

CHALLENGES FACING PUBLIC PROCUREMENT INFORMATION IN SOME AFRICAN COUNTRIES NAMELY: SOUTH AFRICA, UGANDA, ZIMBABWE AND TANZANIA.

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ABSTRACT

This article seeks to find out challenges facing the procurement laws in Africa. The article examines the meaning and purpose of public procurement, drawing parallels between its essential elements, and stages with the need and requirement to enhance transparency and accountability to attain its objectives. It also seeks to provide analysis of traditional procurement reform objectives and identifies the importance of transparency and accountability as well as value for money in procurement to their achievement of joint goals. The article then examines broadly the access to information provisions of the procurement laws in a number of African countries namely -South Africa, Zimbabwe, Uganda and Tanzania and concludes that these laws contribute to improving access to information across Africa, particularly where an access to information law is absent, but are not robust enough to sufficiently provide comprehensive access to information. It examines the level of constraint posed by administrative charges for access to information. Also the article concludes based on the Tanzanian experience that limited access to information, laws already exist may be more as a result of; limited capacities in both the citizens sector and public sector to capture and maintain information in a retrievable format; deliberate delays by public officers to frustrate applications for access; poor information management practices and half hearted efforts within the citizens sector to apply existing law, than any application of administrative fee or other limiting provisions of the law, WITTING, W.A (2002).

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1.0 Introduction.

An understanding of public procurement, its essence and purpose provide the best justification for public access to procurement information. Public procurement means an acquisition, whether under formal contract or otherwise, of works, Supplies and services by public bodies using publicly sourced finances. It involves the purchasing, hiring or obtaining by any contractual means of publicly needed goods, construction works and services by the public sector. It also includes situations in which public funds are mobilized to Procure works, goods and services even if the government does not get directly involved (Tanzania procurement policy term, 2012).

Public procurement is also the acquisition of goods and or services at the best possible cost of ownership, in the right quantity and quality at the right time, in the right place, for the direct benefit or use of government, corporation or individuals, generally via a contract. This definition though incomplete, identifies substantive issues that are subject of public procurement. To determine best possible total cost, right time, or quantity or

right place, we will need a comparison, perhaps between most or all available options, thus if the different goods, services or works can be provided by different people or entities, to compete to provide them, the different people or entities, need to know that the opportunity exists to compete, also they will need to know the precise need to be served and perhaps the standards that need to be met, fulfilling this need, thus requires information sharing, transparency as we often call it.

1.2 Challenges and public procurement information.

Procurement has become an integral part of corporate performance and has challenges facing it on how to set up and how to manage global sourcing offices. That is also more in terms of processes, a linkage between the global sourcing offices and the headquarters. It's also how the global sourcing offices do work with other non-procurement functions, Christina Bauer (October, 2011).

One of the main responsibilities of public sectors is to improve their procurement information systems. Sound public procurement policies and practices are essential to good governance. The Procurement Management Information system is a tool for receiving, storing, sharing and disseminating procurement information as required by the public procurement legislation in most of the developing countries in Africa.

2.0 The value of transparency in Public Procurement.

Indeed even before this stage, the need to be met must be pre-determined, and if as is often the case, with government, the activity is intended to serve the people, then the people need to be aware, if for no other reason, to be assured that an effort is being made to meet their needs and above all that, it is indeed their need that the process is intended to meet. This also means that at the end of the activity, there may be need to determine if and how well the pre-determined need has been met, and whether the cost equates the outcome received, whether the decisions were right or wrong and how well authority given has been exercised, considering that evaluating performance is integral to good democratic governance, WTO (2001)

2.1 Value for Money in the public procurement

Value for Money is a core principle underlying public sector procurement. Value for Money in a procurement function is a good measure of an economy and efficiency with which public financial resources are converted into procured quality goods, services and works. It is evaluated on a whole-of-life basis of the good or service being procured and is influenced by a number of factors which procuring entities have to observe the following:-

- i) Adoption of procurement methods which are economical.
- ii) Maturity of the market for the works or service sought, and the knowledge of the market.
- iii) Performance history of each prospective supplier through a product search and maintenance of database of best performers.
- iv) Relative risk of each proposal gets duly calculated in the entire process of procurement.
- v) Financial considerations, including all relevant direct and indirect benefits and costs.
- vi) The anticipated price that could be obtained at the point of disposal of procurement items should be estimated.
- vii) Maintenance cost of procurement items should be taken into account and be justified in the procurement process decisions and
- viii) Evaluation of contract options that takes value and quality on balance.

