases for products such as small items, viz, office stationeries to office equipment and even extended to huge assets such as vehicles, machinery and the most non-liquid asset, land and buildings. These guidelines also cover the provisions for the purchase of services. Examples of services purchased on behalf of the government included those received from consultants and advisors in the areas of engineering, technical, financial, legal and others.²²

5. Conclusion – The way forward for Malaysia

A careful perusal of the UNCITRAL Model Law gives us reason to go ahead with a more regulated regime of public procurement in that the prevailing social national interests are still recognised under the UNCITRAL Model Law provisions. There should not be any underlying fears that national companies and national suppliers will be sidelined. What we should be striving for is a method that allows for value for money to be the fundamental foundation for procurement. Transparency in procurement will also be another milestone to achieve good value for taxpayers' money. Open competition will also allow all those involved in the industry to have a level playing field from where they are able to enjoy the benefits across the board. As such, in conclusion, it is recommended that to follow the UNCITRAL Model Law Procurement Rules will not in any way cause detriment to national goods and services. In fact, once the procurement regime boasts of transparency, competition and value for money, and practises integrity in procurement and monitoring of projects, investor confidence will boost the economy and this will in turn benefit the national players.

22 See Rohana Othman, Husein Zakaria, Norlaili Nordin, Zamzam Shahidan and Kamaruzaman Jusoff: "The Malaysian Public Procurement's Prevalent System and its Weaknesses": available at <http://thescipub.com/html/10.3844/ajebasp.2010.6.11> (retrieved on March 24, 2016).