

# PRACTICAL ISSUES IN PROCUREMENT AND SUPPLY GOVERNANCE

By  
Deo Kirama<sup>1</sup>

## 1. Introduction

Procurement is an area where Governments all over the world spends a lot of monies. It is a function through which the Governments and Institutions obtain goods, works and services which are the vehicles for the achievement of the intended missions. With procurement function Governments engage providers of essential services, such as health supplies, educational materials, defence equipments and construction and development of various infrastructures<sup>2</sup>. Public procurement which is the procurement undertaken using the taxpayers monies is used as an important tool for achieving economic, social and other objectives (Arrow smith, 1998; Thai, 2001). Public procurement is different from private procurement although both are conducted in an open market. Main difference between the two apart from the source of monies spent, lies on the fact that private sector procurement builds on an equation which mainly considers economic variables while in the procurements using public monies, the equation takes into consideration more variables others going beyond economic considerations. These considerations include accountability, equity among potential suppliers, encouragement of national manufactures and respect for international obligations (Reg. 4 of PPR 2013).

In South African Constitution for example, public procurement is required to be done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.<sup>3</sup> For this reason, public procurement is regulated by enacted laws and regulations in order to protect the public interests. It is worth noting that unlike private sector procurement, public procurement is a business process within a political system and has therefore significant consideration of integrity, accountability, national interest and effectiveness (Wittig, 1998). Due to its magnitude, Procurement is an area that takes huge amount of tax payers' money and from this very fact; the function is prone to unscrupulous conducts including corruption, collusion and embezzlements. To address the misconduct, proper and effectively functioning systems are imperative.

## 2. Magnitude of Procurement to Warrant the Attention

In Tanzania it is reported that the fact of Public procurement to account for more than 70 % of

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<sup>1</sup> Deo Kirama is a Civil Servant working as a Chief External Auditor at the National Audit Office in Tanzania. He has a working experience of 12 years auditing various Government sectors. He has attained MBA in Finance Management from the University of Dar Es Salaam, MSC in Procurement and Supply Chain Management from Mzumbe University, BCOM in Accounting from the University of Dar Es Salaam and he is a Certified and Registered Accountant (CPA) in Public Practice and an Approved Procurement Professional (CPSP).

<sup>2</sup> Walter Odhiambo and Paul Kamau, Working Paper No.208 of OECD Development Centre,2003

<sup>3</sup> Constitution of the Republic of South Africa 1996, s 217 (hereafter the Constitution).

annual government expenditures puts it in the spotlight, makes it a topical discussion and an area requiring an emphasis of good governance principles. In terms of the GDP ratio, the OECD Development Centre through the working paper number 208 of March 2003, it indicated that the estimates showed the central government procurement in Kenya and Tanzania being on an average of about 8% of the GDP for years 1999/2000-2000/2001. At the same time, Uganda had an average of about 30%, which is much higher than in the other two countries of the East Africa Community (EAC), Tanzania and Kenya. This figure for Uganda even surpasses the 9-13 per cent range estimated by Trionfetti (2000) and 6 % in the OECD study noted above. In this study, public procurement was estimated at 10.7% and 8.09 % of GDP in Kenya and Tanzania, respectively. Procurement in most countries was stated at the range of 10% – 30 % of Gross National Product (GNP) in years 2000 (Callender & Mathews, 2000). With these reported data, it is evident that the procurement activities call for the attention of decision makers and other stakeholders. To support the magnitude of procurement as a percentage of GDP in East Africa, OECD research in year 2003 has the following table.

Table 1. Estimated Size of Central Government Procurement in Kenya, Uganda and Tanzania (million shillings)<sup>a</sup>