2.2 The application of Accountability in public procurement.

Accountability is one of the ethos of good governance highly pursued by some Governments in Africa. It is required that the public procurement practice shall always hold its practitioners responsible for enforcing and obeying the law, rules and regulations. It makes the practitioners Subject to challenge and to sanction where appropriate, for neglecting or breaching those laws, rules and regulations. Accountability is fundamental to individual and institutional integrity and probity and to deterrence to collusive procurement, conflict of interest and corruption. The procurement function at all stages and in all processes shall ensure adherence to professional, technical, administrative and political forms of accountability. In pursuing all forms of accountability, Procuring entities are bound to:

- i) Ensure that all procurement entities adopt good governance principles and practices as a way of contributing to proper and efficient management of public resources.
- ii) Strengthen all forms and dimensions of public accountability mechanisms in Public Procurement Service in the countries.
- iii) Institute mechanisms for effective enforcement of the public procurement laws, principles and ethics.
- iv) Strengthen the capacity of public procurement oversight institutions and organizations to ensure and administer all forms of accountability.

3.0 Access to information and procurement objects

The above factors and more perhaps account for why world over procurement reforms have always been intended to achieve, amongst others the following objectives:-

- Accountability in the procurement process
- Attainment of probity and transparency in the procurement process
- Competitiveness in the public sector procurement system
- Value for money standards and practices
- Professionalizing Procurement practice

These are also the objectives of procurement reforms in the many African countries that have in the last, but one decade embraced reforms, examples include Uganda, south Africa , Zimbabwe and recently more Tanzania my home country. Fundamental to achieving these objectives is the issue of access to information. Without transparency, it is impossible to achieve accountability. Without equal, fair and simultaneous distribution of information to all prospective bidders, it is difficult, if not impossible to achieve the level of competitiveness required to secure value for money. Without access to information, an onlooker cannot always determine when professionalism is at work or when quackery has taken over. A public procurement transparency regime, implies not only that the implementing agency should grant requests for information from stakeholders and interested members of the public, but that it should also proactively publish and widely disseminate relevant information to the public, after all it is about expending a common wealth. Such an agency should as much as possible, routinely publish a wide variety of information relevant to its operations, procedures and specific procurement activities.

Under the Procurement Acts/Regulations of South Africa, Zimbabwe, Uganda and Tanzania, the objectives of probity, accountability, transparency and value for money are promoted under transparency provisions requiring procuring entities to maintain procurement records. Also supporting improved access to information are the broad provisions in these country laws for;

- a) Use of the open competitive bidding as the preferred method of procurement and disposal of the assets;

- b) Preparation wide publication and distribution of procurement and disposal opportunities including invitation for tender, prequalification document, express of the interest (EOIS); Request for proposal and bidding documents; Request and grants of access to documents to the public with limitation to be discussed;
- c) Maintenance of annual up to date of standard list of registered tenders/bidders, register of suppliers and agents and black listed suppliers contractors and consultants;
- d) Insurance of procurement and disposal documents to successful bidders;
- e) Preparation and publication of notice of award and notice of the tender acceptance;
- f) g) Maintenance, archival and safeguarding of documents and records of the procurement and disposal activities/proceedings for a required number of years ;
- h) Complaint/appeal provisions which support cost effective and quick ventilation of grievances.