	<u>Kenya</u>		<u>Uganda</u>	<u>Tanzania</u>		
	1999/2000	2000/2001	1998/1999	1999/2000	1999/2000	2000/2001
Total Government Expenditure	223 225	326 633	1 501 173	1 870 280	1 168 779	1 305 035
Less Labour Costs	35 389	47 951	341 163	373 890	285 336	308 052
Less Subsidies	200	200				
Less Interest Payments	28 917	31 129	68 841	75 520	99 230	1 10 876
Less Transfers	61 745	80 837	98 168	113 603	197 324	220 551
Less Net Lending	1 599	1 953	2 319	9 660	56 311	48 702
Less Public Debt Redemption	49 932	78 845	158 912	93 085		
Less Military Expenditure	80	0	7 628	7 487	0	0
Central Govt. Procurement	45 363	85 718	824 142	1 197 035	530 579	616 855
GDP at Market	740 330	788 917	3 290 389	3 443 926	6 441 296	7 225
<i>CGP as % of GDP</i>	<i>6.13</i>	<i>10.87</i>	<i>25.05</i>	<i>34.76</i>	<i>8.24</i>	<i>8.54</i>
<i>Labour costs % Total Govt</i>	<i>15.85</i>	<i>14.68</i>	<i>22.73</i>	<i>19.99</i>	<i>24.41</i>	<i>23.60</i>
<i>Total Govt. Expenditure %</i>	<i>30.15</i>	<i>41.40</i>	<i>45.62</i>	<i>54.31</i>	<i>18.15</i>	<i>18.06</i>

Source: Bank of Tanzania (2002, 2001); Government of Kenya (2001b,c); Uganda Bureau of Statistics (2001).

Reproduced from OECD working paper number 208 of March 2003

### **3. Efforts to Perfect Public Procurement and Supply Management**

Considering the magnitude and impact of procurement towards political and social objectives of the Government and other public organizations, Countries all over the world have been struggling to find out the best model of governance interms of legal and institutional frameworks that would address the mismanagement and other unwanted practices that occurs in the process. Various types of interventions have been tried; laws have been enacted, amended and repealed over time as the address to the shortfalls but to no success. When crafting procurement legislations, the embedded purpose is ensuring fair procurement processes in the public interest,

to protect the rights of participants, promote accountability and ensure value for money.

In Tanzania, it took about 34 years since independence in 1961 to 1995 before the old ways of doing procurements could be reviewed from that stated in the Finance and Ordinance Act of 1961. In this mandate procedure to be followed in the process of procurement was not spelt out except briefs on the acquisition of goods, completely leaving out works and consultants' services (OECD, 2003). According to this order, procurement was done at the Ministerial level and there was no mechanism to regulate and control activities of different procurement entities. Although the Central Tender Board existed, it was just a department in the Ministry of Finance. With the growth of the public sector in terms of size and role in economic activities, there was the clear need for a new system that would regulate public procurement.

Currently public tender processes in Tanzania are regarded as administrative processes regulated by the Public Procurement Act No.7 of 2011, but once the tender is awarded, the parties enters a contract which is governed by the law of contract Act,2002 R.E (Cap 345)<sup>4</sup>. This means that more than one laws are involved in ensuring procurement objectives are realized.

Although the law regulating conduct of public procurements is in place and the institutional frameworks are established, there have been disappointments of the public procurement systems to yield the anticipated benefits. Thoughts on these disappointments are sited on the challenges of inadequacy of governance systems, non compliance with governance systems laid down and the lack or inadequacy of the good will of top Government officials to champion effective and efficient public procurement processes.

#### **4. Key Governance Aspects in Procurement and Supply**

According to UNESCO<sup>5</sup>, Governance is explained to refer to structures and processes that are designed to ensure accountability, transparency, responsiveness, rule of law, stability, equity and inclusiveness, empowerment, and broad-based participation. It represents the norms, values and rules of the game through which public affairs are managed in a manner that is transparent, participatory, inclusive and responsive. International agencies such as UNDP, the World Bank, the OECD Development Assistance Committee (DAC) and others define governance as the exercise of authority or power in order to manage a country's economic, political and administrative affairs. The 2009 Global Monitoring Report sees governance as 'power relationships, formal and informal processes of formulating policies and allocating resources, processes of decision-making and mechanisms for holding governments accountable.

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<sup>4</sup> Also stated by R Roos and S de la Harpe (2008) in South Africa

<sup>5</sup><http://www.unesco.org/new/en/education/themes/strengthening-education-systems/quality-framework/technical-notes/concept-of-governance/>

To clarify on the concept of governance, the Institute on Governance<sup>6</sup> states that, the concept is difficult to capture in a simple definition but literature proposes several definitions mainly resting on three dimensions namely authority, decision-making and accountability. The Overseas Development Institute (ODI), the UK's leading independent think tank on international development and humanitarian issues came up with governance assessment framework through the World Governance Assessment project (WGA 2000-2007) where six principles were mentioned. The principles include room of participation, fairness in the processes, decency of government processes, accountability of public entities, transparency and efficiency in use of scarce resources without incurring waste or delay.

From the literatures, it is obvious that Governance in public procurement may be looked at the way the public procurement law is crafted, the institutions that have been instituted and the processes in which public procurements are undertaken all aiming at promoting participation, fairness, decency of processes, accountability, transparency and efficiency. It is worth noting truth that public procurement has been challenging as compared to the procurements that are undertaken in the private sector setting. The reasons for this may be from various grounds but failure in governance systems may not be overlooked.

### **5. Empirical Cases of Procurement and Supply Mismanagement**

Although public procurement is important on achieving social, economic and political goals of Governments, ensuring efficiency and economy in the process is crucial. This requires that the whole process is well understood by both the actors, and the processes have the governance arrangement that ensures justice, fairness, transparency and value for money. Unfortunately, for most developing countries, this is not the case. Although several developing countries have taken steps to reform the public procurement systems, the process is still shrouded by secrecy, inefficiency, collusion, interference and corruption. In all these cases, huge amounts of resources are wasted. In several cases, major procurements have been mismanaged and from the mismanagement some executive officers have been fired from job and others taken to the Court of law for causing losses to Governments.

The challenges in procurement are not of certain continent and some examples shows that there are cases surfacing from various parts of the World. In Brazil for example, the former President H.E Luiz Inácio Lula da Silva was taken to Court for procurement frauds. The BBC reported the headline that “*Brazil ex-President Lula and his wife face charges in corruption scandal* “ in the details the reporter stated that Prosecutors initially focused on money laundering, but soon came to allegations of a complex corruption scheme at Petrobras (the National Oil Company) where overpriced contracts were given in return for bribes<sup>7</sup>. This case alone shows how the Governance can fail from the unexpected level of the executive officers. While expecting the high

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<sup>6</sup> <http://iog.ca/defining-governance/>

<sup>7</sup> <http://www.bbc.com/news/world-latin-america-37368852> on 15th September,2016

Government Officials to protect the laws, in this case of Brazilian Ex-President proves otherwise. In Kenya it was reported by BBC that, the mayor of Nairobi City was involved in corruption charge over cemetery scandal. The reporter stated that officials were accused of paying \$3.6m (£2.4m) of taxpayers' money for the graveyard land, which was worth only 10% as much and did not have a title deed”<sup>8</sup>

From another East African State Uganda<sup>9</sup>, it was reported that the Company named M/S Muhlbauer Technology Company Ltd which is a contractor for Uganda National identity was reportedly procured under dubious circumstances in March 2010. It is stated further that the company was given over US\$ 200b to make national IDs for Ugandans but until Saturday March 9<sup>th</sup> 2013, it had only reportedly produced only 401 Ids out of a population of 33Million Ugandans being a decade down the road, with about US\$240 billion already spent. This case resembles that of Tanzania where, the CEO of National Identity Authority (NIDA) was sacked following a questionable expenditure of 79.6 Billion on the National Identity scheme including the procurement process<sup>10</sup>.

To check more on Tanzania, the Daily News of 31 December 2015 reported the suspension of Chief Executive Officers of Reli Assets Holding Company (RAHCO) and the CEO of Dar Rapid Trans (DART) as the institutions being investigated on allegations of breaching the procurement law. It reported that the Managing Director of RAHCO had been suspended to pave the way for investigations into allegedly gross procurement flaws in awarding tender for building standard gauge railway line linking Dar es Salaam and Kigoma as well as neighbouring countries of Burundi and DR Congo while the case of the Executive Officer of DART project is also similar procurement irregularities regarding the reported dubious process in awarding a tender to an interim service provider of the Dar Rapid Transport (DART) project.

## **6. Practical Aspects of Governance Challenges in Procurement and Supply**

Public procurement is questionable and it has lost a trust even of the top Government Officials. On 31 December, 2015, Daily<sup>11</sup> News reported H.E Dr. J.P.Magufuli the President of the United Republic of Tanzania that during his inaugural address to the 11th Parliament in Dodoma in November 2015 to intend fighting wasteful spending of public funds on procurement especially on luxury goods and so he called for immediate amendment of the procurement law to address its shortcomings. Success of the governance in ensuring intended objectives of public procurement depends on a number of issues which together builds what is called a good governance system. These factors can be mainly be classified into two categories namely aspects of legal and institutional adequacy and personnel aspects.