The regime of detailed documentation of activities, publication of procurement records, opens bidding processes-open competitive bidding, access to information on request , receipt, management and distribution of comprehensive records of all procurement proceedings; often including the duty to develop, establish and maintain databases or ICT based systems for collation, storage and distribution of information relating to procurement activities and actors in the procurement process in the subject countries, provides the environment for access to information, relating to public expenditure by citizens. However these provisions are not absolute and share a number of limitations.

4.0 The concept of confidentiality in the public procurement

In addition to confidentiality clauses relating to some category of procurement information in the Uganda and Tanzanian laws, a common statutory limitation to procurement related access to information provisions in subject countries is the imposition of administrative fees or levies on a person seeking access to public procurement documents. In the case of South Africa Act provides for payment of cost of copying and an unstated administrative fee, leaving the actual fee to the regulator to stipulate. The Tender Board for Public Procurement in South Africa is yet to stipulate any fees, as is the case in Zimbabwe where the same decision is left in the hands of the Contracts Committee. Section 47 PPDP (Uganda) 2003 provides that “procuring and disposing entity shall not except when required to do so, by an order of court, disclose any information where the disclosure would amount to a breach of the law; impede law enforcement; prejudice legitimate commercial interests of the parties; inhibit fair competition; or in any way not be in the public interest, until the successful bidder is notified of the award. The challenge here is that the criteria for the decision to grant access or not to grant are so subjective, that they may amount to substantial limitations, on the other hand, these provisions appear to be saying, that these limitations to access to information will not apply once the winning bidder is announced and notified. In effect at this later stage all information should become available.

Section 2.2.3 PPC (S .Africa) 1997 the principles of proposal for procurement state that within the bounds of commercial confidentiality to debrief winners and losers on the outcome of the tendering process so as to facilitate better performance on the future occasions, but all not all public have right to these information’s except concerned persons.

The Tanzania law, has a similar provision, this time vesting in the Permanent Secretary (on his own or under direction of the Minister) the power to prohibit the Authority, its employee or member of staff from communicating to any person, for any purpose any document or information so specified, when such would involve the disclosure of the deliberations of the Government, relating to matters of a secret or confidential nature and is likely to be injurious to the public interest, or prejudicial to interests of the country.

While the law in Zimbabwe concerning procurement in section (36) sub sect (2a) provides right to procuring entity to provide information to interested party for reasonable charge, with a copy of any document referred to in or permit any interest party at his own expenses to make a copy of any document referred to in.

For Tanzania Section (42) of the Tanzanian Public Procurement Act 2004, provides the right for disposal of public documents both file and electronic copies after 5 years, in Uganda 7 years from the date the decision is made or date of the contract completion (whichever is later), respectively), Section 51 PPDPA (Uganda). Similar confidentiality clauses do not however exist in the Uganda.

In South Africa there are various provisions across public procurement legislation detailing how organs of state must dispose of public assets to private entities. The National Treasury must make regulations relating to the alienation, letting or other disposal of state assets (section 76(1) (k), PFMA). Regulation 16A7 of the Treasury Regulations states that disposal of assets must be at a market-related value and can be done by quotations, competitive bids or auction; whichever is the most advantageous for the state. Disposal of assets must be approved by the relevant treasury in accordance with Regulation NO.19.6

It would appear that in none of these examples does the procurement law provide a complete regime for access to information, thus where no access to information laws exist, improved access to information provisions in the procurement law will be a good beginning.

In practice however, indications are that there exist other reasons for limited access, unrelated to Limitations in the law. For example in Nigeria oral accounts of citizens advocates on requests for information under the public Procurement Act 2007, indicates that limited access to procurement information has been more as a result of ;limited capacities in both the private sector and public sector to capture and maintain information in a retrievable format; deliberate delays by public officers to frustrate applications for access; poor information management practices and half hearted efforts within the citizens sector to apply existing law, than any application of administrative fee or other limiting provisions of the law.

5.0 Obstacles to procurement Reform in developing countries

Robert Hunja, a senior procurement specialist at the World Bank, described the aims of the reform programme in many developing countries as being to establish a strong and well functioning procurement system that is governed by a clear and mechanisms of enforcement, coupled with an institutional arrangement that ensures consistency in overall policy formulation and implementation (Hunja, 2003). The challenges currently include limited number of monitors and limited resources to attract and retain skilled personnel, who can support the delivery of the capability of this tool, and continue to encourage and improve the skill and motivation of monitors to use the tool.

According to Global Integrity (2010), despite the fact that conflict of interest is covered under law, it is not always enforced in practice. Therefore, public officials are still able to award contracts to themselves through a third party, or award contracts to non-existing companies. Furthermore, the same source also reports that companies found guilty of major violations of procurement regulations are not blacklisted and can continue to participate in future procurement bids. Companies are recommended to use a specialized public procurement due diligence tool in order to mitigate the corruption risks associated with public procurement in developing countries like my countries.

For instance, one of controversial corruption scandal relating to procurement and contracting issues in Tanzania was in Tanzania's Central Bank (BoT) and concerned the construction of the Twin Towers in Dar es Salaam. According to an October 2009 article by This Day News Paper, the two senior officials at the BoT, Amatus Liyumba and Deogratius Kweka, were accused of misusing their authority and inflating the costs of the Twin Towers project, which ended up costing four times the value of a similar building in London or New York.

Liyumba was charged with causing the loss of USD 153 million. Nine former members of the BoT board of directors and a former central bank lawyer were set to testify against Liyumba in October 2009.

Subsequently, Kweka was released from police custody, while Liyumba was found guilty of abuse of office and sentenced to two years in prison in May 2010. Moreover, BoT Legal Secretary, Bosco Kimela, was acquitted after the charges were dropped against him, as reported by the US Department of State 2010. In September 2009, chairman of the panel of Magistrates, Saul Kinemela, along with three BoT employees, was charged with embezzling USD 70 million by manipulating contract prices and printing requests for currency procurement.

In relation to the BoT case, in 2011, two Tanzanian businessmen were found guilty of defrauding the Central Bank of over USD 1 million and sentenced to five years in prison each.

Tanzania Freedom House 2010 reports that although public procurement procedures are designed to guarantee competition, the system remains opaque and disclosure of contract-related information can lead to legal action, especially within the extractive industries.

5.1 General challenges in Public procurement in SMEs and private sectors.

Many problems exist in developing and transition countries like Tanzania, Uganda, Zimbabwe and South Africa that keep local suppliers from taking advantage of the government market place. In general these problems involves: untrained or poorly trained work force; in adequate accountability for government decisions and lack of the transparency in the procurement process.

Private sector participation in public procurement particularly goods and services is very minimal. For examples local tenders, suppliers, consultants, contractors, architects and engineers have not built enough capacity to participate in tenders advertised internationally and local particularly when the value are big. Local suppliers and contractors often do not have capacity to raise credit, bid bonds and securities from local banks and insurance companies considering the high interest rates.

Suppliers who would like to participate in public procurement find the procurement procedures irrational and cumbersome. They are sometimes excluded when the procurement is too big and they are apprehensive of unfamiliar procedures. They are not well informed. This renders the process difficult and open to abuse, WRLD BANK (1995a).

Conclusion and Recommendations

One of the challenges facing the public procurement sectors in the developing countries discussed above is a lack of public awareness about the benefit of public procurement and its laws, regulations, guidelines, procedures and regulatory instruments. There is also a lack of awareness on public procurement markets, complaints review mechanisms among stakeholders. In this regard, awareness creation and sensitization on public procurement functions, laws, regulations and procedures must be extended to all segments of society and stakeholders including potential bidders. In addition the Government, in collaboration with other stakeholders, must establish effective communication and awareness creation mechanisms.

To do this efficiently, the government has to be supported by information and communication technology and a reliable database in the public procurement system. Within the framework of information and communication technology, an electronic procurement system can offer a number of advantages over a normal paper work based system of procurement. The main advantages are easy and cost effective access to procurement information.

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