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<sup>8</sup> <http://www.bbc.com/news/world-africa-11628433> on 26 October 2010

<sup>9</sup> <http://www.monitor.co.ug/SpecialReports/The-national-ID-scandal/688342-1714690-s58ldoz/index.html> on Saturday March 9<sup>th</sup> 2013

<sup>10</sup> The citizen newspaper of Tuesday January 26,2016,

<sup>11</sup><http://www.dailynews.co.tz/index.php/features/45574-magufuli-steps-in-to-address-loop-holes-in-procurement-act>

## **A: Aspects of Legal and Institutional Adequacy**

### *A.1 Inadequacy of the law*

The first challenge that practically hits the governance system in Tanzanian procurement process is inadequacy of public procurement law in addressing certain situations. The procurement law for example, states the requirement of delegating the procurement authorities to regional or branch offices but still there are entities that find themselves challenged on how to formulate the delegated authorities considering the size of staffing and volume of transactions that the regional/branch office has. This has resulted into these entities having their processes developed as per applicable procurement manuals which conflicts with public procurement laws. The procurement law has also been named as bureaucratic procedures that end of the day increases costs and prolong procurement time.

### *A.2: Applicability of public and private laws*

Public tender processes are regarded as administrative processes, but once the tender is awarded, the parties conclude a contract where after their relationship is governed by the law of contract. Public procurement is thus a field where the principles of both public and private law are relevant. Public and private law remedies may also be available to aggrieved parties, depending on the stage in the procurement process and the status of the party. Should a public tender, after it has been awarded and a contract entered into between the parties, be set aside on review, the contract so concluded between the public entity and successful tenderer, is void. This entails that no contractual remedies are available to the initially successful tenderer. In *Steenkamp v Provincial Tender Board, Eastern Cape*<sup>12</sup> the Constitutional Court had to consider whether an initially successful tenderer could lodge a delictual claim for damages to compensate for expenses incurred after conclusion of a contract, which was subsequently rendered void on an application for review of the tender award. In these aspects, the knowledge of various laws surrounding procurement and procurement contracts is vital and lack of such knowledge is a bump in success of public procurement processes.

### *A.3 Mis-use of Complaint Review Process*

Section 88 of the PPA, 2011 establishes the Public Procurement Appeal Authority (PPAA) and Reg.104-107 provides procedures of review process. The aim of these review mechanisms is to ensure fairness in the procurement process. Such a complaint review and remedy system, provides an important contribution to the compliance environment and integrity of the public procurement system. Such a system must be seen to operate efficiently and fairly and to provide balanced and unbiased decisions<sup>13</sup>. It is however a great regrets that this opportunity of

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<sup>12</sup> *Steenkamp v Provincial Tender Board, Eastern Cape* 2007(3) SA 121 (CC). The reference of the case as reported in the Supreme Court of Appeal is 2006 (3) SA 151 (SCA). Hereafter the Steenkamp-case.

<sup>13</sup> R Roos and S de la Harpe (2008)

complaint review is at times misused and suppliers may choose to complain although knows that there is no strong case to argue. All these delay the procurement process and increase the procurement costs on the procuring entity.

#### *A.4: Civil Service Shortcomings*

Shortcomings in civil service are another challenge that challenges the success of public procurements. The working culture in the civil service at times fails to match the culture of private sector service providers and suppliers. In the United Kingdom the Parliamentary Committee (PASC)<sup>14</sup> found that there were clear shortcomings in the ability of the Civil Service to run effective and efficient procurement. The committee noted that the Civil Service shows a consistent lack of understanding about how to gather requirements, evaluate supplier capabilities and develop relationships or specify outcomes.

### **B: Aspects of Personnel Conducts**

#### *B.1: Reluctance in implementing legal requirements*

Implementation of the law as it requires is the area that challenges realization of procurement objectives. The law once reviewed sometimes may be seen to fit the demand of the situation but implementing the same as required has not been so in public organizations. For example, although it is a requirement for the head of Procurement Management Unit (PMU) to be a Certified Procurement Professional, in some entities there are appointed personnel to head these functions without meeting these legal requirements only building the case on the factor of long working experience. This conduct has attracted audit queries and some procurement have been mismanaged when it comes to the issues that requires the strong professional muscles. This aspect may be linked with extent of preparedness for the Government system to adapt to new ways of doing things.

#### *B.2: Uncertainties in Fund availability*

Section 49 of the PPA, 2011 requires the procuring entities to rationally plan for their annual procurements to avoid emergencies and integrate procurements to get value for money. To be able to execute procurement plans as approved, adequacy of funds and timely availability of the same plays a vital role. In public sector procurements, financing issue is another point of discussion in as far as practical challenges are concerned. Budget approving authority in accordance with Sect.33 (2) of the PPA, 2011 is required to approve budget, annual procurement plan and an action plan. Considering the challenges in Government budget adequacy and the flow of the exchequer releases as paid from the treasury, procuring entities are challenged on how to implement annual procurement plans because the funds comes in unpredictable amount

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<sup>14</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/government-procurement-report/>

and timing while the plans have the pre determined timing and cost . With unpredictable flow of funds it becomes very challenging for the procuring entities to adhere to the annual procurement plan which attracts audit queries when audited.

### *B.3: Interferences of high government officials/Authorities*

Unwanted interference from Government officials or authorities is another factor that hits badly performance of the public procurement experts. Procurement experts are driven out of the procedures by some influences from the top Government Officials especially in major public projects as it has been reported in Ugandan case of the National IDs project. In other cases the Government high authorities may impose a project and direct an immediate start without considering time required to abide by the procurement process. Interference like this may be done with both motives either to ensure eyes on and strong controls over such procurements or participation in chopping an enormous cash invested in the project. These conducts leaves the procurement experts at the dilemma of serving the profession and serving the requirements of the “Boss”.

### *B.4: Conduct of Unscrupulous Civil Servants*

Conduct of the employees working in the public organizations plays a central role in shaping public procurement outcomes. There are those employees who are scrupulous in discharging their responsibilities and those who are unscrupulous. It is the employees conduct that triggers for corruption, frauds, collusions and any other unwanted results. Governance systems in public procurement is hit by existence of unscrupulous civil servants some of them being elite who endouves to serve their own interests and even some technical men and support cadre who uses their positions to put their interests before the public interests.

Civil servants may engage in various forms of corruption to bypass the requirement of procurement law. Types of corruption in public procurement in which they can engage as stated by Jones (2010) includes bribery paid by companies to procurement and other officials, government leaders and elected politicians to influence their decisions, cronyism which is a practice of senior officials, government leaders, and politicians of favouring businesses to which they, their family members, personal and business associates, or political allies have a financial or ownership connection. To ensure procurement process that follows transparency, equity, fairness and value for money principles, conduct of civil servants must be put under controls.

## **7. Conclusion**

Public procurement involves substantial amount of taxpayers monies spent for acquisition of goods, works and services from the open market. Because of the substantial sum of monies involved, public procurement is volatile to corruption and mismanagement. In developing countries where corruption is still a pervasive and it hits public procurements badly, good governance systems are the key for achievement of equity and value for money principles.

Existence of laws which are adequate to address various entities specific conditions and existence of the best enforcement measures are some steps towards good governance of public procurement. Apart from the legal and institutional framework, people who put the law in practice are key ingredient on the issues of good governance. It is the good law, appropriate institutions and the good conduct of civil servants that will facilitate the attainment of public procurement objectives.

#### 8. Reference

- *Constitution of the Republic of South Africa* 1996, s 217 (hereafter the Constitution)
- <http://iog.ca/defining-governance>
- <http://www.bbc.com/news/world-africa-11628433> on 26 October 2010
- <http://www.bbc.com/news/world-latin-america-37368852> on 15th September,2016
- <http://www.dailynews.co.tz/index.php/features/45574-magufuli-steps-in-to-address-loopholes-in-procurement-act>
- <http://www.monitor.co.ug/SpecialReports/The-national-ID-scandal/688342-1714690-s58ldoz/index.html> on Saturday March 9<sup>th</sup> 2013
- <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/government-procurement-report/>
- <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/quality-framework/technical-notes/concept-of-governance/>
- Public Procurement Act No.7 of 2011, United Republic of Tanzania
- Public Procurement Regulations (GN 446) of 2013, United Republic of Tanzania
- The citizen newspaper of Tuesday January 26,2016,
- Trionfetti, F. (2000), “Discriminatory Public Procurement and International Trade”, The World Economy, Vol. 23, pp. 57-76.
- Walter Odhiambo and Paul Kamau, Working Paper No.208 of OECD Development Centre,2003